CHAPTER - III

HUMAN RIGHTS WITH REFERENCE TO CONSTITUTION OF INDIA, HUMAN RIGHTS COMMISSION AND INTERNATIONAL COVENANTS

3.1 HUMAN RIGHTS

Respect for Human Rights has always been one of the main concerns of every democratic society. It is universally recognised that democracy cannot survive and sustain itself without respect for Human Rights and sincere efforts to promote and protect them. Although Human Rights, in theory can be nurtured and enhanced within various political systems history has convincingly proved that they can be truly guaranteed only in conditions of the greatest possible transparency in decision making on the part of those who are in positions of power.\(^1\) However before appreciating this aspect one has to understand the concept and meaning of ‘Human Rights’.

3.1.1 Concept and Meaning

Human is a concrete concept which refers to us and “Right” means recognized and protected interest by law. So it can be said that our interest which is recognized by law is human rights.\(^2\) Every human being needs certain necessities like food, water, cloth, shelter, health which are basic for sustaining life, without which one cannot live. Likewise every human being is entitled to certain basic rights and fundamental freedoms and in the absence of which one cannot live as human beings. Thus ‘Human Rights’ are those rights which are essential to human beings to live as human being.

All societies and culture have developed some conception of rights and principles that should be protected and respected as such rights evolved on some basic principles which have been universally accepted and contributed to the development of human right. Rights of man – natural rights, civil rights, political rights, economic

\(^1\) India and Human Rights p. (iii)-Rights of Accused by Dr.Ashuthosh, Chapter 6“protection of Human Rights” P.292.

\(^2\) Dr. N.C. Patnaick, Misuse of Police Power; A Strain on Human Rights Indian Bar Review Vol. XXIII 2002 at p.85
rights, social rights and cultural rights which evolved with different degrees of emphasis reflects one common feature – 'Human Dignity' which is considered indispensable for the attainment of individual’s wholesome personality. Thus these rights come with birth and are applicable to all people throughout the world irrespective of the race, colour, sex, language or political or other opinion.

The idea of human rights is tied to the idea of human dignity, which is the cornerstone of all human rights. All those rights which are essential for the protection and maintenance of dignity of individual and create conditions in which every human being can develop his personality to the fullest extent may be termed human rights. The principles of human rights were drawn up as a way of ensuring that the dignity of everyone is properly and equally respected. Any action, which would affect or violate the inherent dignity of the human being, would amount to violation of Human Rights.

Human Rights are those minimal rights which every individual must have against the State of other public authority by virtue of his being a 'member of the human family', irrespective of any other consideration. But the concept and meaning of 'Human Rights' is not as simple as stated above. According to Professor Upendra Baxi, the very term 'Human Rights' indeed problematic. In rights-talk, the expression often masks the attempts, to reduce the plentitude of its meanings to produce a false totality. One such endeavour locates the unity of all Human Rights to some designated totality of sentiment such as human ‘dignity’ 'well-being' and 'flourishing’. Another mode invites us to speak of human rights as ‘basic’, suggesting that some others may be negotiable, even dispensable. Those who are deprived, disadvantaged and dispossessed may indeed find it hard to accept and justifications for a very notion of Human Rights that may end of denial of their rights to human. Yet another mode of totalisation makes us succumb to an anthropomorphic illusion that the range of Human Rights is limited to human beings, the new rights to environment (or what is somewhat inappropriately, even cruelly, called 'sustainable development') take us far

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3 Observation of Hon’ble Justice P.N. Bhagawathi in Menaka Gandhi vs. Union of India AIR 1978 SC 597 p.619 = 1978 (1) SCC 248
beyond such a narrow notion as descriptive ventures, such attempts at totalisation reduced to a 'coherent' category forbiddingly diverse world of actually existing Human Rights.\textsuperscript{6} As prescription venture, such modes simply privilege certain preferred values over others. In both cases, the normative complexity and existential outreach of Human Rights norms and standards are made to yield their historic features to the demands of a uniform narrative. This, overall, obscure the contradictory nature of development of 'Human Rights'. There is not one world of 'Human Rights' but many conflicting words.

The plurality and multiplicity of the fecund expressions ‘Human Rights' is worthy of celebration only if we are able to designate distinctive modes of the sustaining networks of meaning and logics of popular action that protest against all forms of human violation. If the notion 'Human Rights' means many things to different people, these meanings need to be configured in some patterns without violating the richness of difference. Professor Baxi essays it tentatively under the following different rubrics.\textsuperscript{7} \textit{viz.} Human Rights as Ethical Imperative; Human Rights as Grammar of Governance; Human Rights as Languages of Global Governance; Human Rights as Syndrome of shared Sovereignty; Human Rights as insurrectionary proxies; Human Rights as Juridical protection and Human Rights as culture.

\subsection*{3.1.2 Human Rights according to Justice Palok Basu}

The concept of Human Rights falls within the framework of Constitutional Law and International Law. For this purpose it has been identified to “defend by institutionalized means the rights of human beings against abuses of power committed by the organs of the State and at the same time to promote the establishment of human living conditions and the multi-dimensional development of human personality.

A close look at the above definition shows that Human Rights, represent, claims which individuals or groups make on the society. They include the right to freedom from torture, the right to live, inhuman treatment freedom from slavery and

\textsuperscript{6} Andrew RowellGreenBacklash: Global Supervision of the Environmental Movement 1996 p. 4-41.\textand for the Extraordinary Relation between Nazism and Deep Ecology = Luc ferry, the New Ecological Order, (1992) P.91-107

\textsuperscript{7} UpendraBaxi, The Future of Human Rights p. 5-13.
forced labour, the right of liberty and security, freedom of movement and choice of residence, right to fair trial, right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, the right to marry and form a family, the right to participate in one's Government either directly or indirectly or thought elected representative, the right to nationality and equality before law. These rights cannot be compromised universally. Human Rights are the birth right of the people the world over. Hence their fulfillment does not lie in the reproduction of the institution of the advanced world, but on the consciousness in the developing world, to ensure the respect and protection of Human Rights. This will forestall the ease in their denial as an incident of valid structural change.8

3.1.3 Origin of Human Rights

Human Rights are those irreducible minima which belongs to every member of the human race when pitted against the State or other public authorities or group and gangs and other oppressive communities. Being a member of a human family he has the right to be treated as human once he takes birth or is alive in the womb with a potential title to personhood. When legal ideas were not clear-cut that blurred, ancient Pandits thought of the doctrine if natural rights founded on natural law not because it is enacted but because it inalienably belongs to each of us as conceived in civilised political societies. When the priestly order denies this right using religion sanction and authority, the independent mind of man expresses dissatisfaction and defies. When kings and queens and other diadems and despotism sought to suppress the individual's freedom and appeal to natural law was made on the assumption that beyond religious superiors and crowned heads, there was a system of natural law which embodied reason, justice and universal ethics.9 Though the concept of Human Rights is as old as the ancient doctrine of 'Natural Rights' founded on natural law the expression Human Rights” is of recent origin, emerging from (post second world war) International Charters and Conventions.

8 Justice PalokBasu, Law Relating to Protection of Human Rights under the Indian Constitution and Allied Laws. p. 5
9 V.R.Krishnalyer, The Dialectics and Dynamic of Human Rights in India ( Yesterday, Today and Tomorrow), p. 54
Human Rights are derived from dignity and are inherent in human beings. Human Rights are natural rights which come by birth as human beings which are basic, indivisible, inalienable and inherent with which a person is born. Broadly speaking, Human Rights may be regarded as those fundamental rights which are possessed by every human being. Such rights by their free nature constitute the minimum that is necessary for an individual to live in civil and political society as a free person with dignity and respect.  

3.1.4 Human Rights in Ancient India

The notion of Human Rights as we understand it today, as universalistic, has developed in western civilization. The struggle, interest or concern to defend and to protect, preserve and promote Human Rights is perhaps as old as human civilization. In fact, the concept of Human Rights is neither entirely western nor modern. It is interesting to note that the cause of Human Rights is not alien to ancient India, which has age old culture of respecting Human Rights. It may be recalled that from time immemorial Indians have called their culture by name of human culture (Manava Dharma or Manava and sanskriti and it is inherent in the Hindu life.

Many centuries ago the principle of 'Vasudhaika Kutumbam' (we are all one human family) propounded universal brotherhood and equality and the highest ideal of human life was echoed 'Sarve Jana Sukhinobhavanthu' (let all people be happy) was proclaimed from this land. But the philosophy of human life was widely and wisely discussed on religious foundations and can be evident in the Rig Veda.

'No one is superior or inferior. All are brothers. All should strive for the interest of all and all should progress selectively'. (The original text is in Sanskrit and is taken from Mandala 5 Sukta 60 Mantra 5 which states 'Aiyestasoakanishtasa etc., sambhratova vridhuuhu sowbhogya'). According to Rig Veda “there is one race of human beings" and validity of different traditions, religious in deed of paths to truth, has always been respected and the guiding principle 'Sarva Dharma samanan' (all religions are equal).

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10 Justice D. Murugesan in Tamil sakthi vs. State of Tamilnadu and others, 2010 CLJ 245 Mad (1)
Rig Veda cites three civil rights that of Tana (body) Skridhi (dwelling place and Jibhasi (life). Mahabharatha tells about the importance of freedoms of individuals (civil liberties) in a State. An eminent historian U.N. Ghosal ¹¹ pointed out a number of civil rights enjoyed by the individual in ancient India. He says that they occupy an important place in the literature of Smritis. These rights were enjoyed by ancient Indians either expressly knowing them as comprehended in dharma or inferred from the concept of duties. The ancient Indian concepts of Human Rights and humanitarian law were primarily based on conduct of war, and were laid down in the legal text such as Manu Smrithi or code of Manu (200 B.C. - 100 A.D), the Mahabharatha 1000 B.C. Koutilyas's Arthasasthra (300 B.C. and Sukranitisara of Sukracharya.¹²

According to Manu, one who is sleeping with or without his armour or a person who is deprived of his weapons or who is engaged in fighting with another person or one who is only looking on the battle but not fighting should not be slain. Further, all such places of religious worship, houses of individuals could not be attacked or destroyed. The Mahabharata states that enemy captured in war not to be killed but is to be well treated. Koutilya's Arthasashrta evidenced that Chandragupta Mourya set free prisoners captured in war. The traditional practice of war was that attack should be informed earlier and war should take place only after sunrise and after sunset. In the 4th century B.C Koutilya's Arthasashastra elaborated on civil and legal rights. The concept of social, economic obligations of the State also mentioned that State (king) shall provide the orphan, the dying, the infirm, the affected and helpless with maintenance and shall also provide subsistence to mothers and children.

Both Buddhism and Jainism emphasized the principles of equality and non-violence. The Buddhist doctrine of non-violence in deed and thought is a humanitarian doctrine par excellence, dating back to 3rd century B.C. The Mauryan Empire Ashoka, the great king during his reign persuaded an official policy of Ahimsa (non-violence) and protection of human rights as his chief concern. Ashoka defined the main principles of non-violence, tolerance of all sects and opinions of all religious and ethnic groups were granted right to freedom of religious practice and equality.

¹¹ U.N.Goshal, Studies in Indian History and Culture (1957), P.293
3.2 FUNDAMENTAL RIGHTS

The State which is organized as a result of individual desire to achieve security, in course of time emerged as an organized sovereign power which violated the rights of the individual. This change directed the political thought towards devising a means by which to bind the unchartered will of the sovereign. This lead to the institution of written constitution. Such a written constitution could be an embodiment of rights and would be considered necessary for the protection of individual rights, liberties and freedoms against absolute and arbitrary action of the State.

The term Fundamental Rights is a technical one. When certain human rights are written down in a constitution and are protected by constitutional guarantee they are called fundamental rights in the sense that they are placed in the supreme or Fundamental Law of the land which has a supreme sanctity over all other laws of the land. Thus when human rights are guaranteed by the written constitution they are called as fundamental rights. Unlike an ordinary right a Fundamental Right is an interest, which is protected and guaranteed by the written Constitution. Such rights are called “Fundamental” because while an ordinary right may be changed by legislature in its process of legislation, but the Fundamental Rights, being guaranteed by the constitution cannot be altered by any process short of amending the constitution itself. The effect of guaranteeing Human Rights in a written constitution is to ensure that any State action including legislation which violates the Fundamental Rights shall be struck down by the Courts because the constitution is the Fundamental Law of the land. A right cannot be said to be 'fundamental' if it is not enforceable against the State by the Courts. When Human Rights are guaranteed by a written constitution they are called 'Fundamental Rights' because a written constitution is the Fundamental Law of a State.\textsuperscript{13} Constitution is not to be construed as a mere law\textsuperscript{14} or simply as a

\textsuperscript{13} Durga Das Basu, Comparative Constitutional Law (1984) p. 159-160
Statute.\textsuperscript{15} It is the fountain head of all the Statutes the Supreme Court of India, in a nine Judge Bench\textsuperscript{16}.

Decision has held that though India has a written Constitution its written text is not the exhaustive source of Constitutional Law which is enforceable in the Court of law. Thus even custom or usage when established would have the force of law and would be enforceable if not inconsistent with the fundamental rights guaranteed. "Conventions" as such would also pave a surer foundation to such rights as would be enforceable as law. Just as a written Constitution has evolved from the concept of natural law as a higher law, so the Fundamental Rights may be said to have sprung the doctrine of Natural Rights. As the Indian Supreme Court has put it “Fundamental Rights are the modern name for what have been traditionally known as 'natural rights'.”\textsuperscript{17}

\textbf{3.2.1 Fundamental Rights and Constitution of India}

A few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing the main political party, the Congress had for long been demanding these rights against the British Rule. During the British Rule in India Human Rights were violated by the Ruler in India in very wide scale. Therefore, the framers of the Constitution man of whom had suffered long incarceration during the British Regime had a very positive attitude towards these rights. Secondly, the Indian society as fragmented into many religions, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to give to the peoples a sense of security and confidence.

Then, it was thought necessary that people should have some rights which may be enforced against the Government which may become arbitrary at times. Though, democracy was being induced in India, yet democratic traditions were


lacking, and there was danger that the majority in the legislature may enact laws
which may be oppressive to individuals or minority groups, and such a danger could
be minimized by having a Bill of Rights.

The need to have the Fundamental Rights was so very well accepted on all
hands that in the constituent assembly the point was not even considered whether or
not to incorporate such rights in the Constitution. In fact, the fight all along was
against the restrictions being imposed on them and the effort all along was to have the
Fundamental Rights on as broad and pervasive a basis as possible.\textsuperscript{18}

The Fundamental Rights are a necessary consequence of the declaration in the
preamble to the Constitution that the people of India have solemnly resolved to
constitute India into Sovereign, Democratic Republic and to secure to all its citizens
justice, social, economic and political; liberty of thought, expression, belief, faith and
worship, equality of status and opportunity.\textsuperscript{19}

The Fundamental Rights in India apart from guaranteeing certain basic Civil
Rights and freedom to all also fulfilled the important function of giving a few
safeguards to minorities, outlawing discrimination and protecting religious freedom
and Cultural Rights. During emergency, however some curtailment of the
Fundamental Rights does take place\textsuperscript{20}. But all these curtailments of Fundamental
Rights are of a temporary nature.

The Preamble, Fundamental Rights and Directive Principles of State Policy
together provide for the basic Human Rights for the people of India which are
discussed below in detail.

\textbf{i. Preamble}

The preamble sets out the main object of the Constitution; the object which at
the Constitution-makers intended to be realized through it.\textsuperscript{21} It is a key to open the

\textsuperscript{18} For an Analysis of discussion on Fundamental Rights in the Constituent Assembly; Granville
Austin, The Indian Constitution of a Nation, 1966, p.50-113.Chapter I
\textsuperscript{19} For an Analysis of discussion on Fundamental Rights in the Constituent Assembly; Granville
Austin, The Indian Constitution of a Nation, 1966 p.50-113, see Chapter I. supra
\textsuperscript{20} For an Analysis of discussion on Fundamental Rights in the Constituent Assembly; Granville
Austin, The Indian Constitution of a Nation, 1966 p.50-113, see Supra, Chapter XIII, Sec.B (b) also
infra. Chapter XXXIII, Sec F
\textsuperscript{21} The Preamble contains in a nutshell its ideals and its aspirations” per SubhaRao, C.J.in L.C.
mind of the Constitution makers.\textsuperscript{22} The preamble is a legitimate aid in the construction of the provisions of the Constitution. The framers of the Constitution set out two purposes in the preamble. First, to constitute India into a Sovereign Democratic Republic. Second, to secure its citizens justice: social, economic, and political; liberty of thought, expression, faith and worship; Equality of status and opportunity; and to promote among the people of India fraternity, assuring dignity of the individual and the unity and integrity of the nation.\textsuperscript{23} Although the expressions 'justice', 'equality' and 'fraternity', may not be susceptible to exact definition, yet they are not mere platitudes. They are given content by the enacting provisions of Constitution particularly by the Fundamental Rights and the Directive Principles of State Policy.\textsuperscript{24} Thus the preamble declares the great rights and freedom which the people of India intended to secure to all citizens and basic type of Government and polity which was to be established.\textsuperscript{25}

\textbf{ii. Fundamental Rights}

Article 12 to 35 of the Constitution pertains to Fundamental Rights of the people. These rights are reminiscence of some of the provisions of the Bills of Rights in the United States Constitution but the former cover a much wider ground than the latter. Also the United States Constitution declares the Fundamental Rights in broad and general terms. But as no right is absolute, the Courts have in course of time spelled out some restrictions and limitations on these rights. The Indian Constitution however, adopts a different approach in so far as some rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other rights the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the Constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

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\textsuperscript{22} Berubari Union and Exchange of Enclaves, Re, !IR 1960 SC 845 (856); (1960) 3 SCR 250: 1960 SCJ 933.

\textsuperscript{23} On the Concept of Dignity seeGovind Misra, "The Concept of Human Dignity And the Constitution of India", in M.P. Singh (Edn.), Comparative Constitutional Law, p.353, 1989.


\textsuperscript{25} Kesavananda Bharti Sribbadgavalvaru vs. State of Kerala, (1973) 4 SCC 225; AIR 1973 SC 1461; (1973) Supp SCR 1; per Shaelat and Grover , JJ. at p.424, 425; contra see Mathew, J. atp. 845 Beg.J at p.904
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The framers of the Indian Constitution learning from the experience of United States visualized a great many difficulties in enunciation of the Fundamental Rights in general terms and in leaving it to the Courts to enforce them, viz., the Legislature not being in a position to know what view the Courts would take of a particular enactment, the process of legislation becomes difficult; there arises a vast mass of litigation about the validity of the laws and Judicial Opinion is often changing so that law becomes uncertain; the Judges are irremovable and are not elected; They are, therefore, not so sensitive to public needs in the social, or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in Judicial hands. Even then, certain rights especially economic rights have had to be amended from time to time to save some economic programmes.26

The Fundamental Rights in the Indian Constitution have been grouped under seven heads as follows: (Article 14-18)

i. Right to equality comprising articles 14-18 of which Article 14 is most important

a. Article 14. Equality before Law

Article 14 runs as follows. “The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India”. This provision corresponds to the equal protection clause of the 14th Amendment of the United States Constitution which declares "no State shall deny to any person within its jurisdiction the equal protection of the laws."

Two concepts are involved in Article 14 viz.,'equality before law' and 'equal protection of laws.' The first is a negative concept which ensures that there is no special privilege in favour of anyone, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition is above the law. The second concept, 'equal protection of laws' is positive in content. It does not mean that identically the same law should apply to all persons or that every law must have a universal application within the country irrespective of differences of circumstances.

26 B.N. Rau, India's Constitution in the Making, 245.
Equal protection of the laws does not postulate equal treatment of all persons without distinction. What it postulates is the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence.\textsuperscript{27}

The Supreme Court has explained in Sri Srinivasa Theatre vs. The State of Tamil Nadu that the two expressions 'equality before law' and equal protection of laws' do not mean the same thing even if there may be much in common between them. ‘Equality before law’ is a dynamic concept having many facets. One facet is that there should be no privileged person or class and that none shall ne above the law. Another facet is "the obligation upon the State to bring about through the machinery of law a more equal society ...... For, equality before law can be predicted meaningfully only in an equal society........"\textsuperscript{28}

The benefit of 'equality' before law and 'equal protection of laws' accrues to every person in India whether a citizen or not. As the Supreme Court has observed on this point: "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human-being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."\textsuperscript{29}

b. Article 15. Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth

Article. 15(1) specifically bars the State from discriminating against any citizen of India on grounds only of religion, race, caste, sex, and place of birth or any of them. Article 15 (1) is an extension of Article 14. Article 15 (1) expresses a particular application of the general principle of equality embodied in Article 14. Commenting on Article 15(1) the Supreme Court has observed:

\textsuperscript{28} Sri SrinivasaTheater Vs.The Government of Tamilnadu AIR 1992 SC, at 1004.
\textsuperscript{29} Faridabad CT. Scan Center vs. D.G.Health Services, AIR 1997 SC 3891: (1997) 7 SCC 752. also, Chairman, Railway Board vs. Chandrima Das, AIR 2000 SC 988,997: (2000) 2 SCC 465
"**Article 15(1)** prohibits discrimination on grounds of religion or caste identities so as to foster national identity which does not deny pluralism of Indian Culture but rather to preserve it".\(^{30}\) While Article 14 is general in nature in the sense that it applies both to citizens as well as non-citizens, Article 14(1) covers only the Indian Citizen and does not apply to non-citizens. No non-citizen can claim any right under Article 15 though he can do so under Article 14.

**Article 15(2)** Prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex or place of birth with regard to: (a) access to shop, public restaurants, hotels and places of entertainment; or, the use of wells, tanks, bathing ghats, roads and places of public resorts maintained wholly or partly out of State funds are dedicated to the use of general public. This Article contains a prohibition of a general nature and is not confined to the State only. On the basis of this provision, it has been held that if a section of the public puts forward a claim for an exclusive use of a public well it must establish that the well was dedicated to the exclusive use of that particular section of the public and to the use of general public.\(^{31}\) A custom to that effect cannot be held to be reasonable or in accordance with enlightened modern notion of utility of public wells because of the force of Article 15.

In Article 15(2) occurs the expression 'a place of public resort' there is difference of opinion on the exact significance of this phrase. One view holds that a place with a 'place of public resort' only if the public have access to it as a matter of legal right.\(^{32}\) A broader view, however, regards a place of public resort as one to which members of the public are allowed access and where they habitually resort to.\(^{33}\) The later view appears to be in more in accord with the tenure and purpose of the Constitutional provision as it would bar discrimination on a wider front.

**Article 15(3)** Under Article 15(3) the State is not prevented from making any special provision for women and children. While Article 15(1) and 15(2) prevent the State from making any discriminatory law on the ground of gender alone, by virtue of

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30 Valsamma Paul vs. Cochin University, AIR 1996 Sc 1011 at 1019; (1996) 3 SCC 545.
32 A.M. Deane vs. Commissioner of Police, 64 CWN 348.
Article 15(3) the State is permitted to make any special provision for women. Article 15(3) recognise the fact that the women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Article 15(3) is to eliminate the socio-economic backwardness of women and to empower them in such a manner as to bring about effective equality between men and women. The object of Article 15(3) is to strengthen and improve the status of women. Article 15(3) thus relieves the State from the bondage of Article of 15(1) and enables it to make special provisions to accord socio-economic equality to women. The most significant pronouncement on Article 15(3) is the recent Supreme Court case Government of Andhra Pradesh vs. P.P. Vijaya kumar.

The Supreme Court has ruled in the instant case that under Article 15(3) the State may fix a quota for appointment of women in Government services. Also, a rule saying that all other things being equal, preference would be given to women to the extent of 30% of the post was held valid with reference to Article 15(3). It was argued that reservation of posts or appointment for any backward class is permissible under Article 16(2) but not for women and so no reservation can be made in favour of women as it would amount to discrimination on the ground of sex in public employment which would be violative of Article 16(2). Rejecting this argument the Supreme Court has ruled that posts can be reserved for women under Article 15(3) as it is much wider in scope and covers all state activities while Article 15(1) prohibits the State from making any discrimination inter alia on the ground of sex alone by virtue of Article 15(3) the State may make special provisions for women. Thus, Article 15(3) clearly carves out a permissible departure from the rigors of Article 15(1).

**Article 15 (4) or Article 29(2)** does not prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled castes and the scheduled tribes. A major difficulty raised by Article 15(4) is regarding the determination of who are 'socially and educationally backward classes'. This is not a simple matter as sociological and

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economic considerations come into play in evolving proper criteria for its
determination. Article 15 (4) lays down no criteria to designate 'backward classes'; it
leaves the matter to the State to specify backward classes but the Courts can go into
the question whether the criteria used by the State are relevant or not. The question of
defining backward classes has been considered by the Supreme Court in a number of
cases. From the several judicial pronouncements concerning the definition of
backward classes several propositions emerge. The backward class envisaged by
Article 15(4) is social and educational and not either social or educational. This means
that a class to be identified as backward should be both socially and educationally

**Article 16 Equality of opportunity in matters of public employment**

Article 16(1) guarantees equality of opportunity to all citizens "in matters
relating to employment" or "appointment to any office" under the State. According to
this Article no citizen can be discriminated against or be ineligible for any
employment or office under the State on the grounds only of religion, race, caste, sex ,
descent, place of birth or residence or any of them.

Article 16(2) is also an elaboration of a facet of Article 16(1). These two
classes thus postulate the Universality of Indian citizenship. As there is common
citizenship, residence qualification is not required in any State.

Under Article 16(3), Parliament makes a law to prescribe a requirement as to
residence within a State or a Union Territory for eligibility to be appointed with
respect to specified classes of appointments or posts. Thus, 16(2) which bans
discrimination of citizens on the grounds of 'residence' only in respect of any office or
employment under the State, can be qualified as regards residence, and a 'residential
qualification' imposed on the right of appointment in the State for specified
appointments. This provision 16(3), therefore, introduces some flexibility and takes
cognizance of the fact that there may be some very good reasons for restricting certain
posts in a State for its residence. Article 16(3), however, incorporates a safeguard to
ensure that it is not abuse. Power has been given to Parliament and not to the State
Legislature to relax the principle of non-discrimination on the ground of residence, so that; only a minimum relaxation is made in this regard.

Under Article 16(4) the State may make reservation of appointments or posts in favour of any 'backward class' of citizen which in the opinion of the State, is not adequately represented in the public services under the State. The term 'State' denotes both the Central and State Governments and their instrumentalities. Explaining the nature of Article 16 (4), the Supreme Court has stated in Mohan Kumar Singhania vs. Union of India, that it is 'an enabling provision' conferring a discretionary power on the State for making any provision or reservation of appointments or forced in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service of the State.\(^\text{36}\) It has been emphasized that the expression 'backward class' is not synonymous with 'backward caste' or 'backward community'. In determining whether a section of population form a backward class for purposes of Article 16(4), a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly be violative of Article 16(2).\(^\text{37}\) Article 16(4) neither imposes any constitutional duty nor confers any Fundamental Right any one claiming reservation.\(^\text{38}\) Indra Sawhney vs Union of India known as the Mandel Commission case is a very significant pronouncement of the Supreme Court on the question of reservation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner.\(^\text{39}\)

**Article 16(5)** provides that a Law may prescribe that the incumbent of an office in connection with the affairs of a religious or denominational institution, or a member of the governing body thereof, shall be a person professing a particular religion or belonging to a particular denomination.

**Article 17 Abolition of Untouchability**

Article 17 reads as 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be

an offence punishable in accordance with law. The main object of Article 17 is to ban
the practice of Untouchability in any form. To give effect to Article 17, Parliament
enacted the Untouchability (offences) Act, 1955, prescribing punishment for
practicing untouchability in various forms. In 1976, the Act was renamed as the
'Protection of Civil Rights Act, 1955'. Parliament has also enacted the Scheduled
Castes and Scheduled Tribes (Prevention of Atrocity) Act, 1989, in order to - (i) to
prevent the commission of atrocity against the members of the Scheduled Casted and
Scheduled Tribes; (ii) to provide for setting up of Special Courts for the trial of
offences under the Act and (iii) also to provide for the release and rehabilitation of
victims of such offences. The word 'Untouchability' has not been defined either in the
Constitution or in the Act, because it is not capable of any precise definition.

Article 18 Abolition of Titles

Article 18(1) prohibits the State from conferring any 'title' except military or
academic distinction. Article 18(2) prohibits citizens of India from accepting any title
from a foreign Government. According to 18(3) a foreigner holding any office of
profit or trust under the State cannot accept any title from any foreign State without
the consent of the President. As per Article 18(4) no person holding any office of
profit under the State is to accept without the consent of the President any present,
emoluments or office of any kind from or under any foreign State.

ii. Article 19 Right to freedom comprising Articles 19 - 22 which guarantee
several freedoms, the most important of which is the freedom of speech

Article 19 Protection of certain rights regarding freedom of speech etc.

Clauses (a) to (g) except (f) of article 19(1) guarantee to the citizens of India
six freedoms viz. of 'speech and expression', 'peaceable assembly', 'free movement',
residence and practicing any profession and carrying on any business. Originally,
Article 19 guaranteed seven freedoms. The freedom to hold and acquire property was
repealed in 1978. These various freedoms are necessary not only to promote certain
basic rights of the citizens but also certain democratic values in and the oneness and
unity of the country. Article 19 guarantees some of the basic, valued and natural rights
inherent in a person. Article 19 protects the six freedoms of an Indian citizen from
State action and violation of these freedoms by private conduct of an individual is not within its purview.\textsuperscript{40} A foreigner enjoys no right under Article 19 since this Article confers certain Fundamental Rights on the citizens and not on non-citizens of India.\textsuperscript{41}

The freedom guaranteed by Article 19(1) is not absolute as no right can be. Each of these rights is liable to be controlled, curtailed and regulated to some extent by Laws made by Parliament or the State Legislatures. Accordingly, Clauses (2) to (6) of Article 19 lay down the grounds and the purposes for which a Legislature can impose 'reasonable restrictions' on the rights guaranteed by Articles 19(1)(a-g). Three significant characteristics of clauses 19(2) to 19(6) are as follows: 1. The restrictions under them can be imposed only by or under the authority of a Law; No restriction can be imposed by executive action alone without there being a law to back it up. 2. Each restriction must be reasonable. 3. A restriction must be related to the purposes mentioned in Clauses 19(2) to 19(6).

**Article 20 Protection in respect of conviction for offences**

Article 20(1) provides the necessary protection against an ex-post-facto law. It has two parts. Under the first part no person is to be convicted of an offence except for violating a 'law in force' at the time of commission of the act charged as an offence. A law enacted later, making an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it.\textsuperscript{42} Immunity is thus provided to a person being tried for an act, under a law enacted subsequently, which makes the act unlawful.\textsuperscript{43} This means that if an act is not an offence on the date of its commission a law enacted in future cannot make it so.\textsuperscript{44} The second part of Article 20(1) immunizes a person from a penalty greater than what he might have incurred at the time of his committing the offence. Thus a person cannot be made to suffer more by an ex-post-facto law than what he would be subjected to at the time he

\textsuperscript{40} Menaka Gandhi vs. Union of India, AIR 1978 SC 597: (1978) 1 SCC 248; Kharak Singh vs. State of Uttarpradesh, AIR 1963 SC 1295: (1964) 1 SCR 332.


\textsuperscript{42} Kanaiyalal vs. Indumati, AIR, 1958 SC 444: 1958 SCR 1394.


committed the offence.\textsuperscript{45} An ex-post-facto law which only mollifies the rigors of criminal law is not within the prohibition of article 20 (1). Therefore, an accused should have the benefit of a retrospective or retroactive criminal legislation reducing punishment for an offence.\textsuperscript{46}

**Article 20 (2)** runs as "No person shall be prosecuted and punished for the same offence more than once" contains the rule against double jeopardy. The roots of the doctrine against double jeopardy are to be found in the well-established maxim of the English Common Law, Nemodebet dis vexari, meaning that a man must not be put twice in peril for the same offence. The principle was in existence in India even prior to the commencement of the Constitution [Section 403(1) of the Criminal Procedure Code 1898 now Section 300, Criminal Procedure Code 1973], but the same has now been given the status of a Constitutional, rather than a mere statutory guarantee. Both prosecution and punishment should co-exist for Article 20(2) to be operative. The prosecution without punishment could not bring the case within Article 20 (2). If a person has been prosecuted for an offence but acquitted, then he can be prosecuted for the same offence and punished.

A person accused of committing a murder was tried and acquitted. The State preferred an appeal against the acquittal. The accused could not plead Article 20 (2) against the State preferring an appeal against the acquittal. Article 20 (2) would not apply as there was no punishment for offence at the earlier prosecution; and an appeal against an acquittal was in substance a continuation of the prosecution.\textsuperscript{47} Enhancement of punishment by the revising authority does not amount to a second punishment.\textsuperscript{48} Preventive detention is not 'prosecution and punishment'and therefore, it does not bar prosecution of the person concerned.\textsuperscript{49}

**Article 20(3)** which embodies the privilege against self-incrimination reads: 'No person accused of any offence shall be compelled to be a witness against himself.' On analysis, this provision contains the following components; It is a right available

\textsuperscript{45} Wealth taxCommissioner, Amritsar Vs. Suresh Seth, AIR 1981 SC 1106:(1981) 2 SCC 790
\textsuperscript{46} T.Barai vs. Henry Ah Hoe , AIR 1983 SC 150: (1983) 1 SCC 177.
\textsuperscript{47} Kalavathi vs. State of Himachal Pradesh, AIR 1953 Sc 131: 1953 SCR, 546.
\textsuperscript{49} GulamAhamad vs. State of Jummu and Kashmit, AIR 1954 J&K 590
to a person 'accused of an offence'; It is a protection against 'compulsion' 'to be a witness'; It is a protection against such 'compulsion' resulting in his giving evidence 'against himself'. All these three ingredients must necessarily co-exist before the protection of Article 20 (3) can be claimed. If any of these ingredients is missing Article 20 (3) cannot be invoked.

**Article 21 Protection of Life and Personal Liberty**

Article 21 lay down that no person shall be deprived of his life or personal liberty except according to this 'procedure established by law'. The most important words in this provision are 'procedure established by law'. Immediately after the Constitution became effective the question of interpretation of these words arose in the famous Gopalan case where an attempt was made to win for a detenu better procedural safeguards than were available to him under the Preventive Detention Act, 1950 and Article 22. But the Supreme Court ruled in this case that in Article 21, the expression 'the procedure established by law' meant the procedure as laid down in the law was enacted by the Legislature and nothing more. A person could thus be deprived of his 'life' or personal liberty in accordance with procedure laid down the relevant law. The Court was thus was concerned with the procedure as laid down in the statute. Whether the procedure was fair or reasonable, or according to natural justice or not was not the concern of the Court. The ruling thus meant that to deprive a person of his life or personal liberty: There must be a law; it should lay down a procedure; and The executive should follow this procedure while depriving a person of his life or personal liberty.The way the majority handled Article 21 in Gopalan case was not free from criticism. Gopalan was characterised as a 'High water mark of legal positivism'. Court's approach was very static, mechanical, and purely literal and was too much coloured by the positivists or imperative theory of law. The Court treated the Constitution as another Statute.

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50 A.K. Gopalan vs. State of Madras, AIR 1950 Sc 27; 1950 SCR 88
51 Edward McWhinney, Judicial Review, 133-138 also Alan Gledhill, Life and Liberty in Republican India, 2 JILI 241 (1960); Schwartz, A Comparative view of the Gopalan case 1950 ind, LR. 276; K.Subbarao, former Chief Justice of India said about Gopalan: " The preponderance of view among the Jurist is that it is wrongly decided. It has in effect destroyed one of the greatest of the Fundamental Rights i.e. personal liberty’ Rao, Some Constitutional Problem, 115 (1970).
The case of Menaka Gandhi is a landmark case of the post emergency period. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, particularly, Article 21.\(^{52}\) This case showed that Article 21 as interpreted in Gopalan could not play any role in providing any protection against any harsh law seeking to deprive a person of his life or personal liberty. In fact, this case has acted as a catalytic agent for transformation of the judicial view on Article 21. Since then the Supreme Court has shown sensitivity to the protection of personal liberty. The Court has reinterpreted Article 21 and practically overruled Gopalan in Menaka Gandhi which can be regarded as a highly creative Judicial pronouncement on the part of the Supreme Court. Not only that, since Menaka, the Supreme Court has given to Article 21, broader and broader interpretation so as to imply many more Fundamental Rights. In course of time, Article 21 has proved to be a very fruitful source of rights of the people. Menaka Gandhi's case has been exerting multi-dimensional impact on development of Constitutional law in India. Menaka case has also deeply influenced the Administration of Criminal Justice and Prison Administration. In a number of cases the Supreme Court has propounded several prepositions with a view to humanize the Administration of Criminal Justice in all its aspects like arrest, fair trial, speedy trial, long pre-trial confinement, more Criminal Courts, maximum imprisonment, right of appeal, legal-aid, handcuffing of under-trial, police torture, Prison Administration, prisoners grievances etc., A very fascinating development in the Indian Constitutional Jurisprudence is the extended dimension given to Article 21 by the Supreme Court in the post Menaka era. The Supreme Court has asserted that in order to treat a right as a Fundamental Right it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, Social and Economic changes in the country entail the recognition of new rights. The law in its eternal youth grows to meet the demands of the society. The extension in the dimensions of Article 21 has been made possible by giving an extended meaning to the word 'life' and 'liberty' in Article 21. These two words in Article 21 are not to be read narrowly. These are organic terms which are to be construed meaningfully. The right to life enshrine in Article 21 has been liberally interpreted to mean something more than mere survival and mere existence or animal existence. It therefore, includes all those aspects of life

\(^{52}\) Menaka Gandhi vs. Union of India AIR 1978 SC 1597; (1978) 1 SCC 248
which goes to make a man's life meaningful, complete and worth living. The Supreme Court has asserted that Article 21 is the heart of the Fundamental Rights.\textsuperscript{53} It has enough positive content and is not merely negative in its reach even though Article 21 is worded in negative terms.\textsuperscript{54}

\textbf{Article 22 Protection against Arrest and Detention in certain cases}

Article 22 guarantees the minimum rights which any person is arrested will enjoy. The protection of the individual from oppression by the police and other enforcement officers is a major interest in a free society. Arrest and detention in police lock-up may be very traumatic for a person. It can cause him in calculable harm by way of loss of his reputation. Denying a person of his liberty is a serious matter. The Supreme Court has clarified in Jogindar Kumar vs. State of Uttar Pradesh that no arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing, the justification for its exercise is quite another. The police officer must be able to justify the arrest apart from his power to do so. Accordingly the Court has laid down the following guidelines in this regard for the police to follow:

"No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the Constitutional rights of a citizen and there has in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bonafide of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest".\textsuperscript{55}

\textbf{Article 22(1) ensures the following two safeguards for a person who is arrested}

1. He is not to be detained in custody without being informed, as soon as may be of the grounds of his arrest. Information about the grounds of arrest is mandatory under Article 22(1).\textsuperscript{56} The Supreme Court has said about this rule in Shobharam case: "In other words a person's personal liberty cannot be

\textsuperscript{53} Unnikrishnan vs. State of Andhra Pradesh, AIR 1993 SC 2178: (1993) 1 SCC 645  
\textsuperscript{54} P.Rathinam vs. Union of India, AIR 1994 SC 1844: (1994) 3 SCC 394  
\textsuperscript{55} Jogindar Kumar vs. State of Uttar Pradesh, AIR 1994 SC 1349: (1994) 4 SCC 260  
curtailed by arrest without informing him as soon as is possible, why he is arrested".\textsuperscript{57} The reason behind the rule requiring communication of grounds to the person arrested is to enable him to prepare his defense and to move the Court for bail or for a writ of Habeas Corpus Writ. Failure to inform the person the reason for his arrest would entitle him to be released.\textsuperscript{58}

2. He shall not be denied the right to consult, and to be defended by a legal practitioner of his choice. The Supreme Court in Shobharam case held that the person arrested on accusation of crime becomes entitled to be defended by a counsel at the trial and this right is no lost even if he is released on bail or is tried by a Court which has no power to impose a sentence of imprisonment.\textsuperscript{59} The Supreme Court in another case has observed in Jogindar Kumar case that the arrested person has a right upon request to have someone informed and to consult privately with a lawyer. These rights are inherent in Articles 21 and 22(1) of the Constitution. The Court has directed that these rights of the arrestee be 'recognized and scrupulously protected'. The Court has laid down certain guidelines also for the effective implementation of these Fundamental Rights.\textsuperscript{60} The right to consult a legal practitioner starts right from the day of arrest. The right arises as soon as a person is arrested.\textsuperscript{61} The Supreme Court taking the traditional view of Article 22(1) ruled that 'the right to be defended by a legal practitioner of his choice' could only mean the right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State.\textsuperscript{62}

\textbf{Article 22(2)} requires an arrested person to be produced before a Magistrate within 24 hours of his arrest. It thus ensures that a judicial mind is applied immediately to the legal authority of the person making the arrest and regularity of the procedure adopted by him. This is a mandatory provision.\textsuperscript{63} The Magistrate is not to act mechanically but should apply judicial mind to see whether the arrest of the

\textsuperscript{58} In re Madhulimaye AIR 1969 SC 1014: 1969 1 SCC 292.
\textsuperscript{60} Jogindar Kumar vs. State of Uttarpradesh, AIR 1994 SC 1349: (1994) 4 SCC 260
\textsuperscript{61} MotiBai vs. State of Rajasthan, AIR 1954 Raj 241.
\textsuperscript{62} Janardhan Reddy vs. State of Hyderabad AIR 1951 SC 217: 1951 SCR 344
person produced before him is legal, regular and in accordance with law. Otherwise, the protection afforded by Article 22(2) would be meaningless.\textsuperscript{64} The Supreme Court has strongly urged in Khatri case that the Constitutional requirement to produce an arrested person before a Judicial Magistrate within 24 hours of his arrest must be strictly adhered and scrupulously observed.\textsuperscript{65}

Article 22(3) makes two exceptions. Article 22(1) and 22(2) do not apply to:

a. Enemy alien and b. To persons arrested or detained under a law providing for preventive detention.

**Article 22(4) to 22(7) Preventive Detention**

Preventive detention means detention of a person without trial and conviction by a Court but merely on suspicion in the mind of an executive authority. Preventive detention is fundamentally and qualitatively different from imprisonment after trial and conviction in a Criminal Court. Preventive detention and prosecution for an offence are not synonymous. Preventive detention is thus preventive, not punitive in theory. Preventive detention is not to punish an individual for any wrong done by him but at curtailing his liberty with a view to preventing him from committing some injurious activities in future. Clauses 4 to 7 of Article 22 lay down a few safeguards and provide for minimum procedure, which must be observed in any case of preventive detention. If a law of preventive detention or administrative action relating thereto infringes any of these safeguards then the law or the action would be invalid as infringing the Fundamental Right of the detainee. It is immaterial whether or not the Constitutional safeguards are incorporated in the law authorizing preventive detention, because even if they are not, they would be deemed to be part of the law as a super imposition by the Constitution which is the supreme law of the land. The Supreme Court has developed certain norms out of Articles 22(4) to 22(7) with a view to protect the personal liberty of the detenu against bureaucratic lethargy, insensitivity, red tape and routine approach.

Article 22(5) has two limbs. One, the detaining authority is to communicate the detenue the grounds of the detention ‘as soon as may be’. Two, the detenue is to be

\textsuperscript{64} In re Madhulimaye AIR 1969 SC 1014: 1969 1 SCC 292.

\textsuperscript{65} Khatri vs. State of Bihar, AIR 1981 SC 928, 932: (1981) 1 SCC 635.
afforded 'the earliest opportunity' of making a representation against the order of detention. This is natural justice woven into the fabric of preventive detention by the Constitution. These are the rights guaranteed to the detenue by Article 22(5). If any of these rights is violated the detention order would become bad. Communication of grounds means communication to the detenue of all the basic facts, documents and materials which went to the subjective satisfaction of the authority to detain him. The detention order becomes bad if any factual components constituting the real grounds for detention are not fairly and fully put across to the detenue, the reasons being that if some facts are held back from him his right to make an effective representation against his detention is infringed.\textsuperscript{66} The Supreme Court has emphasized that Article 22(5) vests a real and not an imaginary or illusory right in the detenue. The communication of facts is a cornerstone of his rights of representation and an order of detention passed on uncommunicated materials is unfair and illegal. According to Supreme Court in Abdul Karim case, "the right of representation under Article 22(5) is a valuable Constitutional right and is not a mere formality."\textsuperscript{67}

On the question of supply of documents to enable a detenue to make a representation, the Supreme Court has ruled in Kamarunnisa case that it is not sufficient to show that the detenue was not supplied the copies of some of the documents in time on demand but it must further be shown that the non-supply of the documents in question has impaired his right to make an effective and purposeful representation against his detention.\textsuperscript{68} Article 22(5) does not say as to whom the representation is to be made or what is to be done with it. However in order to make Article 22(5) meaningful and convert it into a safeguard to the detenue the Supreme Court has interpreted Article 22(5) to mean that the Government must consider the detenue's representation before sending it to the Advisory Board. The Supreme Court has observed in Hardhan Saha case as follows:

\textsuperscript{67} Abdul Karimvs.State of West Bengal AIR 1969 SC 1026, at 1033: (1969) 1 SCC 433
"If the representation of the detene is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If the representation is made after the matter has been referred to the Advisory Board the detaining authority will consider it before it will send representation to the Advisory Board."\(^{69}\)

**Article 22(4) Advisory Board:** Advisory Board is another safeguard provided by Article 22(4) to a detene under preventive detention. From the tenor of Article 22(4)(a), it is clear that a law of preventive detention may provide for detention up to three months without the safeguard of an Advisory Board. For preventive detention up to three months no reference to such a Board is necessary. Under Article 22(7)(c) Parliament is authorized to prescribe the procedure to be followed by an Advisory Board. Preventive detention for over three months is possible only when an Advisory Board holds that in its opinion there is sufficient cause for such detention. The Board must report before the expiry of three months. If the report is not made within three months of the date of detention, the detention would become illegal.\(^{70}\) The Board is to consist of persons who are, have been, or are qualified to act as High Court Judges. The Supreme Court has spelled out the rule that not only the Advisory Board should report within three months of the date of detention order that, in its opinion there is sufficient cause for the detention of the detene, but also the Government should itself confirm and extend the period of detention (beyond three months) within three month’s time limit. Failure on the part of the Government to do so will render the detention invalid as soon as three months elapse and any subsequent action by the Government cannot have the effect of extending the period of detention beyond three months. While confirming the order of detention, the Government has not only to pursue the report of the Advisory Board but apply its mind to the material on record.\(^{71}\) It is also necessary that the order of confirmation be in writing and being communicated to the detene.

**Article 22 (7) (a).** Under this Article Parliament may by law prescribe “The circumstances under which, and the clause or clauses or cases in which a person may

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\(^{69}\) ArthanSaha vs. State of West Bengal, AIR, 1974 SC 2154 at 2159; (1975) 3 SCC 198.


\(^{71}\) Nandlal vs. State of Punjab AIR, 1981 SC 2041:(1981)
be detained for a period longer than three months" without referring his case to an Advisory Board under Article 22(4)(a).

iii. **Article 23 Right against Exploitation consist of Articles 23 & 24**

Article 23 and 24, though Fundamental Rights, lay dormant for almost 32 years after the Constitution came into force and there was hardly any significant judicial pronouncements concerning these Constitutional provisions, since 1982, however these Articles have assumed great significance and have become potent instrument in the hands of Supreme Court to ameliorate the pitiable condition of the poor in the country.

According to Article 23(1), traffic in human beings, beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. A significant feature of Article 23 is that it protects the individual not only against the State but also against private citizens. Article 23(1) prescribes three unsocial practices viz., beggar, traffic in human beings and forced labour.

The term beggar means compulsory work without any payment. Beggar is labour or service which a person is forced to give without receiving any remuneration for it. The practice was widely prevalent in the erstwhile princely States in India before the advent of the Constitution. It was a great evil and has, therefore, been abolished through Article 23(1). Withholding of pay of a Government employee as a punishment has been held to be invalid in view of Article 23 which prohibits beggar. "To ask a man to work and then not to pay him any salary or wages savours of beggar. It is a Fundamental Right of a citizen of India not to be compelled to work without wages". The expression 'traffic in human being' commonly known as slavery, implies buying and selling of human beings as if chattels and such a practice is constitutionally abolished. Traffic in women for immoral purposes is also covered by this expression. The word 'other similar form of forced labour' in Article 22(1) are to be interpreted ‘ejusdem generis’. The kind of ‘forced labour’ contemplated by the

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72 Suraj vs. State of Madhyapradesh, AIR 1960 MP 303
73 Raj Bahadur vs. Legal remembrances, Government of West Bengal, AIR 1953 Cal. 522; ShamaBai vs. State of Uttarpradesh, AIR, 1959 All. 57.
Article has to be something in the nature of traffic in human beings or beggar. Conscription for police service or military service cannot come under either. Even payment of wages less than minimum wages would be regarded as forced labour. Giving a very expansive interpretation to Article 23 Bhagawathi J said in the Asiad case:

"The word force must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leads no choice of alternative to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wages." The term 'forced labour' does not only mean when a person is forced to do labour for less than the minimum wages, it also means labour which a person is forced to do even though he is being paid his remuneration. It is the element of 'force' which makes labour as forced labour. Commenting on this ruling in Asiad case the Supreme Court has observed per WadhwaJ. that, "thus this Court has held that under Article 23 no one shall be forced to provide labour or service against is will even though it be under a contract of service. Payment of full wages when labour extracted is forced will attract the prohibition containing Article 23."

Under Article 23(2), the State can impose compulsory service for public purposes, and in imposing that service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them. The State is not obligated to pay for the compulsory service imposed. It was said in justification of this provision in the constituent assembly that whenever compulsory service is needed it can be demanded from all and if the State demands service from all and does not pay any one then the State is not committing any very great inequality. The Government demanding services of teachers for census, lection, family planning duties is not violative of Article 23(1). Such services fall within the meaning of 'public purpose' under Article 23(2) and these services can also be treated as national service which is a fundamental duty of every citizen under Article 51A.

74 DalalSamanta vs. District Magistrate, Howrah AIR 1958 Cal 365
75 People's Union for Democratic Rights vs. Union of India, AIR 1982 SC 1491: (1982 SCC 235.
77 Devendranath Gupta vs. State of Madhya Pradesh, AIR1983 MP 172.
Article 24 Prohibition of employment of children in factory etc.

A critical human and economic problem is that of child labour. Poor parents seek to augment their meagre income through employment of their children. Employers of children also stand to gain financially. It is realised that total ban on child labour may not be socially feasible in the socio-economic environment of the country. Accordingly Article 24 puts only a partial restriction on employment of child labour. Article 24 prohibits employment of a child below the age of fourteen years to work in any factory or mine, or in any other hazardous employment. The question of employment of child labour has been brought to the attention of the Supreme Court in several cases by way of Public interest litigation. In M.C. Mehta vs. the State of Tamil Nadu the Court has considered the Constitutional perspective of the abolition of Child labour in the notorious Sivakasi Match Industry. The Court has issued detailed directions to eradicate the practice of employing children below the age of fourteen years in this hazardous industry. The Court has insisted that the employers must comply with the provisions of child labour (Prohibition and Regulations) Act. The Court has emphasized that abolition of child labour is definitely a matter of great public concern and significance.

iv. Right to freedom of Religion guaranteed by Articles 25 to 28

India is a pluralistic society and a country of religion. It is inhibited by many religions. Thus the framers of the Constitution desire to introduce the concept of secularism meaning State neutrality in matters of religion. Religious tolerance and equal treatment of all religious groups are essential parts of secularism. Secularism in India does not mean irreligion. It means respect for all faith and religions. The State does not identify itself with any particular religion. India being a secular state there is no state or preferred religion as such and all religious groups enjoy the same Constitutional protection without any favour or discrimination.\textsuperscript{78} Articles 25 to 28 of the Indian Constitution confer certain rights relating to freedom of religion not only on citizens but also on all persons in India including the religious groups. The Constitutional provisions have raised several problems of interpretation. On the whole the Supreme Court has interpreted these provisions with a view to promote inter

\textsuperscript{78} Dr.Radakrishnan in Secularism in India (ed. B.K. Sinha) 127 (1968)
religious amity harmony and accord. The Courts have also lean towards minority groups and has conceded to them certain rights over and above the majority rights. The Constitution does not deny the term secular as it is a very elastic term and not capable of any precise definition and so it is best left undefined. Flexibility is most desirable as there cannot be any fixed views on this concept for all time to come. Hence the Court decides from time to time the contours of the concept of secularism and enforces it in practice. The Supreme Court in Aruna Roy case has ruled that the concept of secularism is not endangered if the basic tenets of all religion all over the world are studies and learnt. Value-based education will help the nation to fight against fanaticism, ill-will, violence, dishonesty and corruption. These values can be inculcated if the basic tenets of all religions are learnt.  

**Article 25 Freedom of Conscience and free profession, practice and propagation of religion**

Article 25(1) guarantees to every person and not only to the citizens of India, the freedom of ‘conscience’ and ‘the right freely to profess, practice and propagate religion.’ This, however, is subject to public order, health, morality, and other provisions relating to Fundamental Right. According to Article 25 (2) (a) the State is not, however, prevented from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. According to Article 25 (2)(b) the State is also not prevented from making any law providing for social welfare and reform, or for throwing open of Hindu Religious institutions of a public character to all classes and sections of the Hindus. According to explanation 1 wearing and carrying of kirubans by the Sikh is included in the profession of the Sikh religion. According to explanation 2 the term 'Hindu' in this Article includes persons professing the Sikh, Jain or Buddhist religion and the reference to Hindu religious institution is to be construed accordingly.

**Article 26 Freedom to manage Religious Institutions**

According to this Article every religious nomination or a section thereof has the right:

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79 Aruna Roy vs Union of India (2002) 6 SCALE 408  
To establish and maintain institutions for religious and charitable purposes.

To manage its own affairs in matters of religion;

To own and acquire moveable and immoveable property and

To administer that property in accordance with law.

The right is subject to public order, morality and health.

**Article 27 Freedom as to payment of Taxes for the Promotion of any Particular Religion**

According to this Article no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion and maintenance of any particular religion or religious denomination.

**Article 28 Freedom as to attendance at religious instruction or religious worship in certain educational institutions**

As per Article 28 (1) no religious education is to be provided in any educational institution which is wholly maintained out of the State funds. Under Article 28(2), this restriction would not apply to an educational institution which, through administered by the State has been established under an endowment or trust requiring that religious instruction should be imparted in such an institution. In State recognized educational institution, religious education can be imparted on a voluntary basis. As per Article 28(3) no person attending an educational institution recognized by the State or receiving aid from the State funds can be required to participate in any religious instruction imparted in the institution, or to attend any religious worship conducted in the institution or any premises attached thereto unless he consents to do voluntarily, or if a minor, if guardian gives his consent for the same.

In Aruna Roy s. Union of India the Supreme Court has ruled that Article 28 does not ban a study of religion. The whole emphasis of Article 28 is 'against imparting religious instruction'. There is no prohibition on 'study of religious philosophy and culture, particularly for having value based social life in a society which is degenerating for power, post or property.' In the words of Dharmatikari, J.:
“Study of religion, therefore, in school education cannot be held to be an attempt against secular philosophy of the Constitution,”81

v. Cultural and Educational Rights are guaranteed by Articles 29 and 30

Articles 29 and 30 protect and guarantee certain cultural and educational rights to various cultural, religious and linguistic minorities located in India.

Article 29: Protection of interests of Minorities

According to Article 29(1) any section of the citizen residing in any part of India having a distinct language, script or culture of its own has the right 'to conserve the same. This Constitutional provision therefore protects the language, script or culture of a section of the citizen. In order to invoke Article 29(1) all that is essential is that a section of the citizen residing in India should have a distinct language. Script or culture of its own. If so, they will have the right 'to conserve the same'. Article 29(1) includes the right 'to agitate for the protection of language'. Unlike Article 19(1) Article 29(1) is not subject to reasonable restrictions. The right conferred upon the citizen to conserve their language etc. is made absolute by the Constitution.

According to Article 29(2) admission is not to be denied to any citizen into any educational institution maintained by the State or receiving aid out of the State funds on the grounds only of religion, race, caste, language or any of them. This provision guarantees the rights of a citizen as an individual irrespective of the community to which he belongs.

The benefit of article 29(2) is not confined only to minority groups but extends to all citizens whether belonging to majority or minority groups in the matter of admission to the educational institution maintained or aided by the state. Article 29 (2) is broad and unqualified. It confers the special right on all citizens for admission into the State maintained or aided educational institutions., to limit this right only to minority groups will amount to holding that the citizens of the majority groups have no right to be admitted into an educational institution for the maintenance of which

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81 Aruna Roy vs Union of India (2002) 6 SCALE 408: AIR 2002 SC 3176; SCALE 430-431 AIR, 3193; SCALE 440 AIR 3201
they contribute by way of taxes. To enforce the restrictions laid down in article 29(2), the High Court can issue a writ under article 226 even against a private institution receiving aid from the State. This article makes it very clear that a private institution receiving aid from the state cannot discriminate on grounds of religion, caste, etc.

Article 30

Right of minorities to administer educational institutions.

Article 30 (1) gives the linguistic or religious minorities the following two rights, 1. Right to establish, and right to administer the educational institutions of their own choice, the benefit of article 30(1) extends only to linguistic or religious minorities and not to any other sections of the Indian Citizens.

Article 30(1) -A

The Constitution 44th Amendment enacted in 1978 added article 30(1)-A, to the Constitution which runs as follows:

"In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause(1), a State shall ensure that the amount fixed by or determined under such law, for the acquisition of such property is such as would not abrogate the rights guaranteed under that clause." The State has a right to acquire property belonging to a minority institution. This provision seeks to protect minority rights somewhat in this regard, but the actual implications of article 30 (1)A are not clear. Does it mean that the State is to give adequate compensation for the property acquired? The Supreme Court has commented on the scope of article 30(1)-A in society of St. Joseph College's case that article 30(1) A has been introduced in the constitution because Parliament in its constituent capacity apprehended that the minority educational institutions could be compelled to close down or curtail their activities by the expedient of acquiring the property and paying them adequate amounts as compensations.

82 State of Bombay vs. Bombay Educational Society, AIR 1954 SC. 561: (1955) 1 SCR 568
Article 30(2) debars the state from discriminating against minority institutions in the matter of giving grants. On the question of government aid to the minority institutions, the Supreme Court has observed in St. Stephen’s college case as follows:

"The educational institutions are not business houses, they do not generate wealth. They cannot survive without public funds or private aid. It is said that their is also restraint on collection of students fees. With the restraint on collection of fees, the minorities cannot be saddled with the burden of maintaining the educational institutions without grant-in-aid. They do not have economic advantages over others. It is not possible to have educational institutions without State aid. The minorities cannot, therefore, be asked to maintain the educational institutions on their own". 

VI. Right to Property

The Constitution (44th Amendment) Act 1978 constitute a water shed in the evolution of the Fundamental Right to property in India. Truly speaking this amendment signifies the demise of the Fundamental Right to property. Before 1978, there existed mainly two articles to protect private property viz. articles 19(1) (f) and 31. Both these Constitutional provisions were repealed by this Constitutional Amendment, and, thus, left private property defenceless against legislative onslaught.

After 1978 in the area of property relations there are only four Constitutional provisions viz. articles 31A, 31B, 31C & 300A. Articles 31A 31B, & 31C although included in the chapter on Fundamental Rights can hardly be characterised as amounting to Fundamental Rights to property in the real sense, for, these three Constitutional provisions in effect, do not confer any right, but instead seek to impose drastic restrictions on the right to property. The purport of these three provisions is to confer immunity on various types of laws curtailing property rights. Article 30A thus confers some semblance of protection of private property, but this Constitutional provision does not enjoy the status of a Fundamental Right.

Article 31A - Saving of Laws providing for acquisition of Estates etc.: Article 31A (1) as it stand now after the 44th Amendment says "notwithstanding anything
contained in article 13”, no law providing for the following “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 the article 14 or article 19”.

- The acquisition by the State of any 'estate' or of any rights therein or the extinguishment or modification of any such rights; or,

- The taking over of the management of any property by the State for a limited period either in the public interest or in order to secure its proper management of the property; or.

- The amalgamation of two or more corporations either in the public interest or in order to secure proper management of any of the corporations; or

- Extinguishment or modification of any rights of managing agents, secretaries and treasurers or managing directors, directors or managers of corporation, or of any voting rights of share holders thereof; or

- The extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license.

Law providing for any of the above, is to be deemed to be void on the ground of its inconsistency with article 14 or 19. The protection of article 31A (1) does not apply to a law made by a State Legislature unless it has been reserved for the President's consideration and has received his assent.

Article 31B provides that the Acts and regulations mentioned in the ninth schedule shall not be deemed to be void, or ever to have become void, in spite of any adverse judicial pronouncement, on the ground that they are inconsistent with or that they take away or abridge any of the Fundamental Right. The provision thus immunizes the various pieces of legislation included in the ninth schedule from an attack on the ground of their non-conformity with any of the Fundamental Right. No act mentioned in the ninth schedule can be invalidated on the grounds of its violation of any other Fundamental Rights.86

Article 31C Saving of Laws giving effect to certain directive Principles: In 1976, article 31C was amended, its scope further expanded, and it was sought to be

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86 Ramnath vs. Union of India, AIR 1984 SC 1178: 1984 Supp SCC 96
made much more drastic, through the 42nd Amendment. The first part of article 31C now said that no law giving effect to any of the Directive Principle would be deemed to be void on the ground of its inconsistency with articles 14 and 19. Thus the 42nd Amendment gave primacy to all the Directive Principles, and not only to articles 39(b) and 39(c) over articles 14 and 19. The scope of article 31C was thus made much wider than what it was before 1976 when it referred only to articles 39(b) and 39(c). Now article 31C refers to all the Directive Principles. It will, thus, be seen that while before 1971 Fundamental Rights had precedence over the Directive Principles, after 1976, this scenario has undergone a drastic change as all Directive Principles came to have precedence over article 14 and 19. The change was sought to be justified on the ground that the rights of the community must prevail over the rights of the individual.

The Supreme Court in a number of cases like Minerva Mills case\(^87\), WamanRao\(^88\)Sanjeev Coke Mfg. Co.\(^89\), held that the article 31C which was expanded in its scope by the 42nd Amendment so as to give primacy to all Directive Principles over article 14 and 19 to be invalid. But in the property owner's case\(^90\) it was argued that the doctrine of revival as it applies to ordinary statutes could not be applied to the Constitutional Amendment. So the question whether article 31C exists in the Constitution or not, or whether it died with the Supreme Court decision in Minerva Mills case, is going to be considered by the Supreme Court only. Accordingly a Bench of five Judges sat in 2001\(^91\)to consider the issue, but the Bench suggested that the matter be referred to a Bench of Judges as one of the points which arose for consideration relates to the interpretation of article 39(b). The Bench of seven Judges met in 2002 and referred the matter to nine Judges.\(^92\)

**Article 300A: Persons not to be deprived of property save by authority of law**

44\(^{th}\) amendment of the Constitution in 1978 transformed the right to property from the category of fundamental Rights by repealing article 31, and converted it into an ordinary Constitutional Right by enacting article 300A instead. Article 300A

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\(^87\) Minerva Mills Ltd. vs. Union of India AIR 1980 SC 1789; (1980) 2 SCC 591
\(^89\) Sanjeev Coke Mfg.co., vs. Bharat Coking Cole Co. Lt. AIR 1983 SC 239; (1983) 1 SCC 147
\(^90\) Property Owners Association vs. State of Maharashtra (1996) 4 SCC 49
\(^91\) Property Owners Association vs. State of Maharashtra AIR (2001) SC 1668; (2001) 4SCC 455
\(^92\) Property Owners Association vs. State of Maharashtra 2002 (4) SCALE 132
merely says: "No person shall be deprived of his property saved by authority of law". The Constitutional Right to property under article 300A is not a basic feature or structure of Constitution. It is only a Constitutional Right. Article 300A ensures that a person cannot be deprived of his property merely by an executive fiat. The rights in property can be curtailed, abridged or modified by the State only by exercising its legislative power. Without law there can be deprivation of property. No law, no deprivation of property is the principle underlying article 300A. An executive order depriving a person of his property without being backed by law is not constitutionally valid. The very same principle was invoked in other similar cases also viz. Bishambar Dayal Chandra Mohan, Wazir Chand, Bishan Das and Vishnu Narayan and Associates by the Supreme Court.

The word "law" in article 300 A means a valid law. Such a law will therefore be subject to other provisions of the Constitution example article 14, 19 (1) (g) and 301. Ordinarily the word 'law' in article 300A may mean a 'positive' or 'State made law'. e.g., a law made by Parliament or a State Legislature or a rule, or a statutory order having the force of law. The extended significance attached to article 14 viz. any unjust law denies equality, an unjust law may be vetoed by the Court. However it should be underlined that article 21 does not apply to property area. Nevertheless, the Court can interpret the word law in article 300A in a meaningful sense and not in the sense of merely a statutory law. For e.g. compulsory transfer of A's property by law to B without any compensation may be held invalid as an unreasonable or arbitrary law. But this needs judicial creativity of high order, such as that displayed by the Supreme Court in Menaka Gandhi. The Supreme Court in Jilubhai case also ruled that the law may fix an amount or which may be determined in accordance with such principles as may be laid therein and given in such manner as may be specified in such law. However, such law shall not be questioned on the ground that the amount so fixed or

96 Wazir Chand vs. State of Himachal Pradesh AIR 1954 SC 415: (1955) 1 SCR 408
97 Bishan Das vs. State of Punjab AIR 1961 SC 1570: (1962) 2 SCR 69
amount determined is not adequate. The amount fixed should not illusory. The principles laid to determine the amount must be relevant to the determination of that amount.\textsuperscript{100}

\textbf{VII. Right to Constitutional Remedies}

Right to Constitutional Remedies is secured by article 32 - 35. The right without a remedy does not have much substance. The Fundamental Rights guaranteed by the Constitution would have been worth nothing had the Constitution not provided an effective mechanism for their enforcement. According to article 13, Fundamental Rights are enforceable and any law inconsistent with the Fundamental Rights is void. Article 13 is the key provision as it makes Fundamental Rights justiciable. Article 13 confers a power and imposes a duty and an obligation on the Courts to declare a law void if it is inconsistent with the Fundamental Right. This is a power of great consequence for the Court. The supreme Court has figuratively characterised the role of the Judiciary as that of a "Sentinel on the quiver".\textsuperscript{101} Article 32 confers power on the Supreme Court to enforce the Fundamental Rights. The High Courts also have a parallel power under article 226 to enforce the Fundamental Rights.

\textbf{Article 32 Remedies for enforcement of rights Conferred by Part III}

Article 32(1) guarantees the right to move the Supreme Court, by appropriate proceedings, for the enforcement of the Fundamental Rights enumerated in the Constitution. Article 32 (2) empowers the Supreme Court to issue appropriate orders or directions or writs including writs in the nature of habeas Corpus, Mandamus, Prohibition, Quo Warranto, and certiorari, whichever may be appropriate, for the enforcement of the petitioner's Fundamental Right. Article 32(3) empowers Parliament by law to empower any other Court to exercise within the limits of its territorial jurisdiction all or any of the powers exercisable by the Supreme Court under Article 32(2). This can however be done without prejudice to the Supreme Court's powers under articles 32(1) and (2). According to article 32(4), the right guaranteed by article 32 shall not be suspended except as otherwise provided for by

\begin{footnotesize}
\textsuperscript{101} State of Madras vs. D.R.Row, AIR 1952 SC 196: (1952) SCR 597.
\end{footnotesize}
the Constitution. Article 359 provides, during an emergency, for the suspension of the right to move any Court for the enforcement of the Fundamental Rights by a presidential order.

The right of access to the Supreme Court under article 32 is a Fundamental Right itself. Article 32 (1) provides a very important safeguard for the protection of the Fundamental Rights of the citizens of India. Article 32 provides a guaranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to undergo the dilatory process of proceeding from the lower to the higher Court as he has to do in other ordinary litigation. The Supreme Court has thus been constituted as the protector and guarantor of the Fundamental Rights. Commenting on the solemn role entrusted to itself by article 32 the Supreme Court has observed in Baryo case as follows:

"The Fundamental Rights are intended not only to protect individual’s rights but they are based on high public policy. Liberty of the individual and the protection of the Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself." The Court has further emphasized in Ramesh Thappar case that "this Court is thus constituted the protector and guarantor of the Fundamental Right and it cannot consistently with the responsibility so laid down upon it, refuse to entertain applications seeking protection against infringement of such rights." The Supreme Court has described the significance of article 32 in the following words in Prem chand Garg case:

"The Fundamental Right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should regard itself as the protector and guarantor of Fundamental Rights’ and should declare that “it cannot, consistently with the responsibility laid upon it, refuse to entertain application seeking protection against

103 Daryao vs. State of Uttarpradesh AIR 1961 SC 1457 at 1461 : (1962) 1 SCR 574
104 Ramesh Thappar vs. State of Madras, AIR 1950 SC 124 : 1950 SCR 594

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infringement of such rights.... In discharging the duties assigned to it, this Court has to play the role of a 'sentinel on the quiver' and it must always regard it as its solemn duty to protect the said Fundamental Rights ' zealously and vigilantly'.

**Relief / Damages / Compensation**

Under article 32 the Supreme Court may issue not only the specified writs but also make any order or give any direction as it may consider appropriate in the circumstances of the case to give proper relief to the petitioner. The Court can grant declaration or injunction as well if that be the proper relief. In course of time, the Supreme Court has given a new dimension to article 32 and has implied there from the power to award damages/compensation when a Fundamental Right of a person has been infringed and there is no other suitable remedy available to give relief and redress in the specific situation for the injury caused to the petitioner. The Court has argued that under article 32 its power is not only injective in ambit, i.e., preventing the infringement of a Fundamental Right but it is also remedial in its scope. Therefore, the Court can not only inject violation of Fundamental Right but also give relief when the right has already been violated. The Court has maintained that in the absence of such a power, article 32 would be rocked of all its efficacy became emasculated and rendered futile and become impotent. In this connection the Supreme Court has pointed in another one case viz. Common Cause, a Registered Society as follows:

"It is in the matter of enforcement of Fundamental Rights that the Court has the right to award damages to the loss caused to a person on account of violation of his Fundamental Rights."

In the case of Rudul Shah vs. State of Bihar, in writ petition for Habeas corpus, the Court awarded damages to the petitioner against the state for breach of his rights of personal liberty guaranteed by article 21 as he was kept in jail for fourteen

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years even after his acquittal by a Criminal Court. In Bodhisattva Gautham case\textsuperscript{110} the Supreme Court awarded an interim compensation to the woman raped and the rapist was directed to pay Rs. 1000/- per month to the woman pending criminal case against him. A significant Judicial pronouncement on the question of monetary compensation under its writ jurisdiction is Chairman, Railway Board vs Chandrima Das\textsuperscript{111}. The brief of the case is:

A Bangladesh woman was gang raped by some Railway employees in the Railway premises at the Howrah Railway Station. A practicing lawyer filed a writ petition in the High Court under article 226 as Public interest litigation. The High Court awarded damages to the victims against the Railways. On appeal, the Supreme Court upheld the High Court decision. It was held to be a violation of the rights of the victim under Article 21 which was available not only to the citizens but also to the non-citizens as well. The Court rejected the contention that the matter s ought to have been raised through a Civil Suit rather than a Writ Petition. Another objection raised was that the petition was filed not by the victim herself, but by a practicing lawyer. Rejecting the objection also, the Court ruled in favour of the locus standi of the Petitioner because, the petitioner claimed not only compensation but several other reliefs and it was filed in public interest.

The categories of cases in which a Supreme Court has awarded damage are as follows:

Where the petitioner has suffered personal injuries at the hands of government Servants by their tortious acts:\textsuperscript{112}

- Police atrocities;\textsuperscript{113}
- Custodial deaths\textsuperscript{114}

\textsuperscript{110} BothiSattwaGautam vs, Suphrachakraborty AIR 1996 SC 922 : 1996 (1) SCC 490;
\textsuperscript{111} Chairman, Railway Board vs. Chandrima Das AIR 2000SC 988 : 2000 (2) SCC 465
\textsuperscript{113} D.K. Basu vs. State of West Bengal, AIR 1997 SC 610 : (1997) 1 SCC 416
Medical negligence\textsuperscript{115}

Environmental pollution\textsuperscript{116}

**Power to Issue General Damages**

While the basic purpose underlying article 32 is to empower the Supreme Court to give relief to an aggrieved person whose fundamental Right has been infringed, the Court has used article 32 for a much wider purpose than that, viz., to lay down general guidelines having the effect of law to fill the vacuum till such time the Legislature steps to fill in the gap by making the necessary law. The Court derives such a power by reading article 32 with article 142 and article 141. Article 144 mandates all authorities to act in aid of the Court orders. The Court has issued guidelines and directions in quite a few cases. Some of the cases are:

- Lakshmi Kant Pandey vs. Union of India, where guidelines for adoption of minor children by foreigners were laid down\textsuperscript{117}
- Supreme Court Advocates on Record Association vs. Union of India, where the Supreme Court laid down guidelines and norms for the appointment and transfer of High Court Judges\textsuperscript{118}
- Vishaka vs. State of Rajasthan where elaborate guidelines have been laid down to discourage sexual harassment of women in work places\textsuperscript{119}
- VineethNarain Vs. Union of India, where the Court has laid down directions to ensure the independence of the Vigilance Commission and to reduce corruption among Government servants. This has been done to implement the rule of law “wherein the concept of equality enshrined in article 14 is embedded.” The Court has done so as no legislation has been enacted covering the said field to ensure proper implementation of the rule of law\textsuperscript{120}

\textsuperscript{115} PaschimBangaKhetMazdoor Samity vs West Bengal, AIR 1996 SC 2426 : (1996) 4 SCC 37
\textsuperscript{117} Lakshnikant Pandey vs. Union of India AIR 1984 SC 464 : (1984) 2 SCC 244
\textsuperscript{118} Supreme Court of India Advocates - on Record Association vs. Union of India (1993) 4 SCC 441, AIR 1994 SC 265
\textsuperscript{120} NinieetNarain vs. Union of India AIR 1998 SC 889 : (1998) 1 SCC 226.
- Common Cause vs. Union of India, where the Supreme Court issued direction for revamping the system of blood bank in the country.\textsuperscript{121}

- ViswaJagriti Mission vs. Central Government, where the Court has issued guidelines against ragging in educational institutions.\textsuperscript{122}

**Public Interest litigations**

A Public Interest litigation writ petition can be filed in the Supreme Court under article 32 only if a question concerning the enforcement of the Fundamental Right is involved. Under article 226, the writ petition can be filed in the High Court whether or not a Fundamental right is involved. The Supreme Court has entertained a number of petitions under article 32 complaining of infraction of Fundamental Rights of individuals, or of weak or oppressed group who are unable themselves to take the initiative to vindicate their own rights. The Supreme Court has ruled that to exercise its jurisdiction under article 32 it is not necessary that the affected person should personally approach the Court. The Court can itself take cognizance of the matter and proceed suo motto or on a petition of any public spirited individual or body.\textsuperscript{123}

**Article 33: Power of Parliament to Modify the Right conferred by this Part in their Application to Forces, etc.**

Article 33 of the Constitution constitutes an exception to the Fundamental Rights. A Government servant is also entitled to enjoy Fundamental rights. A person does not lose his Fundamental Rights if so facto by joining Government service. But, under article 33 Parliament is endowed with power to restrict or abrogate the Fundamental Right of a few categories of Government servants. Article 33 empowers Parliament to determine by law to what extent any of the Fundamental rights shall in its application to - the members of armed forces; or the members of the forces charged with the maintenance of public order; or persons employed in any bureau or other organization established by the state for purposes of intelligence or counter intelligence; or persons employed in or in connection with the telecommunication

\begin{footnotes}
\item[121] Thomas Das vs Union of India AIR 1996 SC 929.
\item[122] VishwaJagriti Mission vs. Central Government, JT 2001 (6) SC 151
\end{footnotes}
system set up for the purposes of any force, bureau or organization referred to in classes (a), (b) and (c) be restricted or abrogated so as to ensure the proper discharge of their duties and maintenance of discipline among them. Article 33 does not by itself abrogate any right; its applicability depends upon parliamentary legislation.

The expression “members of the Armed Forces” used in sub clause (a) above covered such civilian employees of the armed forces as barbers, carpenters, mechanics etc. Although these persons are non-combatant, nevertheless, they are integral to the armed forces and, therefore, their Fundamental Rights also can also be curtailed under article 33.\textsuperscript{124} Article 33 selects only a few services for special treatment, such as, Military and Para-Military Forces, Police forces and analogous forces. Article 33 does not exclude any other category of civil servant from the purview of Fundamental Rights by reason of being Government Servant. This provision may therefore be treated as an exception to the Fundamental Right.\textsuperscript{125}

A law enacted by Parliament governing the armed forces (Army Act) cannot be challenged on the ground that it infringes any fundamental right. The power is conferred on Parliament and not on the State Legislature. Maintenance of Law and Order being a State Subject the law governing the forces charged with the maintenance of public order falls within the State sphere. Nevertheless, such a state law cannot abrogate a Fundamental Rights of member of such force. This can only be done by Parliament under article 33. The Parliament is entitled to lay down to what extent Fundamental Right can be modified by State Legislation applicable to the forces charged with the maintenance of public order.\textsuperscript{126} In this direction the Parliament has enacted the Public Forces (Restriction of Rights) Act, 1966, for restricting certain Fundamental Rights of the Police Forces functioning under the several statutes listed in the schedule to the Act. The ban on a member of the police force from becoming a member of any trade union or labour union was placed by the Central Government under the rules made under the Police Forces (Restriction of Rights) Act, 1966. The ban placed on a member of police force from becoming a member of any trade union or labour union has been upheld by the Supreme

\textsuperscript{124} O.A.K. Nair vs. Union of India, AIR 1976 SC 1179 : (1976) 2 SCC 780.
The Parliament has also enacted the Intelligence organisation (Restriction of Rights) act. 1985, restricting certain Fundamental Rights in their application to the members of certain Intelligence agencies.

**Article 34: Restriction on Rights conferred by this part while Martial Law is in force in any area**

Article 34 enables Parliament to enact an Act of Indemnity to protect Government and Military Officers from any liability for action taken by them for restoration of order during the Martial Law period. Such an Act cannot question on the ground of infringement of fundamental rights of a person.

**Article 35: Legislation to give effect to the Provisions of this part**

Article 35. (a)(i) confers on Parliament and not the State Legislatures powers to make laws with respect to any matter which under articles 16 (3), 32 (3), 33 & 34 may be provided for by law made by Parliament. Article 35 (a) (ii) confers on Parliament and not the State Legislature, power to make laws for prescribing punishment for those acts which are declared offences under the Fundamental Rights. Article 35.b lays down that any law existing on the date of the commencement of the Constitution and dealing with any of the matters mentioned in articles 35(a)(i) and (ii) as mentioned above is to remain in force until altered, repealed or amended by the Parliament.

**iii. Directive Principles of State Policy (Part I - Articles 36 - 51)**

Articles 36-51 contain the Directive Principles of State Policy. The idea to have such principles in the Constitution has been borrowed from the Irish Constitution. These principles obligate the State to take positive action in certain direction in order to promote the welfare of the people and achieve socio-economic goals. The Directive Principles differ from Fundamental Rights. The Directive Principles seek to give certain directions to the Legislature and Governments in India as to how and in what manner and for what purpose, they are to exercise their power.

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But these principles are specifically made non enforceable by any Court of Law. Article 37 of the Constitution states:

"The provisions contained in this part shall not be enforceable by any Court, but 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 law."

The State shall secure social order in which social, economic and political justice shall inform all the institution of national life. Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to sub serve the common good, and there shall be adequate means of livelihood for all and equal pay for equal work. The State shall endeavour to secure the health and strength of workers, the right to work, to education and assistance in cases of want, just and humane condition of work and living wage for workers and a uniform civil code, and free and compulsory education for children. The State shall take steps to organise village panchayat, promote the educational and economic interest of the weaker section of the people, raise the level of nutrition and standard living, improve public health, organise agricultural and animal husbandry, separate the Judiciary from the Executive and promote the international peace and security.

The Directive Principles of State Policy possesses two characteristics. Firstly, they are not enforceable in any Court and therefore, if a directive is not obeyed or implemented by the State, its obedience of implementation cannot be secured through judicial proceedings. Secondly, they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Hence the Courts do not enforce a Directive Principle, as such, as it does not create any justiciable right in favour of an individual. A Court will not issue an order or a writ of mandamus to the Government to fulfil a Directive Principle. The Supreme Court in Lilly Thomas case again reiterated that the Court has no power to give direction for

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the enforcement of the Directive Principles of State Policy. But in course of time the Supreme Court's view as regards the interplay of Directive Principles and Fundamental rights underwent a change.

The Supreme Court started giving a good deal of value to the Directive Principles from the legal point of view and started arguing for harmonising the two - the Fundamental Rights and the directive Principles. The aspect of the Directive Principle was stressed upon by the Supreme Court in GolakNath case. The Supreme Court emphasised that the Fundamental Right and Directive Principles formed an 'integrated scheme' which was elastic enough to respond to the changing needs of the society. In State of Kerala vs. N.M. Thomas case, the Supreme Court observed that the Directive Principles and Fundamental Rights should be construed in harmony with each other and every attempt should be made by the Court to resolve any apparent inconsistency between them. In Unnikrishnan vs. State of Andhra Pradesh the Supreme Court observed that the Fundamental Rights and Directive Principles are supplementary and complimentary to each other, and not exclusionary of each other, and that the Fundamental rights are but a means to achieve the goal indicated in the Directive Principles and that Fundamental Rights must construed in the light of the Directive Principles.

3.3 HUMAN RIGHTS COMMISSION AND HUMAN RIGHTS COURTS

The purpose of setting up the Human Rights Commission is to strengthen the machinery for more effective enforcement of the Fundamental Rights of the people. The statement of object and reasons appended to the Bill which later became the Act made clear the purpose underlying the proposed enactment. While noting that India was a party to the International Covenant on Civil and Political rights and the International Covenants on Economic, Social and Cultural Rights both of which were adopted by the United Nations General Assembly on 16th December 1966. The Rights embodied in those Covenants stood substantially protected by the Constitution of India; the Statement observed that there had been “growing concern in the country

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and about issues relating Human Rights." Having regarded to this and to the changing social realities and emerging trends in the nature of crime and violence. It has been considered essential to review the existing laws and the procedures and the system of administration with a view to bringing about greater efficiency and transparency. The Protection of Human Rights Bill was passed by the Lok Sabha and Rajya Sabha on 18th and 22nd December 1993 respectively. It received the President's assent on 8th January 1994. The Act was passed to provide for the constitution of National Human Rights Commission and State Human Rights Commission and Human Rights Courts for better protection of Human Rights and for matters connected therewith or incidental thereto.

3.3.1 National Human Rights Commission

National Human Rights Commission has been set up as a statutory body under the protection of Human Rights Act, 1993. The Commission consists of A Chairperson who has been the Chief Justice of the Supreme Court of India; One member who is or has been a Judge of the Supreme Court; One member who is or has been the Chief Justice of a High Court; & Two members who are to be appointed from amongst the persons having the knowledge of, or practical experience in, matters relating to Human Rights.

The Chairperson and the members of the Commission are to be appointed by the President of India. Every such appointment is to be made after securing the recommendations of a Committee consisting of the Prime Minister as Chairperson; Speaker of the Lok Sabha; Minister in-charge of the Ministry of Home Affairs, Government of India; Leader of the Opposition in the Lok Sabha; Leader of the Opposition in the Rajya Sabha; and Deputy Chairman of the Rajya Sabha.

The Chairpersons of the National Commission for Minorities, the National Commission for Women and the National Commission for Scheduled Castes and Tribes are deemed to be members of the Commission for (NHRC) the discharge of the various functions assigned to it, except for the functions relating to inquiry into complaints of violation of human rights, viz the function mentioned in S.12 (a)(i) and (ii) of the Act.
The functions to be discharged by the Commission are listed in S.12 of the Act as given below:

a. To inquire, suo motto or on a petition presented to it by a victim or any person on his behalf, into complaint of-
   
   (i) Violation of the human rights abetment thereof, or
   
   (ii) Negligence in the prevention of such violation, by the public servant;

b. to intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

c. to 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 the inmates and make recommendation thereon:

d. to 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. to review the factors, including acts of terrorism that inhibit the employment of human rights and recommend appropriate remedial measures;

f. to study Treaties and other International Instruments on Human rights and make recommendations for their effective implementation;

g. to undertake and promote research in the field of human rights;

h. to spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights available through publications, the media, seminars and other available means;

i. to encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

j. such other functions as it may consider necessary for the promotion of human rights.
According to Section 13 of the Act the Commission has been given ample powers to enable it to discharge its functions effectively. The Commission has its own powers to regulate its procedures. It has, while inquiring into complaints under the Act, powers of a Civil Court trying a suit under the Code of Civil Procedure, and in particular in respect of the following matters:

i) Summoning and enforcing the attendance of witnesses and examining them on oath;

ii) Discovery and production of documents;

iii) Receiving evidence and affidavits;

iv) Requisitioning of any public record or copy thereof from any Court or office;

v) Issuing Commissions for the examination of witnesses or documents;

vi) Any other matter which may be prescribed;

The Commission shall also have the 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. Any person so required is legally bound to furnish such information within the meaning of sections 176 and 177 of the Indian Penal Code.

The Commission or any of its authorised officers may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the enquiry may be found, and may seize any such document. This power is subject to section 100 other Criminal Procedure Code.

The Commission is deemed to be a civil Court. When any offence as is described in section 175,178,179, 180 or 228 of Indian Penal Code is committed, in the view of the presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Criminal Procedure Code forward the case to a Magistrate having jurisdiction 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 Criminal Procedure Code. 1983.
Every proceeding before the Commission shall be deemed to be a Judicial Proceeding within the meaning of section 193 and 228 and for the purpose of section 196 of the Indian Penal Code, and the Commission shall be deemed to be a Civil Court for all the purposes of section 195 and chapter xxvi of the Criminal Procedure Code.

According to section 18 of the Act, the Commission is authorised to take any of the following step on the completion of an enquiry.

i. where the enquiry disclose violation of human rights, the Commission may recommend to the concerned Government or authority the initiation of proceedings for the prosecution or such other action against the concerned person or persons;

ii. Approach the Supreme Court or the concerned High Court for such direction, or orders or writs as that Court deem necessary;

iii. Recommend to the concerned authority the grant of an interim relief to the victim or the members of his family as the Commission may consider necessary;

iv. Provide a copy of the enquiry report to the petitioner or his representative;

v. Send a copy of the enquiry report together with his recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month or such further time as the Commission may allow, forward its comment on the report, including the action taken or proposed to be taken thereon, to the Commission;

vi. 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 recommendation of the Commission.

The Supreme Court has given a much wider dimension to the functioning of the NHRC through its rulings in Paramjit Kaur vs. the State of Punjab. The Court has held that under article 32 it can refer any matter to the Commission for enquiry and the Commission then acts sui generis under the remit of the Supreme Court and, in
such a case the Commission is not bound by the shackles and limitation of the NHRC Act. The Court has described the Commission as “a unique and expert body in itself”. Fundamental Rights guaranteed by the Constitution represent the basic human rights possessed by every human being. The Supreme Court's jurisdiction under Article 32 "cannot be curtailed by any statutory limitation" including those contained in the various provision of NHRC Act. The Court has emphasised that all authorities in the country are bound by the directions of the Supreme Court and have to act in aid of the Court (Article 144). Therefore, when the Court in the exercise of its jurisdiction under Article 32 entrusts to the NHRC to deal with certain matter in a manner indicated in the Court order - the Commission would function pursuant to the direction issued by the Supreme Court and not under the Act constituting it. The Court has observed:

"In deciding the matters referred by this Court NHRC is given a free hand and is not circumscribed by any condition. Therefore, the jurisdiction exercised by the Commission in these matters is of a special nature not covered by enactment or law and thus acts sui generis."(?)

NHRC acts as a watchdog to protect human rights. It is expected to play an active role in ending violations of human rights. The most important feature of the Commission is its power to independently probe cases of violation of human rights. The Commission can act suo moto without waiting for any formal application if any violation of human right comes to its notice.

**The Role of National Human Rights Commission in Prison Reforms and Management**

Members of the commission continue to visit jails, lock-ups and other centers of detention in different parts of the country. Officers of the Commission in addition especially asked to study the conditions of prisons in Bihar (Sarai Kale, Bhagalpur), Punjab (Patiala) and Uttar Pradesh (Agra, Basti, Meerut and Muzaffarnagar). The findings followed a now familiar and depressing pattern: overcrowding, lack of sanitation, mistreatment and mismanagement. Officers of the Commission learnt of the physical torture of the prisoners by them jail staff in Basti, inadequate stocks of medicine for the treatment of prisoners and demands for money from those who come to visit them. The Inspector General of Prisons, Uttar Pradesh was summoned by the
Commission to New Delhi and instructed to put matter right. In Meerut jail investigators of the Commission found rampant corruption. Upon the intervention of the Commission remedial steps, including disciplinary and other action has been initiated against the offending staff. In Bikaner jail, it transpired that prisoners were compelled to pay bribe to be able to apply to parole; student prisoners likewise had to pay bribe in order to be able to appear for examination.

The other serious problem relating to the management of jails in the country received the attention of the Commission was that innocent persons with mental disabilities were sometimes being held in prisons; in addition prisoners with mental disabilities were being treated as were other prisoners, with no effort being made to deal with the distinctive problem. The Commission addresses a letter to all the Chief Ministers on 11th September 1996 pointing out the appropriate provisions of the law in respect of the manner in which persons with mental disability should be treated. The letter cautioned that, should the Commission find in course of its visit to the jails that mentally disabled persons were still being held in them, it would recommend the payment of compensation to those so detained and to their families. In consequence of that letter many prisoners and others with mental disability were transferred to institutions where they can be given psychiatric help. In this connection the Commission strongly recommends that rule 82 (1) and rule 82 (4) of the United Nations Standard Minimum Rules for treatment of prisoners be followed. Rule 82 (1) requires that "persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible." Rule 82 (4) requires that "medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment." The Commission also endorses the recommendations made earlier by the Mulla Committee which stated that if a convict undergoing imprisonment became mentally ill he should be accommodated in the psychiatric wing if such wing exists in the prison hospital, or he should be sent to the nearest mental hospital for treatment. Further, if the prisoner fails to recover from mental illness even after completing half of the maximum term of conviction, the State Government for release from prison should consider his case.
The Commission continued to give special attention to the condition of women who were held in jail. In Nari Bandi Niketan of Uttar Pradesh a number of women prisoners told the investigation officers of the Commission that they feared that their husbands would no longer accept them after their release from prisons. Some others complained that they rarely heard from their children. The Commission felt that there is great need for frequent opportunity for women prisoner to meet or unite with their family. In this connection the Commission also felt that the following key recommendation of the National Expert Committee on women prisoners, which met under the chairmanship of Shri. Justice V.R. Krishna Iyer in 1986-87, should be followed with greater diligence.

- All custodial premises for women prisoners should have a private and secure environment.
- Qualified lady doctors and nurses should be attached on a visiting basis to every prison for women and custodial centre for women inmates.
- The scale of diet for women prisoners should be in strict accordance with medical norms; special extra diet should be provided if medically prescribed.
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Overcrowding in jails, caused largely because of the vast number of undertrials continued to create conditions grossly at variance with the demand of the human dignity. For instance a visit to Meerut jail by the staff of the Commission revealed the presence of some three thousand persons in that prison, as against a declared capacity of 650. The Commission had expressed the hope that the far reaching judgement by the Supreme Court in the case Common Cause vs. Union of India (W.P. no.1128/1986) would greatly expedite the disposal of cases pending in Criminal Court in the country. Yet the situation appears still to be grim. The Commission has,
accordingly, requested all Inspectors General of prisons to send monthly reports to it giving details of the number of under-trials in the prisons. The data received over a period of time will be carefully analysed by the Commission in order to assess the impact of the judgement, and see what next needs to be done.

In an interesting recent development the Mumbai High Court in Muktaram Sitaram Shinde vs. State of Maharashtra in W.P. no. 3899/96 has asked the State Government to appoint nominees of the National Human rights Commission as ex-officio or non-official visitors to the jail in the State. The Commission is seized of this matter and soon make its nomination. The Commission believes that such a step will lead to increased transparency in the administration of jails and also add strength to the Commission's efforts to improve the condition of jails in the country.

During his visit to prisons in various states the Commission observed that Session Judges were not visiting jails in the regular manner that is required by Prison Manual. The Chair person accordingly wrote to the Chief Justice of the High Court in all the States on 25th September 1996 requesting them to direct the Session Judges to fulfill their duties more diligently. A number of Chief Justices had replied saying that they have issued appropriate instruction.

However, according to Justice V.R. Krishna Iyer, the National Human Rights Commission is prestigious but powerless, which has done excellent job far beyond its limited statutory capabilities. If more powers were given to bite, not merely to bark, the National Human Rights Commission would be a boon to the victims of the violation which are on the increase(3).

3.3.2 State Human Rights Commission

As per section 21 of the Act a State Government may constitute a body to be known as the name of the state Human Rights Commission to exercise the power conferred upon and perform the functions assigned to a State Commission under chapter V.

A State Commission is to consists of five members -- one Chairperson who has been the Chief Justice of a High Court, one member who has been a Judge of the
High Court; one member who has been a district Judge and two other members to be appointed from amongst persons having knowledge and practical experience in matters relating to human rights.

All these members are to be appointed by the Governor after obtaining the recommendations of a Committee consisting of the following: (1) Chief Minister (Chairperson); Speaker of the Legislative Assembly; (iii) Home Minister; (iv) Leader of the Opposition in the Legislative Assembly; (v) Chairman of the Legislative Council if any; (iv) Leader of the opposition in the Legislative Council, if any.

Most of the provisions applicable to the National Commission also apply to the State Commission. A State Commission may inquire into violation of human rights only in respect of matters relating to the entries enumerated in Lists II and III of the VII schedule to the Constitution.

There are many reasons to support the State Human Rights Commission. India is a big country, and therefore, there should be State Commissions as well in addition to the National Commission. The redressal of grievances of breach of human rights must be swift and inexpensive; the message of human rights must reach the gross root level. The federal character of the country should be respected by establishing separate National and State Human Rights Commissions.

Such Commissions have been established in several States. State Human Rights Commissions have been established in West Bengal, Himachal Pradesh, Madhya Pradesh, Assam and Tamil Nadu in that order. Uttar Pradesh has notified the Constitution of the Commission but the appointment chairperson and members have yet been made. The Government of Jammu and Kashmir has passed legislation to establish a State Human Rights Commission and this has received the assent of the Governor; appointments are to be announced. In Governments of Kerala and Punjab the establishment of State Level Commission is under consideration.

3.3.3 Human Rights Courts

As per section 30, for the purpose of providing speedy trial of offences arising out of violation of human right, 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 the Human Rights Court to try the said offences. For every such 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.

3.4 INTERNATIONAL COVENANTS RELATING TO HUMAN RIGHTS WITH SPECIAL REFERENCE TO PRISONS AND PRISONERS

Though there are numerous international instruments which lay down codes by which prisoners should be dealt with, the following are the foremost among them.

3.4.1 The Third Geneva Convention-1924

The third Geneva Convention defines humanitarian protections for prisoners of war. Prisoners of war are defined as members of the armed forces or members are militias or volunteer corps forming part of the armed forces, belonging to a party to the conflict, members of regular armed forces who profess allegiance to a party not recognised by the detaining power, persons accompanying armed forces but are not members and inhabitants of a non-occupied- territory who take up arms in resistance who are captured by an enemy power. Prisoners of war may not renounce rights secured by the convention. Those rights include the right to humane treatment which prohibits specifically violence causing death or seriously endangering health or physical mutilation or scientific or medical experiments, protection from acts of intimidation, insults and public curiosity, protection from reprisals exercised, physical or mental torture, adequate physical and psychological treatment, to keep personal items including money, to be evacuated if the territory in which they are held becomes too dangerous, to adequate food, water, shelter and clothing, sanitary living conditions, religious freedom and to complain. Detaining powers have to the right to use appropriate force in the event of escape, require prisoners to give in their name and rank, and to utilize prisoners for labour. The third Geneva Convention came into force in 1924 but was significantly amended in 1949. The United Nations Security Council is the final international tribunal for all issues relating to Geneva Conventions. All signatories to the U.N. Charter (193) are bound by the Geneva Convention.
3.4.2 The Charter of United Nations-1945

The first documentary use of expression 'Human Rights' is to be found in Charter of the United Nation which was adapted (after the second world war) at San Francisco on June on June 25, 1945 and ratified by majority of its signatories in October that year. The Preamble of this Charter, which was drawn up to prevent a recurrence of the destruction and suffering caused by the second world war, setting up the international organisation called the United Nations, declared that the United Nations shall have for its objects, inter alia, “to reaffirm faith in 'fundamental human rights' ......”, and Article 1 thereafter stated that the ‘purposes’ of the United Nations shall be, among others,

"To achieve international co-operation in promoting and encouraging respect for Human Rights and for fundamental freedoms for all without distinction as to race, sex, language or religion..."

The United Nations Charter however was not a binding instrument and merely stated the ideal which was to be later developed by different agencies and organs.

3.4.3 Universal Declaration of Human rights-1948

The first concrete step by way of formulating the various human rights was taken up by the United Nations General Assembly in December 1948 by adapting the Universal Declaration of Human Rights. It was intended to be followed by an international bill of rights which could be legally binding on the covenanting parties. Of all the international attempts, the universal declaration of human rights, 1948 has won a place of honour as a basic international code of conduct by which performance in promoting and protecting human rights is to be measured. The preamble to the universal declaration of Human Rights, 1948 act as a mirror through which the essence of this instrument could be visualized. It embodies the expectations of humanity as also foundation of freedom, justice, peace and protection (by rule of law) against tyranny and oppression. The preamble lays emphasis on equal rights of men, women and children and the need to live with dignity. The following are the notable provisions in the Universal Declaration relating to persons in confrontation with law:
Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: 1. Everyone charged with a penal offence has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.


The United Standard Minimum Rules for the treatment of prisoners came into force in 1955 (30.08.1955). The standards set out by the United Nations are not legally binding but offer guidelines in international and municipal law with respect to any person held in any form of custody. They are generally regarded as having good principle and practice for the management of custodial facility. The document sets out standards for those in custody which covers registration, separation of categories, accommodation, personal hygiene, clothing and bedding, food, exercise and sports, medical services, discipline and punishment, instrument of restraint, information to and compliance by prisoners, contact with the outside world, books, religion, retention of prisoner's property, notification of death, illness, transfer, removal of prisoners, institutional personnel and inspection of facilities. It also sets out guidelines for prisoners under sentence which further includes treatment, classification and individualization, privileges, work, education and recreation and social relation and after-care. There are also special provisions for insane and mentally abnormal prisoners, prisoners under arrest or awaiting trial, civil prisoners and persons arrested or detained without charge.
3.4.5 **International Covenants of Civil and Political Rights-1966**

After all, Universal declarations operated nearly as a statement of ideals which was not of the nature of a legally binding Covenant and had no machinery for its enforcement. That deficiency was sought to be removed by the United Nations general Assembly by adopting in December 1966, two covenants for the observance of Human Rights:

a. The International Covenants on Civil and Political Rights.


While the former formulated legally enforceable the rights of the individuals, the latter was addressed to the States to implement them by legislation. The two Covenants came into force in December 1976 after the requisite number of member states (35) ratified the Covenants subsequently, numbering 69 at the end of 1981. The Government of India ratified the Covenants on 1979. It is highly regrettable that the United States of America, the model for the preparation of the International Covenants on Human Rights, which has also taken so much interest in the internationalization of Human Rights, has not so far ratified the International Covenants of 1966.

The effect of such ratification is that the ratifying State is obliged to adapt legislative measures to implement the Covenant to ensure the right proclaimed in the Covenant so that, though the Covenant itself is not part of the domestic law of the ratifying State, the rights embodied in the relevant legislation are enforceable through the domestic Courts. The Universal declaration of Human rights, the International Covenants on Civil and Political Rights and the International Covenants o Economic, Social and Cultural Rights are together regarded as constituting the International Bill of Rights. The important aspects relating to the Criminal Jurisprudence are highlighted under article 7, 9, 10, 11, 12, 14, and15. They are inherent right to life, sentence of death; no torture or cruel or inhuman or degrading treatment or punishment; right to liberty and security, no arbitrary arrest or detention , treating with humanity the persons deprived of liberty; separating convicted from un convicted, providing separate treatment, separating juveniles from adults, speedy
adjudication, reformation and social rehabilitation shall be the aim of penitentiary system, no imprisonment for the inability to fulfill contractual obligation; equality before law, fair and public hearing by a competent, independent and impartial tribunal; proving guilty considering the law in existence at the time of commission of offence, no heavier penalty than the one prescribed, allowing benefit of lighter penalty when provision made subsequent to the commission of offence. One of the important areas, International Covenants on Civil and Political Rights, 1966, was the right to compensation for miscarriage of justice in article 14(6). This subsequently led to the enactment of Criminal Justice Act, 1988 which specifically provided under section 133, for payment of compensation for miscarriage of Justice.

On 16th December 1966 the United Nations General Assembly adopted a proposal for providing for the possibility of consideration, in the Human Rights Committee of complaints or communications from individuals against State parties. This proposal took the form of the optional protocol to the International Covenants on Civil and Political Rights and adopted on the same day. The protocol however came into force on 23rd March 1976. India has not signed this optional protocol. The second optional protocol aiming at the abolition of death penalty was adopted by the General Assembly on 15th December 1989. India has not signed even this optional protocol.

The Covenants on Economic, Social and cultural Rights, 1966 recognised wide range of rights which were not so far recognised viz, the right to work, right to just conditions of work, equal pay for equal work, a decent living, safe and healthy working condition, social security, right to form trade unions and right to strike.

3.4.6 Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment-1984

The United Nations General Assembly adopted on 10th December 1984 the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention imposes on State Parties the obligation to make torture a crime and to prosecute and punish those found guilty of it. This Convention is yet to be ratified by India.
3.4.7 Basic Principles for the Treatment of Prisoners-1990


The basic principles set forth for the treatment of prisoners in the international instrument are as follows:

- All prisoners shall be treated with respect due to their inherent dignity and value as human beings.

- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- It is however desirable to respect the religious beliefs and cultural precept of the group to which prisoners belong, whenever local conditions so require.

- Responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.

- Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the Human rights and fundamental freedom set out in the Universal Declaration of Human Rights and, where the Stated concerned is a party the International Covenants on economic, Social and Cultural rights and the International Covenants on Civil and Political Rights and the optional protocol thereto, as well as such other rights as are set out in other United Nations Covenants.

- All Prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality

- Efforts addressed to the abolition of solitary condition as a punishment, or to the restriction of its use, should be undertaken and encouraged.
Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate the reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.

Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

With the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoners into society under the best possible conditions.

The above principles shall be applied impartially.


The law enforcement officials have a vital role in the protection of right to life, liberty and security of the person as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenants on the Civil and Political Rights. The Standard Minimum Rules for the treatment of prisoners provide for the circumstances in which prison officials may use force in the course of their duties. Article 3 of the Code of Conduct for Law for Law Enforcement Officials provides that Law Enforcement Officials may use force only when strictly necessary and to the extent required for the performance of their duty. The meeting of the seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials. Resolution 14 of the Meeting inter alia emphasized that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights. The basic principles set forth in this instrument, which have been formulated to assist Member State, in their task of ensuring and promoting the proper role of law
enforcement officials, should be taken into account and respected by Governments within the framework of their National Legislation and practice, and be brought to the attention of law enforcement officials as well as other persons such as Judges, Prosecutors, Lawyers, Members of the executive branch and the Legislature and the public. This instrument contains in detail on the general and Special Provisions, Rules and Regulations regarding the use of force firearms by the law enforcing officials. Policing unlawful assembly, policing persons in custody or detention, qualifications, training and counselling for the law enforcement agencies; reporting and review procedure regarding the incidents occurred are also elaborately dealt with. The following are the Principles regarding the policing persons in custody or detention.

Principle 15: Law enforcement officials, in their relations with persons in custody or detention shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

Principle 16: Law enforcement officials, in their relations with persons in custody or detention shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of the person in custody or detention presenting the danger referred to in Principle 9.

Principle 17: The preceding Principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the treatment of prisoners particularly Rules 33, 34& 54.