CHAPTER III

CIVIL AND POLITICAL RIGHTS IN THE INTERNATIONAL BILL OF RIGHTS AND CORRESPONDING PROVISIONS IN THE CONSTITUTION OF INDIA- (A STUDY OF THE DEROGABLE PROVISIONS)

A comparison of the Civil and Political Rights in the IBR with the interpretation of these Constitutional rights by the judiciary

The first generation rights in the IBR are found in the UDHR and ICCPR\(^\text{105}\). Articles 3 to 21 of the UDHR contain civil and political rights while the corresponding provisions in the ICCPR are contained in PART III of the ICCPR from Article 6 to Article 27.

For the purpose of comparing the Indian Constitutional provisions with the provisions in the IBR concerning first generation rights the researcher has broadly classified these rights in two categories- derogable provisions and non-derogable provisions. PART III of the Constitution of India dealing with fundamental Rights encompasses both the derogable and non derogable provisions enshrined in the ICCPR. The rights conferred under Part III of the Constitution are called 'Fundamental Right' because they are not being secured by the ordinary law but by the Constitution which is supreme law of the land. Since they are secured by the Constitution they cannot be changed or modified by ordinary process of legislation. Fundamental rights serve as limitation or restriction upon the executive and legislative power of the State. This is made clear by Article 13(2) which provides that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of such inconsistency be void. Moreover, as provided by Article 13(1), all laws in force in the territory of India immediately, before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. Besides, while an ordinary legal right belongs to the category of private law and deals with the relationship of two or more private citizens, a

\(^{105}\) Refer Annexure II for the full text of the ICCPR.
fundamental right belongs to the category of public law and it is the right which the individual possesses against the state.106

Derogable provisions

Articles 6 to 27 comprise the substantive part of the ICCPR and cover both derogable and non derogable provisions. Articles 9, 10, 12, 13, 14, 17 and 19-27 of the ICCPR constitute the derogable provisions of the ICCPR. All the civil and political rights in the UDHR are enshrined in Articles 3-21 of the declaration and constitute ‘a standard of achievement for all peoples at all times’.

The fact that certain provisions of the ICCPR are derogable does not mean that a state party, group or any person has any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the ICCPR or to limit these rights to a greater extent than is provided for in the ICCPR except in the event of a public emergency. Article 4 of ICCPR107 allows state parties to take measures derogating from their obligations under the said Covenant to the extent strictly required by the exigencies of the situation. In its interpretation of Article 4, the Human Rights Committee108 has stated that two conditions must be satisfied before a state of emergency is declared: (a) The situation must amount to a public emergency which threatens the life of the nation and (b) the state must have officially proclaimed a state of emergency. It stressed that not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation and that the measures introduced derogating from the ICCPR should be limited to the extent strictly required by the exigencies of the situation.

106 Refer to Annexure VIII-C for the full text of PARTIII of the Constitution of India
107 Refer Annexure II (page xvi) for the full text of Article 4, ICCPR
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.
108 The Human Rights Committee constituted under Art 28 of ICCPR is the monitoring mechanism in the present Covenant.
Common Article 1 of the ICCPR and the ICESCR expressly declare the right of self determination of all peoples by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development. This right also enables all peoples to freely dispose of their natural wealth and resources based on the principle of mutual benefit and international law and clearly states that in no case may a people be deprived of the means of subsistence. Articles 2 and 3 enjoin the responsibility of the State to provide for non discrimination and equal enjoyment of all civil and political rights enshrined in ICCPR.

A comparison of the derogable first generation provisions in the IBR with the Indian Constitutional provisions is outlined hereunder:

**Arbitrary arrest or detention: (Art.9, ICCPR)** Article 9 of the UDHR states that, “No one shall be subjected to arbitrary arrest, detention or exile”. These provisions are further elaborated in the ICCPR. Art 9 of the ICCPR contains five clauses which protect:

- The right to liberty and security of persons; [Art.9(1)]
- safeguards against arbitrary arrest or detention except on such grounds and in accordance with such procedure as are established by law;[Art.9(1)]
- The right of all persons to be informed, at the time of arrest, of the reasons for his arrest and charges leveled against; [Art.9(2)]
- The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; [Art.9(3)]
- The right to trial within a reasonable time or to release subject to guarantees, while recognizing that it shall not be the general rule that persons awaiting trial shall be detained in custody; [Art.9(3)]
- The right of persons deprived of liberty by arrest or detention to be entitled to take proceedings before a court, in order to ensure speedy justice and ensure protection against unlawful and illegal detention.; [Art.9(4)] and
- The right of victims of unlawful arrest or detention to have an enforceable right to compensation; [Art.9(5)]
Art.9 (1) of ICCPR corresponds to Art.21 of the Indian Constitution.

Art. 22 of the Indian Constitution states the “(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice and can be compared to Art.9 (2) of ICCPR. The landmark ruling in D.K. Basu v State of West Bengal drives home this fundamental right and the eleven guidelines framed by the Apex Court in this PIL are deemed to be in addition to the constitutional and statutory safeguards already provided for.

While ICCPR is silent on the aspect of ‘free legal aid’, or ‘the right to be defended by a legal practitioner of ones choice’, Art.22 of the Indian Constitution encompasses this right. Further Art.39-A of the Indian Constitution mandates that, “The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable

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109 D.K. Basu guidelines-A. The following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures : (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register. (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest. (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested an is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest. (5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. (6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the, police officials in whose custody the arrestee is. (7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her, shall, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. (8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well. (9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the local Magistrate for his record. (10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. (11) A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on conspicuous notice board. (Para 36) B. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of arrestee. (Para 39)
legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”. It is interesting to note that though Article 39-A of the Indian Constitution falls in PART-IV containing Directive Principles of State Policy the language contained in Article 39-A is couched in mandatory terms and is not expressed as a requirement “subject to the economic capacity of the State”. Thus the scope of protection offered by the Indian Constitution in this regard is wider.

Article 9(3) of ICCPR can be compared with Art.22 (2) of the Indian Constitution which reads:

“Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate”. With respect to the latter sentence in Article 9(3) of ICCPR which reads, “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment” it has to be noted that sub-section (1) of Section 436 of the Criminal Procedure Code in India makes the provision of bail in a bail able offence a matter of right110. Not only is bail mandatory, the Court must also release the accused on bail without fixing an exorbitant bail amount111. Besides under the Proviso to Section 437(ii) the Court may release on bail accused persons who are women; under the age of sixteen years; and who are sick and infirm, even when they have been accused of or suspected to have committed a non-bail able offence.

Further in consonance to Art.9 (4), the Apex Court has ruled that the right to speedy trial is implicit in Article 21 of the Indian Constitution.

However with respect to Art 9(5) of ICCPR, enjoining the State to compensate victims of unlawful arrest or detention India expressed her reservation while ratifying

110 Dharmu v Rabindranath 1978 Cr LJ 864(Ori)
111 A. Kokan Rao v State 1998 Cr LJ 1898 (Ori)
the ICCPR. The Government of India, at the time of ratification in 1979 made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and therefore this clause would not bind India. However that reservation has now lost its significance in view of the judgment of the Apex Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.\textsuperscript{112} Though there is no express provision in the Constitution of India for grant of compensation for violation of the fundamental right to life, none-the-less, the Supreme Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty of life.\textsuperscript{113}

**Segregation of accused persons:** Article 10 of ICCPR enjoins the State parties to segregate accused persons from convicted persons and accord them treatment appropriate to their status as un-convicted persons. In *Hussainara Khatoon v Home Secretary*, State of Bihar\textsuperscript{114} which also marks one of the early instance of a Public Interest Litigation, scores of prisoners languishing as under trials in the State of Bihar, many of whom had spent more years in detention as under trials than they would have had they been tried, found guilty and punished where summarily released by the Supreme Court that observed that their continued detention clearly violates not only human dignity but also their fundamental rights under Article 21.

That right to life does not mean 'animal existence' but includes the right to live with human dignity was expressed by the Apex Court in *Francis Coralie*\textsuperscript{115}. This view was reiterated in *P.Rathinam v. Union of India*\textsuperscript{116} and *Olga Tellis*\textsuperscript{117} and is in consonance with Article 10(1) of ICCPR exhorting State Parties to treat all persons deprived of liberty with humanity and respect for the inherent dignity of the human person.


\textsuperscript{113} See Nilabati Behera v State(1965) 1 SCR 375

\textsuperscript{114} AIR 1979 SC 1360; See also Kadra Pahadia v State of Bihar, AIR 1981 SC 939

\textsuperscript{115} (1994) 3 SCC 394

\textsuperscript{116} AIR 1981 SC 746,753; (1981) 1 SCC 608

\textsuperscript{117} AIR 1986 SC 180
Liberty of movement: Article 12 of ICCPR seeks to protect the liberty of movement and corresponds to Article 13 of the UDHR. A similar provision is contained in Article 19(1) (d) of the Indian Constitution. Clause 1, sub-clause (d) of Art 19 states that all citizens shall have the right to move freely throughout the territory of India. Art 19(1) (e) further adds that all citizens shall have the right to reside and settle in any part of the territory of India.

In Satwant Singh v. A.P.O\textsuperscript{118} the right to travel abroad was held to be an aspect of ‘personal liberty’.

Freedom to leave one’s country: Article 12(2) of ICCPR provides for the freedom to leave one’s country subject to the restrictions cited in Article 12 (3). In Menaka Gandhi \textit{v. Union of India} the passport authorities impounded the petitioner’s passport without affording her an opportunity to be heard and in their defence argued in Court that as per the Passport Act a hearing was not required. Rejecting the contention, Justice Bhagwati held that ‘\textit{audi alteram partem}’ (the right to be heard) was an essential principle of natural justice implicit in Article 21 of the Constitution. The Supreme Court emphasised that the procedure established by law under Article 21 means ‘a just, reasonable and fair law’ and in doing so smuggled in the ‘due process’ clause to be part and parcel of Article 21.

In Malak Singh \textit{v State of Punjab and Haryana}\textsuperscript{119} the Apex Court held that excessive surveillance was violative of Art.19 (d) and entitled “a citizen to the Court’s protection which the Court will not hesitate to give”. The Apex Court has also upheld the right to use public roads for locomotion as a fundamental right in Saghir Ahmad \textit{v State}\textsuperscript{120}, Satwant Singh Sawhney \textit{v D.Rathinam, Asst. Passport Officer, New Delhi}\textsuperscript{121}, Menaka Gandhi \textit{v Union of India}\textsuperscript{122} and Rupinder Singh \textit{v Union of India}\textsuperscript{123} to name a few landmark cases.

\textsuperscript{118} AIR 1967 sc 1836  
\textsuperscript{119} Malak Singh \textit{v State of Punjab and Haryana} AIR 1981 SC 760  
\textsuperscript{120} Saghir Ahmad \textit{v State} AIR 1954 SC 728  
\textsuperscript{121} Satwant Singh Sawhney \textit{v D.Rathinam, Asst. Passport Officer, New Delhi}, AIR 1967 SC 1836  
\textsuperscript{122} Menaka Gandhi \textit{v Union of India} AIR 1978 SC 597  
\textsuperscript{123} Rupinder Singh \textit{v Union of India} AIR1983 SC 65
Declaring “Bandh”\textsuperscript{124} to be violative of Art. 19 (d) the Apex Court in \textit{Bharat Kumar K. Palich v State}\textsuperscript{125}, while upholding the judgment of the Kerala High Court observed, “The calling of ‘Bandh’ entails the restriction of free movement of the citizen and his right to carry on his avocation and if the Legislature does not make any law either prohibiting it or curtailing it or regulating it, it is the duty of the Court to step in and to protect the rights of the citizen so as to ensure that the freedoms available to him are not curtailed by any person or any political organization. This ruling of the Supreme Court set the stage for similar rulings from other High Courts. The Supreme Court in September 30, 2007 reiterated this view when it passed an order restraining the ruling DMK-led coalition in Tamil Nadu from going ahead with a bandh the next day over the Sethusamudram controversy.

Equally pertinent it is to note that in February 2009 the Supreme Court termed ‘Bandhs’ as a ‘legitimate means of expressing people’s feelings in a democracy, reversing the trend the judiciary followed since 1997.’ The volte-face came when the Court refused to ban the Chennai bandh called for on Feb 4, 2009 to protest against the killings of civilians in Sri Lanka’s military campaign against the LTTE. The stark change looked even more so because of the fact that the fresh position was outlined by a bench headed by Chief Justice K.G. Balakrishnan who was also one of the members of the Kerala High Court bench that had given the anti-bandh judgment in 1997.\textsuperscript{126}

\textbf{Rights of aliens}: Article 13 of the ICCPR seeks to protect the rights of aliens from being expelled from a country without reasonable justification. Acting on petition filed by the NHRC the Supreme Court of India in the \textit{Chakma refugee} case sought to uphold the sentiments expressed in ICCPR\textsuperscript{127} and declared that the State is bound to protect the life and liberty of every person, citizens and non-citizens alike.

\textsuperscript{124} “Bandh” is a Hindi word meaning ‘closed’ or ‘locked’. The expression therefore conveys an idea that everything is to be blocked or closed. Organisers of Bandh clearly express their intention that they expect all activities to come to a standstill on the day of the “bandh”\textsuperscript{125}.

\textsuperscript{125} \textit{Bharat Kumar K. Palich v State} AIR 1997 Ker 291 AT P.298

\textsuperscript{126} Refer report in the \textit{THE TIMES OF INDIA} dated February 4, 2009

\textsuperscript{127} Refer NHRC v. State of Arunachal Pradesh, AIR 1996 SC 1234
Right to fair trial: Article 14 of the ICCPR corresponds to Article 10 of the UDHR and provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal and lays down the guidelines when a hearing may be held ‘in camera’ where the press and public may be excluded. Though the Constitution of India does not expressly make such provisions the Supreme Court has time and again held that contents of Article 14 of ICCPR are implicit in Article 21. In State of Punjab v. Baldev Singh\(^{128}\) the Supreme Court observed that conducting a fair trial for those accused of a criminal offence is indeed the cornerstone of democracy. Equally pertinent it is to note that S.142 of the Evidence Act does not give power to the prosecution to put leading questions on the material part of the evidence which a witness intends to give against the accused\(^{129}\).

Article 39A of the Indian Constitution corresponds to Article 14 (3) (d) of the ICCPR and mandates the State to provide free legal aid to every indigent prisoner. This view was reiterated by the Apex Court in Hussainara\(^{130}\) while in Khatri v. State of Bihar\(^{131}\) the Apex Court further declared that ‘the State governments cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability. In Suk Das\(^{132}\) the conviction of the appellant was quashed by the Supreme Court because the accused remained unrepresented by lawyer thereby vitiating the trial and declared that “legal aid would be an idle formality if it was to depend upon the specific application by such poor or ignorant person for such legal assistance.”

In Ranjan Dwiwedi\(^{133}\) when the petitioner raised an apprehension that no lawyer of standing would appear on his behalf given that the Delhi High Court rules laid down that the amicus curiae would be entitled to a meager 24 rupees a day as fee while he would be pitted against prosecution conducted by a senior lawyer the Court responded by enhancing the fee payable to the amicus curiae by raising it to Rs. 500/- per day for the senior counsel and Rs.350/- per day for the junior counsel.

\(^{128}\) AIR 1999 SC 2378  
\(^{130}\) AIR 1979 SC 1360  
\(^{131}\) AIR 1981 SC 928  
\(^{132}\) AIR 1986 SC 991  
\(^{133}\) Air 1983 SC 624
Right to privacy: While the UDHR and the ICCPR make an express reference to the right to privacy in Article 12 and Article 17 respectively and mandate state parties to ensure that there is no interference with one's privacy, family, home and correspondence or lawful attacks on one's honour and reputation, the Indian Constitution does not state this right in express terms.

However the Supreme Court of India has held that the right to privacy is included in the expression 'personal liberty'134 and therefore can be curtailed or taken away only according to fair and just procedure established by a valid law. Holding that the right to privacy is implicit in Article 21, the Apex Court in Madhukar135 ruled that a woman, even of easy virtue is entitled to privacy and can protect her person if there is any attempt to violate it against her wish. In Karak Singh136 the Apex Court held that domiciliary visit by the police without the authority of law would amount to undue interference of one's privacy and violate Article 21. In the telephone tapping case137 the Court held that right to privacy includes telephone conversation in the privacy of one's home or office. In Mr. X v Hospital 'Z' the Supreme Court declared that the right to privacy is not absolute and may lawfully be restricted for the prevention of crime, protection of health or morals or order or protection of rights or freedom of others.

Right to freedom of expression: The content of Article 19 of the UDHR is echoed in clause 1 and 2 of Article 19 of the ICCPR. However Article 19(3) of the ICCPR states that the exercise of the rights provided for in clause (2) of Art.19 carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, namely: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Clause 1(a) of Art.19 of the Indian Constitution guarantees the right to freedom of speech and expression to all citizens of India. Though the Constitution

137 PUCL V. Union of India, AIR 1997 SC 568
does not expressly recognize the freedom of the press as early as in 1950 in *Ramesh Thappar* the Apex Court held that freedom of speech and expression includes the liberty of press because in the absence of a free press the citizens may not be able to form an informed opinion regarding the affairs of the State. The freedom of press also implies freedom of propagation of ideas and freedom of circulation. Thus, imposition of pre-censorship on publication is a restriction on the liberty of the press which is an essential part of the freedom of speech and expression, unless it is justified under Clause (2) of Art.19. Similarly, imposing ban or preventing a newspaper from publishing its views on any particular subject-matter constitutes the violation of freedom of speech and expression. In *Ramesh Thappar v. State of Madras* a notification was issued by the State Government banning the entry into, sale, distribution or circulation in the State of Madras of ‘Crossroad’ a newspaper published from Bombay. This notification was challenged as violating Art.19 (1) (a). It was held by the Supreme Court that the notification was an infringement of freedom of speech and expression.

Again, the Supreme Court, in Secretary, *Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, made it clear that right to receive and impart information is a part of the right to freedom of speech and expression. In *Sakal* and *Bennett and Coleman*, the Supreme Court modified its earlier view expressed in *Hamdard Dawakhana*, and ruled that “commercial speech” and advertisement revenue have a great significance on the economy of newspapers, and reading these judgments in *Tata Press*, concluded that “commercial speech” is part of freedom of speech guaranteed under Art.19(1) (a).

However reasonable restrictions may be imposed under Clause (2) of Art.19 on the exercise of the right to freedom of speech and expression in the interests of –

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138 Brij Bhushan v. State of Delhi, AIR 1950 SC 129
139 Virendra v. State of Punjab, AIR 1957 SC 896
140 *Ramesh Thappar v. State of Madras* AIR 1950 SC 127
141 *Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal* (1995) 2 SCC 161
142 *Sakal Papers v Union of India* AIR 1962 SC 305.
143 Bennet Coleman v UOI, AIR 1973 SC 106
144 *Hamdard Dawakhana v Union of India* AIR 1960 SC 554
(1) The sovereignty and integrity of India;
(2) The security of State;
(3) Friendly relations with foreign State;
(4) Public Order;
(5) Decency or morality;
(6) In relation to contempt of Court;
(7) In relation to defamation; or
(8) In relation to incitement to an offence.

The restrictions in order to be *reasonable* must satisfy following conditions –

(1) The restriction being imposed on the freedom of speech and expression must be in the interest of various objects mentioned in Art.19(2)

(2) The restrictions must be reasonable in the sense that it strikes a balance between the right to freedom of speech and expression and the purpose to be attained under Art.19 (2).

**Prohibition against propaganda for war:** Any propaganda for war or advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence is expressly prohibited under Article 20 of the ICCPR. A similar provision is not found in express terms in the UDHR and The Constitution of India. However Article 245 of the Constitution of India empowers the Parliament to enact laws for the territory of India and Article 13 clearly states that all laws in force in the territory of India immediately before the commencement of the Constitution are valid as long as they are not inconsistent with the provisions of the Constitution. The Indian Penal Code, 1860, in Chapter IX deals with ‘Offences against the State’ and in Chapter XI deal with offences against public tranquility and the contents therein echo the provisions of the ICCPR in this regard.
The right to assemble peaceably: The right of peaceful assembly is recognised under Art.21 of ICCPR and further states that, "No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others".

Art.19 (1) (b) of the Constitution guarantees to citizens of India the right to assemble peaceably and without arms. Under Art.19(3), however, the State can make any law imposing reasonable restrictions on the exercise of this right in the interest of public order, sovereignty and integrity of India.

To some extent there is a common ground between freedom of speech guaranteed in Art.19 (a) and right of peaceful assembly guaranteed in Art.19 (b).Both cover regulations on demonstrations, processions and meetings applying similar principles. Interpreting these restrictions the Apex Court has held that while public meetings may be held in public places and maidans by usage\textsuperscript{146}, Art.19 (1) (b) does not confer on any one a right to hold meetings in government premises\textsuperscript{147}. The right to strike is not available under either Article.

Right to freedom of association: Art.22 of the International Covenant on Civil and Political Rights provides that every one shall have the right to freedom of association with others including the right to form and join trade unions for the protection of his interests. However, lawful restrictions may be imposed on the members of the armed forces and of the police in their exercise of this right. It means that the members of armed forces and of the police may not be allowed to avail themselves the right to form and join trade unions. Other restrictions placed on the exercise of right to form and join association and trade unions include those—

(1) which are prescribed by law; and

\textsuperscript{146} D.Anantha Prabhu v District Collector, AIR 1975 Ker 117.
\textsuperscript{147} Railway Board v Niranjan Singh, AIR 1969 SC 966
(2) Which are necessary in democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.

The right to form associations or unions is guaranteed to every citizen\textsuperscript{148} under Article 19 (1) (c) of the Constitution of India. However, Clause (4) of Art.19 provides that reasonable restrictions may be imposed upon the exercise of this right in the interest of sovereignty and integrity of India, or public order or morality.

**Freedom to form association vis-à-vis Armed Forces and Police**

Art.33 of the Indian Constitution authorizes the Parliament by law to restrict or abrogate any of the fundamental rights in its application to the following persons –

(a) Members of Armed Forces;

(b) Members of the Forces charged with the maintenance of public order;

(c) Persons employed in any bureau or other organization established by State for the purpose of intelligence or counter intelligence;

(d) Persons employed, in connection with the telecommunication systems set up for the purposes of any force, bureau or other organization referred to above in clause (a) to (c).

In *O.K.A. Nair v Union of India*\textsuperscript{149} the Supreme Court observed that the civilian employees of defence establishments are covered by the term of the members of the Armed Forces within the meaning of Art.33, therefore they could be restrained from forming trade unions. Similarly, in *Delhi Police Non-Gazetted Karmachari Sangh v. Union of India*\textsuperscript{150} the Supreme Court observed that the members of the Sangh are covered under Art.33, thus, they may be restrained from forming a Sangh and as such there would be no violation of Art.19(1)(c).

\textsuperscript{148} Refer to Annexure VIII- B for the Constitutional Provisions relating to Citizenship.

\textsuperscript{149} *O.K.A. Nair v Union of India* IR 1976 SC 1179

\textsuperscript{150} *Delhi Police Non-Gazetted Karmachari Sangh v. Union of India* (1987) 1 SCC 115
**Reasonable restrictions:** In *State of Madras v. V.G.Rao*, a provision of law, which authorized the State Government to declare an association unlawful, if in the opinion of Government it constitutes a danger to public peace or interfered with the maintenance of law and order, was held to be in violation of Art.19(1)(c). Although provision was made for reference of the case to the Advisory Board and provision for representation was also made, still the restriction was held to be unreasonable because there was no provision for judicial scrutiny. Similarly, in *G.K.Ghosh v. E.X.Joseph*, Rule 4-B of the Central Civil Service (Conduct) Rules, 1955 was challenged. This Rule provided that no government servant can join or continue to be the member of any such service association of Government Servants which, either, has not been recognized by the Government within six months of its formation or from which the recognition has been withdrawn. This rule was held to be in violation of Art.19 (1) (c) because it imposed unreasonable restriction on the freedom of association and was not covered by the limitations coming within the meaning of Art.19 (4).

**Right to Property:** Interestingly while the UDHR in Article 17 expressly protects the right to Property, the ICCPR is silent on this issue. In India, while the right to property continues to remain a constitutional right it is no longer a fundamental right under the Constitution of India. Though when the Constitution of India came into force Article 19(f) expressly recognised the right to property for all ‘citizens’ this right was repealed vide the 44th Amendment Act in 1978 and Article 300-A was inserted into the Constitution to protect the right to property. Theorists point out that Article 300-A which states that “no person shall be deprived of his property save by authority of law” has ensured the protection of this right to all ‘persons’, a term no doubt wider than the term ‘citizens’ to which this right earlier applied under Article 19(f) in PART III of the Indian Constitution. All the same the researcher submits that the repeal of the right to property has the consequence of a double edged sword. No doubt the dilution of the right to property was necessitated in the post independent period in India to facilitate land reforms. However the ultimate

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151 *State of Madras v. V.G.Rao* AIR 1952 SC 196
152 *G.K.Ghosh v. E.X.Joseph* AIR 1963 SC 812
153 Vide Article 300A of the Constitution of India
repeal and taking away of this fundamental right altogether has left scores of people in the country vulnerable in the face of compulsory acquisition of property ostensibly to facilitate development in the nation and through the recognition of the 'doctrine of eminent domain'. In such a situation internally displaced people have no longer the right to file a writ under Article 32 for such remedy is available only in the event of the infringement of a fundamental right of the Constitution but must instead have recourse to a long and winding legal process. Eminent jurists have been divided in their opinion regarding the repeal of the right to property. While Mr. M. H. Seervai, an eminent jurist has condemned this repeal, fearing that the taking away of one fundamental right could lead to the repeal of other fundamental rights as well subsequently, Dr. P.K. Thripathi declares that this right has now become more firmly and comprehensively secured in the Constitution since the Amendment has ensured that not only should the procedure of Article 368 be complied with but the consent of the State as prescribed in the proviso to Article 368 must also be obtained. Under Entry 42 of the Concurrent List, both Parliament and the State legislatures have the power to legislate on 'acquisition or requisition of property'. The condition inherent in this power was that it cannot be used arbitrarily, that is it must be used for a public purpose, and after paying in full compensation to the person deprived of his property.

The researcher would also like to draw attention to the fact that in India, the Apex Court has given a very liberal interpretation to the term 'property' declaring that it should extend to all those well recognised types of interest having the insignia or characteristic of property rights. Thus corporeal and incorporeal rights\textsuperscript{154}, money\textsuperscript{155}, contract, interest in property, shareholder interest in a company, and the right to receive pension\textsuperscript{156} have all been declared to come within the ambit of property.

Reference to property is made in Article 2 of the ICCPR and Article 2(2) of the ICESCR while requiring State Parties to undertake to guarantee to all individuals within its territory all the rights enunciated in the aforesaid covenants without any discrimination whatsoever including discrimination on grounds of 'property'.

\textsuperscript{154} Dwaraka Das Srinivas \textit{v.} Sholapur Spg. and Wvg. Co. Ltd., \textit{AIR} 1954 SC 112
\textsuperscript{155} Bombay Dyeing Co. \textit{v.} State of Bombay, \textit{AIR} 1958 SC 328
\textsuperscript{156} Bharat Petroleum Management State Pensioners \textit{v.} B.P.C.Ltd, (1988) 3 SCC 32
It is also pertinent to add that in India personal freedoms enshrined under Article 19 accrue to only ‘citizens’ unlike the right to equality enshrined in Article 14 which accrues to all ‘persons- natural and juristic’. Citizenship as defined in PART II of the Constitution indicates only natural persons who satisfy the criteria. In State Trading Corporation v. Commercial Tax Officer\textsuperscript{157} The Supreme Court held that a company is not a citizen of India and cannot therefore claim such fundamental rights as have been conferred on citizens. The argument of lifting the corporate veil to protect the rights of the shareholders was also rejected in Tata Engineering and Locomotive Company.\textsuperscript{158} However in the Bank Nationalization case, R.C. Cooper v. Union of India\textsuperscript{159} and the cases that have followed the Apex Court has held that if the actions of the State impair the rights of a company and shareholders as well, protection under Article 19 can be availed of.

**Protection of family:**

Article 16 of the UDHR and Article 23 of the ICCPR recognize the family as the fundamental unit of society and exhort member states and society to accord the family every means of protection. These Articles further recognize the right of persons of majority to marry and found a family and mandate that marriage may be entered into only with the free and full consent of the intending spouses. Further State Parties are directed to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

Though the Constitution of India is silent with respect to the role of family as a fundamental unit of society, certain references are drawn to the role of a parent/guardian. For instance, reference to the role of a parent/guardian in determining religious instruction that may be imparted to minors in schools is set out in Article 28(3) while Article 51-A (k) requires the parent/guardian to provide

\textsuperscript{157} AIR 1963 SC 184.
\textsuperscript{158} Tata Engineering and Locomotive Company v. State of Bihar, AIR 1965 SC 40
\textsuperscript{159} AIR 1970 SC 564. See also Bennet Coleman and Company v. UOI, AIR 1973 SC 106 and D.C. & G M v. Union of India, AIR 1983 SC 937 where Desai, J. declared that if the rights of the shareholder and the Company are co-extensive, denial of fundamental freedoms to one would lead to the denial to the other.
opportunities for education to his child, or as the case may be, ward between the age of six and fourteen years.

By mandating equal protection of all laws in Article 14 the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution may well be assumed. But the reality is far removed. In India personal laws are not determined by a Uniform Civil Code despite such a Code being touted as the ideal in Article 44 of the Directive Principles of State Policy. While Hindu Law was revamped in 1956 prohibiting polygamy and enforcing monogamy on both husband and wife, the same rule does not apply to Muslims in India. While the Muslim male cannot be guilty of bigamy under the Indian Penal Code (Sections 493-496) for marrying during the lifetime of his spouse a Muslim woman who marries another during the lifetime of her spouse would be exposed to penalty under this section.

The Supreme Court recognised the right to marry and found a family in *C.B.Muthamma v. Union of India* 160 wherein the Court struck down a rule that mandated that “a woman member of the Indian Foreign Service shall obtain the permission of the government in writing before her marriage is solemnized.”

The Supreme Court in *Air India v Nargesh Meerza* 161 (Air Hostess case) struck down a rule that stated that an Air Hostess would lose her job on her first pregnancy or on attaining 35 years whichever is earlier. The contention of the Airlines that the classification was not made merely on the basis of ‘sex’ but on other consideration, such as that an Air Hostess should be ‘pretty’ etc., was also rejected by the Court. However, the Court in the instant case upheld the rule by which an Air Hostess would lose her job if she marries within 4 years of her recruitment holding this rule ‘reasonable’. It appears to the researcher that this observation of the Court is not sound for a similar provision that restrains male recruits from marrying in the first four years of service was non existent and the rule thereby appears to favour gender discrimination and goes against the letter and spirit of Article 16 of the UDHR and

160 AIR 1979 SC 1868.
161 AIR 1981 SC 1829.
Article 23(2) of ICCPR that permits any male or female who has attained the age of majority to marry and found a family.

That marriage should be made with the free and full consent of the intending spouses is recognised in the Indian Contract Act of 1872 and Section 26 of the said Act further states that an agreement in restraint of marriage is unlawful and void.

The need for the State to accord protection to the family as a fundamental unit of society is indeed a pertinent human right which should well be incorporated in to the Constitution of India and the present lacunae should be sought to be filled through an Amendment of the Constitution.

**Rights of Children:** Article 24(1) of the ICCPR mandates that every child, without any discrimination, shall have the ‘right to such measure of protection as are required by his status of a minor, on the part of his family, society and the State’ and corresponds to the provisions of Article 25, paragraph 2, of the UDHR, interestingly the only article of the UDHR that makes specific reference to children. However most provisions of the UDHR are couched in broad terms and apply to ‘everyone’ thereby encompassing children in its sweep.

Clause 2 of Article 24, ICCPR, requires that ‘every child be registered immediately after birth and shall have a name’. Clause 3 of Article 24 entitles ‘every child to acquire a nationality’.

The scope of child rights in express terms is wider in the ICCPR than in the UDHR. The right to nationality is indeed covered in the UDHR in Article 15 and is couched in the language ‘everyone has the right to a nationality’ thereby implying this right for children as well.

According to Article 15(3) of the Constitution of India the State can make special provisions for *women and children*. Thus the concept of positive discrimination is enshrined in the Constitution. The rules relating to citizenship are contained in PART II of the Constitution (Articles 5-11).
Birth registration being the first step to providing a child with identity both as an individual and as a member of society also provides legal documentation containing the date of birth, name of the child along with parentage.

While India was a signatory to the UN Convention on the Rights of Child 1989, she holds the dubious distinction of having the largest number of unregistered children in the world.

Though the Government of India framed the Registration of Birth and Deaths Act, 1969 and set up institutions in all the States to record the births and deaths in the country and made registration of all births and deaths compulsory under the Act, the level of birth registration is far from satisfactory and plagued with large interstate variations. Another problem related to the Civil Registration system is delay in publication of reports making the reports outdated.

**Right to Vote:** Article 21 of the UDHR and Article 25 of the ICCPR are comparable provisions. Art.21 of the Universal Declaration of Human Rights provides that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives

2. Everyone has the right of equal access to public service in his country

3. The will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall beheld by secret vote or by equivalent free voting procedures.

Art.25 of the ICCPR contains almost similar provisions. It provides that every citizen shall have the right and the opportunity:

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162 About 38,000 out of the estimated 70,000 births that occur in the country are registered. Source: Census India, Issue 18: 2003, page 1.
(a) to take part in the conduct of public affairs, directly or through chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held of secret ballot, guaranteeing the free expression of the will of the electors;

(c) to have access, on general terms of equality, to public service in his country.

The Preamble to the Indian Constitution declares that India is a "democratic republic" having a Parliamentary form of government comprising elected representatives of the peoples. It has been observed by the Supreme Court in *Smt. Indira Nehru Gandhi v. Raj Narain*, that the principle of free and fair election is to the basic requirement of the democracy which form the part of basic structure of the Constitution.

The Constitution has adopted principle of adult suffrage as a basis of election to the Lok Sabha and the Legislative Assemblies of States. Art.326 of the Constitution provides that the elections to the House of Peoples and to the Legislative Assemblies of every State shall be on the basis of adult suffrage. It means every person who is a citizen of India and completed the age of eighteen years shall be entitled to be registered as a voter provided he is not disqualified otherwise. A person may be declared disqualified by law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice. The Representation of People Act lays down that no person is entitled to be registered as voter in the electoral rolls of Lok Sabha or Legislative Assembly constituency if –

(a) He is not a citizen of India,

(b) He is declared to be a person of unsound mind by a competent Court,

(c) He is disqualified from voting under a law relating to corrupt practices and other offences in connection with elections.

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163 AIR 1975 SC 2299
Art.325 of the Constitution provides that there shall be one general electoral roll for every territorial constituency for election to the either House of Parliament or to the House or either House of the Legislature of a State. No person shall be ineligible for inclusion in any such roll on grounds only of religion, race, caste, sex or any of them. Similarly, no person can claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

**Election Commission:**

To ensure fair, free and impartial election provisions are made in Constitution for the establishment of the Election Commission as an autonomous and impartial institution to conduct elections. It consists of Chief Election Commissioner and such number of members as the President may from time to time fix. The Election Commission performs following functions –

1. The Superintendence, direction and control of the preparation of electoral rolls for all elections to Parliament and to the Legislature of every State and to the Office of President and Vice President; \(^{164}\)

2. To conduct all elections to Parliament and to the Legislature of every State and to the officer of President and Vice President;

3. To advise the President on the question of disqualifications of any Member of Parliament and to advise the Governor on the question of disqualification of a Member of the State Legislature. \(^{165}\)

**The Democratic decentralization process:**

Art 40 of the Constitution in PART IV envisages the setting up of Panchayats serving as bodies of local self governance relying on the concept of ‘Gram Swaraj’ propounded by Gandhiji. During the Constitution Assembly debates, the question of including Panchayat Raj Institutions in the operative part of the Constitution was discussed and ultimately rejected. Ambedkar did not want to give primacy to the

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164 Constitution of India, Art.324
165 Art.192(2)
'village' and in his speech before the newly Independent India's Constitutional Assembly in 1948 remarked, 'What is the village but a sink of localism, a den of ignorance, narrow mindedness and Communalism? I am glad the Draft Constitution has discarded the Village'.

Panchayat Raj Institutions (PRIs) as a result found place in the Directive Principles of State Policy, as an 'unenforceable right' that merely reflected in Governmental Policy. The story of PRIs in Independent India was fraught with ups and downs. Though mostly democratic bodies, PRIs were not constitutional entities but mere creatures of State Acts. PRI passed through three broad phases: (a) The phase of ascendancy (1959-64) (b) The phase of stagnation – (1965-69) (c) The phase of decline (1969-77).

**Initiatives to revive Panchayat Raj Institutions**

With the change of Government at the Centre in 1977, under the leadership of Moraji Desai, the Ashok Mehta Committee was set up heralding a revival of interest in Panchayat Raj that proved to be short-lived. It took nearly another decade for any major change to be considered. While the Singhvi Committee in 1986 looked into the legal aspects of Panchayat Raj and urged that they should be given constitutional recognition; that their powers and functions should be set forth in a new chapter and that free and fair elections to the Panchayats should be organized through the Election Commission of India, the Sarkaria Commission in its report in 1988 disagreed with this view and opined that the subject was within the domain and competence of states. The Panchayat Raj and Nagarpalika initiatives started by Rajiv Gandhi were therefore not just a resumption of the decentralization process but an attempt to force the pace of change. The Singhvi Committee's recommendations were accepted in substance and it was recognized that this time the process should be 'underwritten by constitutional provisions'. Though the amendment exercise sought by Rajiv Gandhi through the 64th and 65th Constitution Amendment Bills were defeated in October 1989, what seemed to be a foolish and hasty endeavour in 1989 came to be regarded as a major systemic change in the country's structure of governance in 1993 and it is
indeed acknowledged today that the Panchayat and Nagarpalika amendments have marked a significant beginning towards multi-level governance.

**SOME NOTABLE FEATURES OF THE 73**\textsuperscript{rd} **AND 74**\textsuperscript{th} **AMENDMENT:** The 73rd and the 74th Amendment Act of 1992, to the Indian Constitution represent the boldest initiative anywhere in the world for spreading local democracy both in rural and urban areas and provisions relating to the working of Panchayats and Municipalities are covered in PART IX and PART IX A of the Constitution.\textsuperscript{166}

Some of its notable features indicating women's empowerment are:

a. In all the local bodies of rural areas (Panchayats) and urban areas (Municipalities) seats will be reserved for women \textsuperscript{167}

b. One third of the seats reserved for Schedule Castes and Schedule Tribes to be reserved for women

c. One third offices of Chairpersons of Panchayats or Municipalities at all levels shall be reserved for women

d. Women and child development forms part of newly added XI and XII schedule of the Constitution of India.

These provisions have brought in qualitative change in the composition of local bodies besides encouraging women to take part in the nation's progress and development. The qualitative change in the composition of local bodies has resulted in grass root leadership on a mammoth scale. India today has over three million Panchayat leaders and with women forming one-third of this team political empowerment of women and women's participation in the public sphere has well become a reality.

\textsuperscript{166} Refer Annexure VIII G and Annexure VIII H for the full text of PART IX and PART XI A of the Constitution of India.

\textsuperscript{167} As per Article 243 K. the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.
Impact of the Two Child Norm:

In the same year of the introduction of the 73rd and 74th Constitutional Amendment a rather coercive ‘Two Child Norm’ was introduced in Panchayats in the State of Rajasthan, barring people with more than two children to contest elections or hold any positions in PRIs. This norm was soon followed by other states, such as Haryana, Orissa, Andhra Pradesh, Madhya Pradesh, Chattisghar and Himachal Pradesh where the state governments linked the two-child norm to Panchayat laws: debarring persons with more than two living children from contesting Panchayat elections or continuing in office. The lowering of the minimum age limit for contesting Panchayat elections from 26 to 21 years bringing younger men and women in the reproductive age group into the arena has sharpened the issues at stake. The researcher submits that this coercive norm creates a situation where the government gives with one hand and takes away with the other since most young women would balk at defying marital, familial and social expectations for the shark-infested pool of Panchayat politics and should be scrapped. What’s more such coercive norms are contrary to the ICPD Program of Action and India’s own National Population Policy. Studies conducted in these States and more particularly in Madhya Pradesh and Rajasthan reveal that people in these affected States have resorted to abortion, denying the birth, disputing the age or parentage of the additional child, adoption, falsifying birth certificates, deserting or sending away the pregnant wife, divorce and alleging infidelity to circumvent this rule.

In 1994 at the U.N. International Conference on Population and Development (ICPD) in Cairo, world leaders reached a new consensus on population. Although the ICPD Program of Action (PoA) legitimizes demographic goals set by national governments, it recommends policy approaches based on the promotion of reproductive health, informed free choice, and gender equity. The document specifically rejects the use of coercion in family planning programs and discourages the use of social and economic incentives and disincentives to reduce fertility.

In his address before the first meeting of the re-constituted National Commission on Population, in 2005, Prime Minister Dr. Manmohan Singh said the focus of the population policy should move away from coercion and should instead focus on a holistic approach that gives women and girl children greater access to education, better healthcare and a bigger share in development. Talking in a similar vein Health Minister Anbumani Ramdoss recently said that “two-child norm cannot be imposed as it would be a violation of fundamental rights of the people.” The Minister added that Population stabilization programme should be pursued wholly on a voluntary basis.
In July 2003 the Supreme Court of India gave a national stamp of approval to the two-child norm policies by upholding the constitutionality of the electoral disincentive law of Haryana State. In its ruling the Supreme Court stated, "Disqualification on the right to contest an election for having more than two children does not contravene any fundamental right, nor does it cross the limits of reasonability. Rather, it is a disqualification conceptually devised in the national interest."170 Emphasizing India’s “burgeoning population” as a national problem causing everything from congestion in urban areas to shortfalls in food grains and reduced per capita income, the Supreme Court further observed, “Complacence in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.”171 Critics of the two-child norm and the Supreme Court decision have likened these coercive policies to the 1970s Emergency Period in India’s political history remembered for massive forced sterilizations and suspension of democratic rights. This controversial norm has also made people ponder and question why this rule has been implemented only with regard to Panches and Sarpanches172 and not MLAs173 & MPs174.

**Right to equality:**

Art.17 of the Universal Declaration of Human Rights, 1948, declares that all are equal before the law and are entitled without any discrimination to the equal protection of laws and this right is reiterated in Articles 25 and 26 of ICCPR and forms the premise for all rights enshrined in the International Bill of Rights for they accrue to everyone and are universal in character.

The Constitution of India guarantees the Right to Equality through Articles 14 to 18. While Art.14 outlaws discrimination in a general way and guarantees equality

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170 The Bench in Javed and Others Vs State of Haryana remarked, “The Court has been at pains to point out how the growth of population of India was alarming and posed a menace to be checked.” Justice Lahoti, writing for the Bench, further said that it was held that the right to contest an election was neither a fundamental right nor a common law right but instead was a right conferred by the statute.


172 Members and head of Panchayats

173 Members of Legislative Assembly

174 Members of Parliament.
before law to all persons Article 15 prohibits discrimination against citizens on such specific grounds as religion, race, caste, sex or place of birth and Art.16 guarantees to the citizens of India equality of opportunity in matters of public employment; Art.17 abolishes untouchability while Art.18 abolishes titles, other than a military or academic distinction. The goal set out in the Preamble to the Constitution regarding equality of status and opportunity is embodied and concretized in Arts.14 to 18. Articles 14-16 have attracted 'a highly activist magnitude in recent years' generating judicial activism in numerous cases. Arts.14, 15 and 16 are constituents of a single code of constitutional guarantees supplementing each other with Articles 15 and 16 being the species of the genus Article 14.

The Apex Court in Indira Sawhney's case ruled that 'Equality is one of the magnificent corner-stones of Indian democracy.' In Ashutosh Gupta the Court observed that "The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution." That the right to equality is a basic feature of the Constitution was declared in Kesavananda and reiterated in numerous subsequent judgments.

In India, the courts have unfolded the vast potentialities of Art.14 as a restraint on the legislative power of the Legislature as well as administrative power of the Administration. Art.14 bars discrimination, prohibits discriminatory laws and acts as a bulwark against any arbitrary or discriminatory state action. The horizons of equality as embodied in Art.14 have been expanding as a result of the judicial pronouncements Art.14 runs as follows: 'The State shall not deny to 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 US Constitution which declares: 'No State shall deny to any person within its jurisdiction the equal protection of the laws'.

177 For instance The Supreme Court in Badappanavar (M G Badappanavar v. State of Karnataka, AIR 2001SC 260, at 264 : (2001) 2 SCC 666) declared "Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals will be violation of basic structure of the Constitution of India."
Two concepts are involved in Art. 14 viz., 'equality before law' and 'equal protection of laws'.

The first is a negative concept which denies any special privilege in favour of any one, and holds 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. This concept corresponds to the second corollary of Dicey's concept of the Rule of Law in Britain. However the rule of law, enshrined in the Constitution is not an absolute rule and there are a number of exceptions to it, e.g., foreign diplomats enjoy immunity from the country's judicial process; Art.361 extends immunity to the President of India and the State Governors; public officers and judges also enjoy some protection, and some special groups and interests, like the trade unions, have been accorded special privileges by 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. 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.

In Chiranjeeet Lal v. Union of India, the Court observed that the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice. Thus, the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances.

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178 WADE & PHILIPS, CONST. & ADM, LAW 87 (1977)
179 Jagannath Prasad v. State of Uttar Pradesh, AIR 1961 SC 1245 : (1962) 1 SCR 151 ; Mohd. Shaheb Mahboob v. Dy. Custodian, AIR 1961 SC 1657 : (1962) 2 SCR 371. The Supreme Court in Sri Srinivasa Theatre v. Govt. of Tamil Nadu, ( AIR 1992 SC at 1004) held that the two expressions 'equality before law' and 'equal protection of law' do not mean the same thing even if there may be much in common between them.
180 AIR 1995 SC 55 at 58: (1994) 6 SCC 349
The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. Art.14 however forbids class legislation.

The doctrine of reasonable classification encompasses Article 14 implying that where all persons are not equal by nature or circumstances, the varying needs of different classes or sections of people require differential treatment. This leads to classification among different groups of persons and differentiation between such classes. Accordingly, to apply the principle of equality in a practical manner, the courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory.\(^{181}\)

Classification to be reasonable should fulfill the following two tests:

(1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

(2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.\(^{182}\) What is however necessary is that there must be a substantial basis for making the classification and that there should be a nexus between the basis of classification and the object of the statute under consideration. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved. Therefore, mere differentiation or inequality of treatment does not \textit{per se} amount to differentiation or inequality of treatment does not \textit{per se} amount to


discrimination within the inhibition of the equal protection clause. To attract Art. 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the Legislature has in view in making the law in question.\textsuperscript{183} There is no closed category of classification; the extent, range and kind of classification depend on the subject-matter of the legislation, the conditions of the country, the economic, social and political factors at work at a particular time.

The Supreme Court has however warned against over-emphasis on classification. The Court has explained that 'the doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality. The over-emphasis on classification would inevitably result in substitution of the doctrine of classification for the doctrine of equality... lest the classification would deny equality to the larger segments of the society.'\textsuperscript{184}

When a person seeks to impeach the validity of a law on the ground that it offends Art. 14, the onus is on him to plead and prove the infirmity. The state can lean on the initial presumption of validity of the law.\textsuperscript{185} The Supreme Court has explained the rationale underlying this rule as follows: "Many a time, the challenge is based on the allegation that the impugned provision is discriminatory as it singles out the petitioner for hostile treatment, from amongst persons who, being situated similarly, belong to the same class as the petitioner. Whether there are other persons who are situated similarly as the petitioner is a question of fact. And whether the petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden to establish the existence of these facts rests on the petitioner. 'To cast the burden of proof in such cases on the state is really to ask it to prove the negative that no other

\textsuperscript{183} Jaila Singh v. State of Rajasthan, AIR 1975 SC 1436 : (1976) 1 SCC 682
\textsuperscript{184} LIC of India v. Consumer Education and Research Centre, AIR 1995 SC 1811, 1822 : (1995) 5 SCC 482
\textsuperscript{185} GK Krishnan v. State of Tamil Nadu, AIR 1975 SC 583 : (1975) 1 SCC 375
persons are situated similarly as the petitioner and that the treatment meted out to the petitioner is not hostile.  

Thus, the Nachane,\textsuperscript{187} when the employees of LIC were exempted from the provisions of the Industrial Disputes Act (IDA) by a law of Parliament, and these employees challenged the law as discriminatory, the Supreme Court stated that the burden of establishing hostile discrimination was on the petitioners (LIC employees); it was for them to show that they and the employees of other establishments to whom the provisions of the IDA applied were similarly circumstanced to justify the contention that by excluding the LIC employees from the purview of the IDA they had been discriminated against. No materials had been produced before the Court for the purpose.

On the other hand, if discrimination is writ large on the face of the legislation, the onus may shift to the state to sustain the validity of the legislation in question.\textsuperscript{188}

At times, even administrative necessity or convenience has been upheld as a basis of classification.\textsuperscript{189} This is especially so in mattes of taxation and economic regulation, because of the complexities involved in these areas, e.g., a bewildering conflict of expert opinion exists on economic matters.\textsuperscript{190}

The benefit of 'equality before law' and 'equal protection of law' 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 the equal protection of the laws.'\textsuperscript{191} Reference

\textsuperscript{186} Deena v. Union of India, AIR 1983 SC 1154, 1167 : (1984) 1 SCC 29
\textsuperscript{187} AV Nachane v. Union of India, AIR 1982 SC 1126, 1132 : (1982) 1 SCC 205
\textsuperscript{188} Dalmia v. Tandolkar, AIR 1958 SC 538 : 1959 SCR 279; Jagdish Pandey v. Chancellor, Bihar University, supra note 20
\textsuperscript{189} Supdt. & Remembrancer of Legal Affairs v. State of West Bengal, AIR 1975 SC 1030 : (1975) 4 SCC 754
to the term 'persons' been given a very liberal interpretation to include both 'natural persons' and 'artificial persons' like joint stock companies.

The Government of India while ratifying the ICCPR on 10 April, 1979 expressed reservations and declarations with respect to Article 1 (Right to Self-Determination)\textsuperscript{192}, Art 9 (Prohibition of Arbitrary Detention), Art. 11 (non imprisonment of judgment debtors), Art 12 (Freedom of Movement), Art 19 (Freedom of Expression), Art 21 (Peaceful Assembly) and Art 22 (Freedom of Association) of the Covenant. India also made reservations to Article 1, 4 and 8 of the ICESCR, while ratifying the treaty. Under Article 2 of ICCPR, India is obliged to ensure to all individuals within its territory and jurisdiction the rights, recognized in the covenant. With regard to the right of self determination the government of India has held that this right would accrue only to those countries that have not yet attained independence, being under foreign domination. This position rests on the factor that the right of self determination would otherwise encourage secessionist tendencies within the country and would contradict the need to protect the unity and integrity of the nation as enshrined in the Preamble. With respect to the personal freedom enshrined in Articles 12, 19, 21 and 22 of the ICCPR, the Government of India agreed to be bound by these rights subject to the limitations expressed in Article 19 of the Indian Constitution and with respect to Article 13 the Government of the Republic of India reserved its right to apply its law relating to foreigners. The reservation expressed with respect to Article 9(5) and Article 11 has been dealt with by the researcher in succeeding chapter while comparing the non derogable provisions in ICCPR with the Constitution of India.

To sum up, in this chapter the researcher has explored the civil and political rights in the UDHR that correspond to the derogable provisions pertaining to civil and political rights in the ICCPR and compared these rights with the corresponding provisions pertaining to civil and political rights in the Constitution of India.

\textsuperscript{192} With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.