Chapter – III

Constitutional Safeguards: Protecting Women Human Rights
CONSTITUTIONAL SAFEGUARDS: PROTECTING WOMEN HUMAN RIGHTS

The preamble to the Constitution of India envisages certain objectives to be achieved which is as following:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR 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 of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation;

IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November 1949, do

HEREBY ADOPT ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The preamble contains “the ideals and aspirations of the people of India” one of the golden ideals is “the equality of status and of opportunity” this objective has been achieved by and large, by providing equality clause in the constitution of India. The equality clause expressly prohibits discrimination on

1. Substituted by the Constitution 42nd Amendment Act 1976, sec-2, for “SOVEREIGN DEMOCRATIC REPUBLIC” (w.e.f. 3.1.1977).
2. Substituted by the Constitution 42nd Amendment Act 1976, sec-2, Ibid. for “unity of the Nation” (w.e.f. 3.1.1977).
the basis of race, religion, caste, sex and place of birth and guarantees equality before the law and equal protection of laws irrespective of race, religion, caste, sex etc. Thus the Indian Constitution has assured equal status to all not only between men and men, women and women but also between men and women.\(^3\)

The Constitution of India guarantees the Right to Equality through Article 14. “Equality is one of the most magnificent corner-stone of Indian democracy.”

The doctrine of equality before law is a necessary corollary of Rule of law which pervades the Indian Constitution.\(^4\) Article 14 outlaws discrimination in a general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principal of equality enunciated in Article 14, separate provisions to cover specific discriminatory situations have been made by subsequent Articles. In this series Article 14 is the most significant, it has been given a highly activist magnitude in recent years by the courts and thus it generates a large number of court cases.

It may be worthwhile to note that Article 17 of Universal Declaration of Human Rights, 1948, declares that all are equal before law and are entitled without any discrimination to equal protection of law, by and large the same concept of equality in the Article 14 of the Indian Constitution.

It may be noted that the right to equality had been declared by the Supreme Court as the basic Feature of the Constitution. The Constitution is wedded to the concept of equality. The preamble of the Constitution emphasizes upon the principles of equality as basic to the Constitution. This means that even a Constitutional amendment offending the right to equality will be declared invalid. Neither the parliament nor any state legislature can transgress the principal of equality. This principle has been recently reiterated

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by the Supreme Court in Badappanavar, Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequal as equals will be violation of basic structure of the Constitution of India.

Article 14 bars discrimination and prohibits discriminatory laws. Article 14 is now proving as a bulwark against any arbitrary or discriminatory state action. The horizons of equality as embodied in Article 14 have been expanding as a result of the judicial pronouncements and Article 14 has now come to have a highly activist magnitude.

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 U.S Constitution which declares: No state shall deny to any person within its Jurisdiction the equal protection of the laws."

The first is a negative concept which ensures that there is no special privilege in favour of any, that all are equal subjects to the ordinary law of the land and that no person whatever be his rank or condition is above the law. This is equivalent to the second corollary of the DICEAN concept of the Rule of Law in Britain.

However it is not an absolute rule and there are number of exceptions to it, e.g., Foreign diplomats enjoy immunity from the country Judicial process, Article 361 extends immunity to the president of India and the state Governor’s public officer and also judges enjoys some protection and some special groups and interests like the trade union 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 law does not postulate equal treatment of all persons without distinction. What it postulates is the application of all persons similarly situated, it denotes equality of treatment in equal circumstances, and it implies that among equals the law should be equal and equally administered that the like should be treated alike without distinction of race, religions, wealth social status or political influence. The principle of equality of law means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means that equal should not be treated unlike and unlike should not be treated alike. Likes should be treated alike.

Article 14 prescribes equality before law. But 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 laws does not mean that identically the same rules of law should be made applicable to all persons in spite of differences in circumstances or conditions. 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 infinite variety of human relations. It must therefore necessarily have the power of making laws to attain particular object and for that purpose of designating, selecting and classifying person and things upon which its laws are to operate Article 15 (1) specifically bar the state from discriminating against any citizens of India on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 15 (1) prohibits differentiation on certain grounds commenting on Art 15 (1) the Supreme Court has observed. Article 15 (1) prohibits

7. Jagannath Prasad v. state of Uttar Pradesh AIR 1961 SC 1245
discrimination on ground of religion or caste identities so as to foster national identity which does not deny pluralism of Indian culture but rather to preserve it.¹⁰

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 just as the principle of classification applies to Article 14 so it does to Article 15 (1) as well. The combined effect of Article 14 and 15 is not that the state cannot pass equal laws, but if it does pass equal laws the inequality must be based on some reasonable ground and that due to Article 15 (1) religion, race, caste, sex or place of birth alone is not and cannot be a reasonable ground for discrimination. The discrimination in Article 15 (1) involves an element of unfavorable bias. The use of the word ‘only’ in the Article 15 (1) connotes that what is disfavored is the discrimination purely and solely on account of any of the ground mentioned above. A discrimination based on any of these grounds and also on other grounds is not hit by Article 15 (1) and 15 (2) though it may be hit by Article 14 if religion, sex, caste, race or place of birth is merely one of the factors which the legislature has taken into consideration, then it would not be discrimination only on the ground of that fact. But if the legislature has discriminated only on one of the grounds and no other factor could possibly have been present then undoubtedly the law would offend against Article 15 (1).

Article 15 is a facet of Article 14 like Article 14, Article 15 (1) also covers the entire range of state activities. But in a way the scope of Article 15 is narrower than that of Article 14 in several respects.

One, while Article 14 is general in nature in the sense that it applies both to citizens, as well as non-citizens, Article 15 (1) covers only the Indian citizens and does not apply to non-citizens. No non-citizens can claim any right

under Article 15 though he can do so under Article 14. Two, while Article 14 permit any reasonable classification on the basis of any rational criterion, under Article 15 (1), certain grounds mentioned therein can never form the basis of classification.

Article 15 (3), the state is not presented from making any special provision for women and children. Article 15 (3) recognizes the fact that the women in India have been socially and economically handicapped for centuries and as result they cannot fully participate in the socio-economic activities of a nation on a ground of equality. The purpose of Article 15 (3) is to eliminate this 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 15 (1) and enables it to make special provisions to accord socio-economic equality to women.

A doubt has been raised whether Article 15 (3) saves any provisions concerning women or saves only such a precision as is in their favours. The better view would appear to be that while the state can make laws containing special provision for women and children it should not discriminate against them on the basis of their gender only. This appears to be the cumulative effect of Article 15 (1) and 15 (3). Although there can be no discrimination in general on the basis of sex, the Constitution itself provides for special provisions being made for women and children by virtue of Article 15 (3). Reading Article 15 (3) and 15 (1) together, it seems to be clear that while the state may discriminate in favour of women against men, it may not discriminate in favour of men against women. However, only such provisions can be made in favour of women under Article 15 (3) as are reasonable and which do not altogether obliterate or render illusionary the Constitutional guarantee mentioned in
Article 15 (2). The operation of Article 15 (3) can be illustrated by the following few cases.

Under S-497, of I.P.C the offense of adultery can be consulted only by a male and not by a female who can not even be punished as an abettor. As this provision makes a special provision for women, it is saved by Article 15 (3) the Supreme Court has observed. 11

Sex is a ground of classification and although there can be no discrimination in general on that ground the Constitution itself provides for special provision in the case of women and children by clause (3) of Article 15. Article 14 and 15 thus read together, validate the last sentence of section 497; IPC which prohibits the women from being punished as an abettor of the offence of adultery,

Upholding S. 497, the Bombay High Court had said in an earlier case that the discrimination made by S-497, is based not on the fact that women have a sex different from that of men, but" women in this country were so situated that special legislation was required in order to protect them.

There existed a common cadre of probation officers for male and females. However for the post of the head of the institute for destitute women, only female were regarded as eligible. This was challenged as discriminatory. In B.R. Anchovy v. State of Gujrat.12 The High Court said that only because there was a common cadre, in which the officer’s of both sexes were appointed, it did not mean that all post in the higher cadre must all be filled in by persons belonging to both the sexes, keeping in view the nature of duties to be performed the state Govt. may decide, that only a woman will head a women’s institute. Article 15 (3) enables the state to make any special provision for

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12. 1988 lab IC 1465.
women and children and so the impugned rule could not be held to be unconstitutional.

The most significant pronouncement on Article 15 (3) is the Supreme Court case Government of Andhra Pradesh v. P.B. Vijay Kumar.\(^\text{13}\)

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 an extent of 30% of the Posts were held valid with reference to Article 15 (3).

It was argued that reservation of posts or appointments to 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 violating Article 16 (2). Rejecting this argument, the Supreme Court has ruled that post can be reserved for women under Article 15 (3) as it is much under in scope and cover 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 rigours of Article 15 (1).

**Article 16**

Article 16 (1) is a facet of Article 14. Article 14 and 16 (1) are closely inter-connected. Article 16 (1) takes its roots from Article 14. Article 16 (1) particularizes the generality of Article 14 and identifies, in a constitutional sense, “equality of opportunity” in matters of employment under the state.

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\(^{13}\) AIR 1995 SC 1648.
An important point of distinction between Article 14 and 16 is that while Article 14 applies to all people’s citizens as well as non-citizens, Article 16 applies only to citizens and not to non-citizens.

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 article 16 (2), no citizen can be discriminated against or be ineligible for any employment of office under the state on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them.

The Supreme Court has deduced the principal of equal pay for equal work from Article 14, 16 and 39 (d) and the preamble to the Constitution. No such principle is expressly embodied in the Constitution but the principle has now matured in a fundamental Right. As the Supreme Court has explained in State of Madhya Pradesh v. Pramod Bhartiya. The doctrine of “equal pay for equal work” is implicit in the doctrine of equality enshrined in Article 14 and flows from it. The rule is as much a part of Article 14 as it is of Article 16 (1) the doctrine is also stated in Article 39 (d), a directive principle which ordains the state to direct its policy towards securing equal pay for equal work for both man and woman.

The Court has enunciated the doctrine as follows. The doctrine of equal work for equal pay would apply on the premise of similar work but it does not mean that there should be complete identity in all respects. If the two classes of persons do the same work under the same employer with similar responsibility under similar working conditions the doctrine of equal parcel equal pay” would apply and it would not be open to the State to discriminate one class with the other in paying salary. But it cannot be said that being a Directive Principle it is not enforceable in a court of law because it is also a

part of Article 14. The Fundamental Rights and Directive Principles are not supposed to be exclusionary of each other.

Employee under one and the same employer holding the same rank performing similar functions and discharging similar duties and responsibilities must also be given similar seals of pay. The Court has emphasized that this is not an abstract doctrine but one of substance. Though not declared expressly in the Constitution it is certainly a constitutional goal.

The principal of equal pay for equal work does not apply when the employer are different. Employers of Regional Rural Bank sponsored by a co-operative bank cannot claim the same salary and allowances as are payable to the employees of Regional Rural Bank which are sponsored by the commercial and nationalized banks.¹⁶

Article 14, as already stated permits reasonable classification which means that the classification is to be based on an intelligible basis which distinguishes persons or things grouped together from those that are left out of the group and the differentia must have a rational nexus with the object to be achieved by the differentia made. In other words there ought to be casual connection between the basis of classification and the object of classification. The doctrine of equal pay for equal work applies in case of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

Also the fact that appointments and the schemes are temporary in nature is irrelevant. Once it is shown that the nature of the duties and functions discharged and the work done are similar the doctrine of "equal pay for equal work" is attracted.¹⁷

But this Principle cannot be applied invariably to professional service. For example dressing of a wound by a doctor or a compunder cannot be equated and be compensated on an equal basis. Similarly a senior or a junior lawyer cannot be treated equally in matters of remunerations. In the field of rendering professional service at any rate the principle for equal work would be inapplicable. Therefore doctors with different qualifications can be graded differently for purpose of remuneration even though they are in charge of dispensaries.

In Judging the equality of work consideration may be given to educational qualifications. Qualitative differences between posts and quantum of responsibilities associated with the posts of the classification has reasonable nexus with the objective of achieving efficiency in administration, the state would be justified in prescribing different pay scales. As the Supreme Court has emphasized Equality must be among equals. Unequal cannot claim equality.\textsuperscript{18}

The principle of Equal pay for equal work does not apply to two sets of employees working in different organizations and when there is qualitative deference in the duties and functions discharged by them.\textsuperscript{19}

Article 21 of the Constitution which guarantees the right to life and personal liberty has come to occupy the position of brooding omnipresence. In the scheme of fundamental rights this provision has become a sanctuary for human values and therefore has been rightly termed as the fundamental of fundamental rights. Like the right to personal liberty which has been given a new content, the right to life has been infused with the dynamic concept of human dignity which is the foundation of all other human rights. In \textit{Francis State of UP v. J.P. Chaurnsia} (1989) I SCC 121, \textit{Garhwal Jal Sammelan Karmachari v. State of UP} AIR 1997 SC 2143.

Coralie Mullin v. Delhi Administration. 20 Justice Bhagwati elucidated the import of the right to life thus. 21

The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival the inhibition against its deprivation extends to all those limbs and faculties by which life, is enjoyed this would include the faculties of thinking and feeling but the question which arises is whether the right to life is limited only to protection of limber faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head, facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the matter, include the right matter basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of oneself.

Thus, the right to life has been held to be wide enough to encompass the right to live with human dignity which in turn would include the basic necessities of life such as hygienic environment, medical care, safe drinking water, food clothing and shelter, and education etc.

Further, the right to life has been held to include the right to livelihood. In Olga Tellis v. Bombay Municipal corporation. 22 Chief Justice Chandra Chud observed the right life..... does not mean merely that life cannot be taken away or extinguished as, for example, by the imposition and execution of the death sentence except according to Procedure established by law. That is but one

aspect of the life. An equally important aspect of it is the right to live livelihood is not treated as the part of right to life the easiest way of depriving a person of his life right to life would be to deprive him of his means of livelihood to the point of abrogation. In view of the fact that Article 39 (b) and 41 require the state to secure an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of life."

Evidently, the right to life seems to be the main right 'from which many more basic human rights emanate. However, the main question, in the context of the Indian conditions, is to what extent these basic rights be realized? Is the presently followed judicial strategy for their realization adequate before we advert to this issue it is necessary to appreciate, though in brief, the extent and nature of the constitutional protection provided under Article 21 of the Constitution. 23

Right to life means having all organs of the body intact.

The right to life is a right to life which is much more than mere animal existence. The right to life means to have intact all limbs and faculties through which life is enjoyed has meaning. It would obviously, be deprivation of life if the body is mutilated or any part of it is amputated or if any organ of the body is destroyed. In Kharak Singh v. State of UP24 the Supreme Court observed that the right to life does not mean the right to the continuance of a person's animal existence, but a right to the possession of all organs, his arms, legs etc. The right to life thus means right to live with full dignity without humiliation and deprivation or denial of any Article Personal liberty obviously means freedom from all physical restraint and coercion of any sort.

23. Ibid. As per C.J. Chanderchud at p. 185.
Right to personal liberty includes all rights left out of Article 19

In *A.K. Gopalan v. State of Madras*, the Supreme Court propounded the thesis that "personal liberty" in Article 21 was used as a compendious term to include within itself all the varieties of right which tend to make up "personal liberty" of a man minus the right guaranteed under Article 19 (1). Das J. opined that while Article 19(1) dealt with the particular species or attributes of that freedom, personal liberty if Article 21 took, and is comprised, the residue. His lordship further observed that for example a free man could eat what he liked subject to the licensing and prohibition laws and do a hundred and one things which were not included in Article 19. This interpretation that personal liberty means only liberty relating to or concerning the person is obviously, to narrow and the Supreme Court itself has repudiated it. In *Kharak Singh v. State of U.P.*, the domiciliary visits during the night by the Police to the house of bad characters and suspects were held to be an invasion or personal liberty being violative of the sanctity of a man’s home and an intrusion into his personal security and his right to sleep undisturbed.

Right to live with human dignity

In *Maneka Gandhi’s case*, the Supreme Court gave a new dimension to Article 21. It was held that the right to ‘live’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Elaborating the same view the Court in *Francis Coralie v. Union Territory of Delhi* said that the right to live is not restricted to mere animal existence. It means something more that just physical survival. The ‘right to life’ is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes

25. AIR 1950 SC 27.
27. AIR 1963 SC 1295.
the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as, adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Following Maneka Gandhi and Francis Coralie cases the Supreme Court in People Union for Democratic Rights v. Union of India,\(^\text{30}\) has held that non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Article 21 of the Constitution, Bhagwati, J, speaking for the majority held that the rights and benefits conferred on the workmen employed by a contractor under various labour laws are “clearly intended to ensure basic human dignity to workmen and if the workmen are deprived of any of these rights and benefits, that would clearly be a violation of Article 21.” It was further held that the non-implementation by the private contractors and non-enforcement by the State authorities of the provisions of various labour laws violated the fundamental right of workers “to live with human dignity.” This decision has heralded a new legal revolution; it has clothed million of workers in factories, fields, mines and project sites with human dignity. They had fundamental right to maximum “wages, drinking water, shelter, creches, medical aid and safety in the respective occupations covered by the various welfare legislations.

In Chandra Raja Kutnari v. Police Commissioner Hyderabad,\(^\text{31}\) it has been held that the right to live include, right to live with human dignity or decency and, therefore holding of beauty contest is repugnant to dignity or decency of women and offends Article 21 of the Constitution. The Government is empowered to prohibit the contest as objectionable performance under Section 3 of the Andhra Pradesh Objectionable Performances Prohibition Act,

\(^{30}\) AIR 1982 SC 1473.
\(^{31}\) AIR 1998 AP 302.
1956, if it is grossly indecent scurrilous or obscene or intended for blackmailing.

In *State of Maharashtra v. Chandrabhan*\(^{32}\) the Court struck down a provision of Bombay Civil Service Rules 1959, which provided for payment of only a nominal subsistence allowance of Re. 1 per month to a suspended Government servant upon his conviction during the pendency of his appeal as unconstitutional, on the ground that it was violative of Article 21 of the Constitution.

**Right to good standard of living**

In *Ahmedabad Municipal Corporation v. Nabob Khan Gulam Khan and others*,\(^{33}\) the Apex court considered the provisions of Article 19(1)(e) read with Article 21 of the Constitution of India and Article 25(1) of the Universal Declaration of Human Rights and held that every, one has a right to standard living, adequate health and welfare of himself and his family. It also considered Article 11(1) of the International Covenant on Economic, Social and Cultural Rights which lays down that the States, parties to the Covenant, recognize that every one has right to standard living for himself and his family including food, clothing, housing and to continuous improvement of living conditions. The Court observed:

"Socio-economic justice, equality of status and of opportunity and dignity of person to foster the fraternity among all the sections of the society in an integrated Bharat is the arch of the Constitution set down in its Preamble. Articles 39 and 38 enjoin the State to provide facilities and opportunities. Articles 38 and 46 of the Constitution enjoin the State to promote welfare of the people by securing social and economic justice to the weaker sections of the society, to minimise inequalities in income and endeavour to eliminate

\(^{32}\) (1983) 3 SCC 387.

\(^{33}\) 1995 (Suppl) 2 SCC 182, AIR 1997 SC 152.
inequalities in status. In that case, it was held that to bring the Dalits and the Tribes into the mainstream of national life, the State was to provide facilities and opportunities as it is the duty of the State to fulfill the basic human and constitutional rights to residents so as to make the right to life meaningful. In *Shantislar Builders v. Narayan Khimalai Totame*, another Bench of three Judges had held that basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal, it is the bare protection of the body; for human being, it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The surplus urban-vacant land was directed to be used to provide shelter to the poor. In *Olga Tellis* case, the Constitutional Bench had considered the right to dwell on pavements or in slums by the indigent and the same was accepted as a part of right to life enshrined under Article 21. Their ejectment from the place nearer to their work would be deprivation of their right to livelihood. They will be deprived of their livelihood if they are evicted from their slum and pavement dwellings. Their eviction tantamounts to deprivation of their life. The right to livelihood is a traditional right to life; the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. The deprivation of right to life, therefore, must be consistent with the procedure established by law. In *P.G. Gupta v. State of Gujarat*, another Bench of three Judges had considered the mandate of human right to shelter and read it into Article 19(1) (e) and Article 21 of Constitution and the Universal Declaration

35. AIR 1986 SC 180.
of Human Rights and the Convention of Civil, Economic and Cultural Rights and had held that it is the duty of the State to construct houses at reasonable cost and make them easily accessible to the poor. The aforesaid principles have been expressly embodied and in-built in our Constitution to secure socio-economic democracy, so that everyone has a right to life, liberty and security of the person. Article 22 of the Declaration of Human Rights envisage that everyone has a right to its realization as the economic, social and cultural rights are indispensable for his dignity and free development of his personality. It would, therefore, be clear that though no person has a right to encroach and erect structures or otherwise on footpath, pavement or public streets or any other place reserved or earmarked for a public purpose, the State has the Constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful, effective and fruitful. Right to livelihood is meaningful because no one can live without means of his living that is the means of livelihood. The deprivation of the right to life in that context would not only denude right of the effective content and meaningfulness but it would make life miserable and impossible to life. It would, therefore, be the duty of State to provide the right to shelter to the poor and indigent weaker sections of the society in fulfillment of the Constitutional objectives.

Right to livelihood and right to work

The Supreme Court has held that the word 'life' in Article 21 does not include the right of livelihood.' In the case of Begulla Bapi Raju v. State of A. P., the Court held that the word 'life' in Article 21 does not include 'the right of livelihood.' In this case the petitioners were deprived of their surplus land which was acquired by the State for giving it to the poor and downtrodden. It

was held that the derivation was justified on the ground that it was for giving effect to the Directive Principles in Article 39.

In *Olga Tellis v. Bombay Municipal Corporation*, popularly known as the 'pavement dwellers case' a five judge bench of the Supreme Court has ruled that the word life in Article 21 includes the right to livelihood also. The court said:

It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that Articles 39(a) and 41 require the State to secure to the citizen an adequate means of livelihood and the right to work, it would be sheer pendentary to exclude the right to livelihood from the content of the right to life.

In that case the petitioners had challenged the validity of Sections 313,313-A, 314 and 497 of the Bombay Municipal Corporation Act, 1888 which empowered the Municipal Authorities to remove their huts from pavement and public places on the ground that their removal amounted to depriving them of their right to livelihood and hence it was violative of Article 21. While agreeing that the right to livelihood is included in Article 21, the Court held that it can be curbed or curtailed by following just and fair procedure. It was held that the above sections of the Bombay Municipal Corporation Act were Constitutional since they imposed reasonable restrictions on the right of livelihood of pavement and slum dwellers in the interest of the

general public. Public streets are not meant for carrying on trade or business. However, the Court took a humanistic view and in order to minimise their hardships involved in the eviction, it directed the Municipal authorities to remove them only after the end of the current monsoon season. The Court also directed the Corporation to frame a scheme for demarcating hawking and non-hawking zones and give them licenses for selling their goods in hawking zones. Licenses in hawking zones cannot be refused except for good reasons.

In *Secretary State of Karnataka & Ors v. Uma Devi and Others*[^39] it was argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the temporary employees permanent, would be violation of Article 21 of the Constitution. The Supreme Court held that the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Article 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The Court observed.

The acceptance of the argument would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the

employment at their own volition and with eyes open as to the nature of their employment.

The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment was not accepted. The Court further held.

The law is dynamic and our Constitution is a living document, may be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in Government service or in the service of its instrumentalities can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.
The jurisdiction of the Human Rights Commission is in those cases where a case is made out of violation of human rights falling under the expression right to life and livelihood. There is no dispute that the right to life would include right to receive wages. Deprivation of the wage does affect the very right of the life and livelihood itself. The question is whether the right to be appointed is a fundamental right. The Apex Court has held the right to livelihood is a fundamental right, as right to life is protected under Article 21 of the Constitution of India. In *Air India statutory Corporation v. United Labour Union*, it is noted that Article 41 provides that the State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want. In other words, the right to employment in the absence of suitable legislation cannot be placed on the same footing as right to livelihood. Though in Para 21, it appears that the Apex Court has observed the right to work becomes as much fundamental as right to life that would be once a person is appointed. The Apex Court has observed as under:

When its correctness was doubted and its reference to the Constitution Bench was made in Delhi Transport Corporation case, while holding that Delhi Road Transport Authority was an instrumentality of the State, it was held that employment is not a bounty from the State nor can its survival be at their mercy. Income is the foundation of any Fundamental Rights. Work is the sole source of income. The right to work becomes as much fundamental as right to life. Law as a social machinery requires to remove the existing imbalances and to further the progress serving the needs of Socialist Democratic Republic under the rule of law. Prevailing social conditions and actualities of the life are to be taken into account to adjudge the dispute and to see whether the interpretation would sub serve the purpose of the society.

This observation must be considered in tune what is set out in Paragraph 15 of the judgment. So reading, it would mean that the right to work as fundamental right can only be considered is fundamental right in those cases where there is a legislative guarantee in the form of legislation. In the absence of right to work being fundamental right, it would not fall within expression life under Article 21 and if so would not fall within the definition of Human rights as set out under Section 2 (d) of the Act. On this count also, the act of the commission would be without jurisdiction.41

Right to property

In T. Vellaiyan v. Registrar, S.H.R. Commission,42 Chennai it was contended that right to life, liberty, equality and dignity includes the right to property, with respect to which a petition was made by the second respondent, the Court held that it could not extend the definition, of “Human Rights” to that extent to include the right to property also within the definition, particularly when the legislature explicitly omitted the right to property within the definition of human rights. The definition of “Human Rights” as defined under Section 2 (d) of the Act.

“Human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.

In that case the rights relating to the property got divided under the terms of the partition deed between the petitioner and the second respondent was in issue. In which event, it cannot be said that the right to property, which was complained by the second respondent before the first respondent, is inclusive of the right to life, liberty, equality and dignity, alleged to have been interfered by the petitioner. The interference of the right to property of the

42. AIR 2005 Mad 80.
second respondent, as complained before the first respondent, was independent inasmuch as the same was based on the partition deed, to decide which, a competent civil Court shall only have jurisdiction. In that view of the matter, it is impermissible for the High Court while exercising the power of judicial review under Article 226 of the Constitution of India, as well as the first respondent/Commission to decide the dimensions of the right to property of the second respondent and the petitioner.

**Right to shelter**

In *Chameli Singh v. State of U.P. and others*, the Supreme Court held that right to shelter is a fundamental right available to every citizen and it was laid into Article 21 of the Constitution of India as encompassing within its limit the right to shelter to make the right to life more meaningful. The Court observed as under:

In any organized society, right to live as a human being is not entered by meeting the only animal's need of the man. All human rights are designed to achieve the freedom from restriction which inhibits his growth, right to life implies the right to food, water, disentitled environment, education, medical care and shelter. All the civil, political, social and cultural rights enshrined in UDHR cannot be exercised without this basic right. Shelter for a human being, therefore, is not a mere protection of his life and limbs. It is the home where he has opportunity to grow physically, mentally, intellectually and spiritually.

Right to shelter therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc, so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. In view of the

43. AIR 1987 SC 2117.
importance of the right to shelter, the mandate of the Constitution, and the obligation under the Universal Declaration of Human Right, the Court held that it is the duty of the State to provide housing facilities to Dalits and Tribes, to enable them to come into the mainstream of national life.

In *Olga Tellis v. Bombay Municipal Corporations* the Constitution Bench of the Supreme Court considered the right to dwell on pavement or in slums by indigent as part of right to life enshrined under Article 21. In *P.G. Gupta v. State of Gujarat*, the Supreme Court considered the human right to shelter and rights enshrined in Article 19(l)(e) of the Constitution of India and Articles 21 of the UDHR and the Convention on Civil, Economic and Cultural Rights and held that it is the duty of the State to construct houses at reasonable cost and make them easily accessible to the poor. The said principle was found embodied and in-built in the Constitution of India to secure socio-economic democracy so that every one has a right to life, liberty and security of person. The Court, also, emphasized on Article 21 of the Declaration of Human Rights which envisaged that every one has a right to social and cultural rights are indispensable for his dignity and free development of his personality.

In *Prabhakaran Nayyar v. State of Tamil Nadu*, the Supreme Court held that shelter is a fundamental right and the enquiry involved in it must be taken on urgent basis by the competent authority and the State. Right to shelter has also been emphasized by the Supreme Court in *M/s Shantistar Builders v. Narain Khimal Totame and others*.

**Right to healthcare**

In *Vincent Parikurlangara v. Union of India*, the Supreme Court held that the right to maintenance and improvement of public health is included in

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44. 1990 (1) SCC 520.
45. 1995 (Suppl) 2 SCC 182.
46. AIR 1987 (SC) 2117.
47. 1990 (1) SCC 520.
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the right to live with human dignity enshrined in Article 21. A healthy body is the very foundation of all human activities. In a welfare State this is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health.

A healthy body is the very foundation for all human activities. That is why the adage "Sariramadyam Khalu dharma Sadhanam." In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. The Supreme Court in Bandhua Mukti Morcha v. Union of India, aptly observed.

It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin's case, to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Arts. 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just as humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State - neither the Central Government - has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

Article 47 in Part IV of the Constitution provide:

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among

its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

This Article has laid stress on improvement of public health and prohibition of drugs injurious to health as one of the primary duties of the State, In Akhil Bharatiya Soshit Karmachari Sangh v. Union of India, the Supreme Court has pointed out that, “the Fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts so they are made justiciable. However, it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a Court of Law, but it does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State.” In a series of pronouncements during the recent years the Supreme Court has culled out from the provisions of Part IV of the Constitution these several obligations of the State and called upon it to effectuate them in order that the resultant pictured by the Constitution Fathers may become a reality. The maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged attending to public health, in our opinion therefore, is of high priority perhaps the one at the top.

In Parmananda Katara v. Union of India, it has been held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under Cr. P.C. Article 21 casts an
obligation on the State to preserve life. It is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence which amounts legal punishment. No law or State action can intervene to delay the discharge of this paramount obligation of the members of the medical profession. The obligation being total law of procedure whether institutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. The Court directed that in order to make everyone aware of this position the decision of the Court must be published in all journals reporting decisions of the Supreme Court and adequate publicity highlighting these aspects should be given by the national media. The Medical Council must send copies of this judgment to every medical college affiliated to it. This is a very significant ruling of the Court. If this decision of the Court is followed in its true spirit, it would help in saving the lives of many citizens who die in accidents because no immediate medical aid is given by the doctors on the ground that they are not authorised to treat medico-legal cases, let us hope that all doctors (Government or private) of this country should follow this ruling of the Court earnestly.

In Consumer educational and Research Centre v. Union of India, the Supreme Court has held that the right to health and Medical care is a Fundamental Right under Article 21 of the Constitution as it is essential for making the life of the workman meaningful and purposeful with dignity of person. "Right to life" in Article 21 includes protection of the health and strength of the work. The expression life' in Article 21 do not connote mere animal existence. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic condition in workplace and leisure. The Court held that the State, be it Union or State Government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workmen during period of employment and leisure.

and health even after retirement as basic essentials to life with health and happiness. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilization which makes life worth living. Health of the worker enables him to enjoy the fruit of his labour. Medical facilities to protect the health of workers are, therefore, the fundamental human rights to make the life of workman meaningful and purposeful with dignity of person. The Court made it clear that all authorities or even private persons or of an industry are bound by the directions issued by the Court in this regard under Article 32 and 142 of the Constitution. The Court accordingly, laid down the following guidelines to be followed by asbestos industries:

(1) All asbestos industries must make health insurance of worker employed in industry.

(2) Every worker suffering from occupational health hazards would be entitled for compensation of Rs. 1 lakh.

(3) All asbestos industries must maintain the health record of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment whichever was later.

(4) "Membrane filter test" to detect asbestos fiber should be adopted by all the factories at par with Metalliferrous Mines Regulations, 1961 and Vienna Convention.

(5) All the factories whether covered by the Employees State Insurance Act or Workmen’s Compensation Act or otherwise, should insure health coverage to every worker.

Right to pollution free environment

In Subhas Kumar v. State of Bihar,55 it has been held that Public Interest Litigation is maintainable for ensuring enjoyment of pollution free-

55. 1998 (8) SCC 296.
water and air which is included in the “right to live” under Article 21 of the Constitution. The Supreme Court observed.

Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the fundamental rights of a citizen. Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impure that quality of life in derogation of laws, a citizen has right to have recourse of Article 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists. But recourse to proceeding under Article 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced though the process of this Court under Article 32 of the Constitution in the garb of public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the
extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation.\footnote{See Bandeau Mukti Morcha v. Union of India (1984) 2 SCR 67; (AIR 1984 SC 802).}

In \textit{Rural Litigation and Entitlement Kendra v. State of U.P.}\footnote{(1985) 2 SCC 431.} the Court ordered the closure of certain lime stone quarries on the ground that there was serious deficiency regarding safety and hazards in them. The Court had appointed a committee for the purpose of inspecting certain lime-stone quarries. The Committee had suggested the closure of certain categories of stone quarries having regard to adverse impact of mining operations therein. Large pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area.

\textit{In Rural Litigation and Entitlement Kendra v. State of U.P.},\footnote{AIR 1987 SC 359.} The Supreme Court observed:

Consciousness for environmental protection is of recent origin. The United Nations Conference on World Environment held in Stockholm in June 1972 and the follow up action thereafter is spreading the awareness. Over thousands of years men had been successfully exploiting the ecological system for his sustenance but with the growth of population the demand for land has increased and forest growth has been and is being cut down and man has started encroaching upon Nature and its assets. Scientific developments have made it possible and convenient for man to approach the places which were hitherto beyond his ken. The consequences of such interference with ecology and environment have now come to be realized. It is necessary that the Himalayas and the forest growth on the mountain range should be left uninterfered with so that there may be sufficient quantity of rain. The top soil may be preserved without being eroded and the natural setting of the area may remain intact. We had commended earlier to the State of Uttar Pradesh as also
to the Union of India that aforestation activity may be carried out in the whole valley and the hills. We have been told that such activity has been undertaken. We are not oblivious of the fact that natural resources have got to be tapped for the purposes of social development but one cannot forget at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way there may not be any depletion of water resources and long-term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.

In Shriram Food Fertilizer case, the Supreme Court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant. There was a leakage of Chlorine gas from the plant resulting in death of one person and causing hardship to workers and residents of the locality. This was due to the negligence of the management in maintenance and operation of the caustic chlorine plant of the Company. The matter was brought before the Court through public interest litigation. The management was directed to deposit a sum of Rs. 20 lakhs by way of security for payment of compensation claims of the victims of Oleum gas leak with the Registrar of the Court. In addition, a bank guarantee for a sum of 15 lacs was also directed to be deposited which shall be encashed in case of any escape of Chlorine gas within a period of three years from the date of the judgment, resulting in death or injury to any workman or any person living in the vicinity. Subject of these conditions the Court allowed the partial opening of the plant. The efforts of the highest Court in environment pollution control through public interest litigation was indeed a laudable, particularly when the Legislature was lagging behind in bridging the

lacuna in the existing legal system and the administration was not well equipped to meet the challenge.

In *M.C. Mehta v. Union of India*, the Supreme Court ordered the closure of tanneries at Jajmau near Kanpur, polluting the river Ganga. The matter was brought to the notice of the Court by the petitioner, a social worker, through a Public Interest Litigation. The Court held that notwithstanding the comprehensive provisions contained in the Water (Prevention and control of Pollution) Act and the Environmental (Protection) Act, no effective steps were taken by the Government to stop the grave public nuisance caused by the tanneries at Jajmau, Kanpur. In the circumstances, it was held that the Court was entitled to order the closure of tanneries unless they took steps to set up treatment plants.

In *M.C. Mehta v. Union of India*, the petitioner brought a public interest litigation against Ganga water pollution requiring the Court to issue appropriate directions for the prevention of Ganga water pollution, he claimed that although Parliament and the State legislatures have passed several laws imposing duties on the Central and State Boards constituted under the Water (Prevention and Control of Pollution) Act and the municipalities. Under the U.P. Nagar Mahapalika Adhiniyam, they have just remained on paper and no proper action had been taken pursuant thereto. The Supreme Court held that the petitioner although not a riparian owner (living on the river side), was entitled to move the Court for the enforcement of various statutory provisions which impose duties on the municipal and other authorities. He is a person interested in protecting the lives of the people who make use of the Ganga water. The nuisance caused by the pollution that makes use of the Ganga water. The nuisance caused by the pollution of the river Ganga is a public nuisance which is wide spread and affecting the lives of large number of persons and therefore

60. (1987) 4 SCC 463.
any particular person can take proceedings to stop it as distinct from the community at large. Accordingly, the Court directed the Kanpur Nagar Mahapalika to submit its proposals for effective prevention and control of water pollution within 6 months to the Board constituted under the Water Act. It also directed the Mahapalika to get the dairies shifted to a place outside the city and arrange for removal of wastes accumulated at the dairies so that it may not reach the river Ganga, to lay sewerage line wherever it is not constructed, to construct public latrines and urinals, for the use of poor people free of charge, to ensure that dead bodies or half burnt bodies are not thrown into river Ganga and to take action against the industries responsible for pollution, licences to establish new industries should be granted only to those who make adequate provisions for the treatment of trade effluent flowing out of the factories. The above directions apply *mutatis mutandis* to all other Mahapalikas and municipalities which have the jurisdiction over the areas through which the river Ganga flows.

In *Vellore Citizen Welfare Forum v. Union of India and others*, the Court issued direction for maintaining the standard stipulated by Pollution Control Board and held that right to have pollution-free environment was a fundamental right.

The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the International sphere "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway Ms. G. H. Brundtland and as such the report is popularly known as "*Brundtland Report.*" In 1991 the World Conservation Union, United "Nations Environment
Programme and World Wide Fund for Nature, Jointly came out with a
document called “Caring for the Earth” which is a strategy for sustainable
living. Finally, came the Earth Summit held in June, 1992 at Rio which saw the
largest gathering of world leaders ever in the history, deliberating and chalking
out a blue print for the survival of the planet. Among the tangible achievements
of the Rio Conference was the signing of two conventions, one on biological
diversity and another on Climate Change. These conventions were signed by
153 nations. The delegates also approved by consensus three non-binding
documents namely, a Statement on Forestry Principles, a declaration of
principles on environmental policy and development initiatives and Agenda 21,
a programme of action into the next century in areas like poverty, population
and pollution. During the two decades from Stockholm to Rio “Sustainable
Development” has come to be accepted as a viable concept to eradicate poverty
and improve the quality of human life while living within the carrying capacity
of the supporting ecosystems. “Sustainable Development” as defined by the
Brundtland Report means “Development that meets the needs of the present
without compromising the ability of the future generations to meet their own
needs. “Sustainable Development” as a balancing concept between ecology and
development has been accepted as a part of the Customary International law
though its salient features have yet to be finalised by the International law
Jurists.

“Some of the salient principles of “Sustainable Development”, as called
out from Brundtland Report and other international documents, are Inter-
Generational Equity, Use and Conservation of Natural Resources,
Environmental Protection, the Precautionary Principle, Polluter Pays Principle,
Obligation to assist and co-operate, Eradication of Poverty and Financial
Assistance to the developing countries. We are, however, of the view that
"The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development." The "Precautionary Principle" in the context of the municipal law means:

(i) Environmental measures by the State Government and the statutory authorities—must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The Onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign. The Polluter Pays principle has been held to be a sound principle by this Court in Indian Council for Environmental Action v. Union of India. The Court observed, We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. The Court ruled that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. Consequently the polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The Polluter Pays principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the

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damaged environment is part of the process of Sustainable Development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty.

Right to privacy

The right to privacy and the power of the State to ‘search and seize’ have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed. History takes us back to Semayne’s case, where it was laid down that ‘Every man’s house is his castle.’ One of the most forceful expressions of the above maxim was that of William Pitt in the British Parliament in 1763, He said, the poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake, the wind may blow through it the storm may enter, the rain may enter, but the King of England cannot enter his entire force dare not cross the threshold of the ruined tenement.

When John Wilkes attacked not only governmental policies but the King himself pursuant to general warrants, State officers raided many homes and other places connected with John Wilkes to locate his controversial pamphlets. Entick, as an associate of Wilkes, sued the State officers because agents had forcibly broken into his house, broke locked, desks and boxes, and seized many printed charts, pamphlets and the like. In a landmark judgment in Entick v. Carrington, Lord Camden declared the warrant and the behaviour as subversive ‘of all the comforts of society and the issuance of a warrant for the seizure of all of a person’s papers and not those only alleged to be criminal in

64. Decided in 1603 (5 coke’s Rep 419 77Eng. Rep 194) (KB).
nature was 'contrary to the genius of the law of England'. Besides its general character, the warrant was, according to the Court, bad inasmuch as it was not issued on a showing of probable cause and no record was required to be made of what had been seized. In *Boyd v. United States*, the US Supreme Court said that the great *Entick* judgment was 'one of the landmarks of English liberty one of the permanent monuments of the British Constitution.'

The Fourth Amendment in the US Constitution was drafted after a long debate on the English experience and secured freedom from unreasonable searches and seizures. It said,

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states.

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondences or to attacks upon his honour and reputation. Everyone has right to the protection of the law against such interference or attacks."

Article 17 of the international Covenant of Civil and Political Rights (to which India is a party) refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, or to unlawful attacks on his honour and reputation."

66. (1886) 116 US 616 (626).
The question whether the right of privacy is invaded in a matrimonial case where the parties are subjected to a medical test has been set at rest by the Apex Court in case of *Sharda v. Dharampal*. The Apex Court interpreting Article 21 of the Constitution of India has ruled that the privacy of a person is not an absolute rule. In a matrimonial case directing the parties to undergo medical test, does not offend Article 21 of the Constitution of India. The Apex Court has also cautioned that such power will have to be exercised only if the applicant has a strong prima facie case. The Apex Court in that case has held:

"The right to privacy has been developed by the Supreme Court over a period of time. A Bench of eight Judges in *M.P. Sharma v. Satish Chandra*, in the context of search and seizure observed that;

When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

Similarly in *Kharak Singh v. State of U.P.* the majority judgment observed thus,

The right to privacy is not a guaranteed right under our Constitution and, therefore, the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of fundamental right guaranteed by Part III.

In *Gavind v. State of Madhya Pradesh* it was held.

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67. AIR 2003 SC 3450.
68. AIR 1954 SC 300 SC 306.
69. AIR 1963 SC 1295.
70. AIR 1975 SC 1378.
“Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.”

In *Zahida Begum v. Mushtaque Ahamed*, the specific case made out by the petitioner was that the marriage could not be consummated, as the defendant-respondent was impotent and he was unable to perform the matrimonial obligations. The Court held that in the circumstances, the question whether the petitioner was a virgin or not was wholly unnecessary. In the circumstances, the learned trial Judge could not have directed the petitioner to undergo virginity test at the hands of a Gynecologist. But the right to privacy is terms of Article 21 of the Constitution are not absolute right. The Court observed:

To sum up, our conclusion is:-

1. A matrimonial Court has the power to order a person to undergo medical test.
2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the India Constitution.
3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw an adverse inference against him.

The Court has the power to order a person to undergo medical test and such an order would not be in violation of the right to personal liberty under Article 21 of the Constitution. However, the Court should exercise such a power only when it is expedient in the interest of justice and when the fact

71. AIR 2006 Kant 10-11.
situation in a given case warrants such an exercise. The DNA test cannot rebut the conclusive presumption envisaged under Section 112 of the Act. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof. It is always open to the Court to draw an adverse inference when the spouse refuses to undergo the test despite the direction given by the Court.\textsuperscript{72}

**Right to education**

In a landmark judgment in *Mohini Jain v. State of Karnataka*,\textsuperscript{73} popularly known as the Captivation Fee Case, the Supreme Court has held that the right to education is a fundamental right under Article 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as the captivation fee. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. In this case the petitioner had challenged the validity of a Notification issued by the government under the Karnataka Education Institutions (Prohibition of Capitation Fee) Act, 1984 passed to regulate tuition fee to be charged by the private Medical Colleges in the State. Under the Notification the tuition fee to be charged from students was as follows; Candidates admitted against Government seats Rs. 2,000 per year, the Karnataka Students Rs. 25,000 per annum and students from outside Karnataka Rs. 60,000 per annum. The petitioner was denied admission on the ground that she was unable to pay the exorbitant tuition fee of Rs. 60,000 per annum. The two judge Division Bench held that the right to education at all level is a fundamental right to citizen under Article 21 of the Constitution and charging captivation fee for admission to education institutions is illegal and amounted to denial of citizen’s right to education and also violative of Article 14 being arbitrary, unfair and unjust.

\textsuperscript{72} Shaik Fakruddin v. Shaik Mohammad Hasan and another AIR 2006 AP 48-52.
\textsuperscript{73} (1992) 3 SCC 666.
Captivation fee makes the availability of education beyond the reach of poor. The right to education is concomitant to the fundamental rights enshrined under Part III of the Constitution. The fundamental right to speech and expression can not be fully enjoyed unless a citizen is educated and conscious of his individualistic dignity. The education in India has never been a commodity for sale.

In *Uni Krishna v. State of A.P.*\textsuperscript{74} The Supreme Court was asked to examine the correctness of the decision given by the Court in Mohini Jain's case. The petitioners running Medical and Engineering Colleges in the State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contended that if *Mohini Jain decision* is correct and followed by the respective State Government they will have to close down their colleges. The five judge bench by 3-2 majority partly agreed with the *Mohini Jain decision* and held that right to education is a fundamental right under Article 21 of the Constitution as 'it directly flows' from right to life. But as regards its content the court partly overruled, the *Mohini Jain's case*, and held that the right to free education is available only to children until they complete the age of 14 years, but after that the obligation of the state to provide education is subject to the limits of its economic capacity and development. The obligations created by Articles 41, 45 and 46 can be discharged by the State either establishing its own institutions or by aiding, recognizing or granting affiliation to private institution. Private education institutions are necessity in the present day context. *Mohini Jain's case* was not right in holding that charging of any amount must be described as captivation fee. Saying so amounts to imposing an impossible condition. It is not possible for the private educational institutions to survive if they charge fee prescribed by government institutions. The private sector should be involved and encouraged in the field of education. But they must be allowed to do so under strict regulatory controls in order to prevent private educational institutions from commercializing 'education. The charging of the permitted

\textsuperscript{74} (1993) 1 SCC 645.
fees by the private educational institutions which is bound to be higher than charged by in similar government institutions cannot itself be characterized as captivation fee.

Article 21 of the Constitution of India, has been interpreted that every child under age of 14 years has a right of basic education.\(^{75}\) In *Bandhuwa Mukti Morcha v. Union of India and others*,\(^{76}\) it has been held that it is the solemn duty of the State to provide basic education to the children also working in different industries or factories and the Court directed the Government to take such steps and evolve scheme assuring education to all children either by the industry itself or in coordination with it. In *Gaurav Jain v. Union of India*,\(^ {77}\) the Apex court has held that State has to provide education to the children born to prostitutes. The Court further issued various directions to protect said children from exploitation and bring them into the main stream of life by educating them.

As far back as 1957, it has been held by the Supreme Court in the case of *Stale of Bombay v. R. M. D. Chamarbaugwala*,\(^ {78}\) that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of *Unni Krishnan, J.P v. State of A.P.*,\(^ {79}\) looking to the above ground realities, this Court formulated a self-financing mechanism/ scheme under which institutions were entitled to admit 50% students of their choice as they were self financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory

\(^{75}\) *Unni Krishnan v. State of AP* AIR 1993 SC 2178.
\(^{76}\) (1991) 4 SCC 177.
\(^{77}\) AIR 1997 SC 3021.
\(^{78}\) AIR 1957 SC 699.
authorities including Medical Council of India, University Grants Commission etc. were directed to make end or amend regulations so as to bring them on par with the said Scheme. In the case of *TMA Pai Foundation v. State of Karnataka*, the said scheme formulated by this Court in the case of *Unni Krishnan* was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue shortfalls making it difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in *Unni Krishnan's case* were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. *TMA Pai Foundation's case* for the first time brought into existence the concept of education as an “occupation,” a term used in Article 19(1)(g) of the Constitution. It was held by majority that Article 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of Clause (6) thereof. Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which *inter alia* may be framed having regard to public interest and national interest. In the said judgment, it was observed para 56 that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering was held to be forbidden. Subject to the above two prohibitory parameters, the

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Supreme Court in *TMA Pai Foundation's case* held that fees to be charged by the unaided educational institutions cannot be regulated.

The judgment in *TMA Pai Foundation's case* was delivered on 31-10-2002. The Union of India, State Government and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several Courts. Under the circumstances, a Bench of five-Judges was constituted in the case of *Islamic Academy of Education v. State of Karnataka*, so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned determination of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of Union of India, State Governments and some of the students, it was submitted, that the right to set up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish sufficient number of educational institutions and consequently the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in *TMA Pai Foundation's case*. In view of rival submissions, four questions were formulated. We are concerned with first question, namely, whether the educational institutions are entitled to fix

their own fee structure. It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff future plans for expansion and or betterment of institution subject to two restrictions, namely, non-profiteering and non-charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up Committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

In *Modern School v. Union of India*, the Supreme Court has held the right of education further means that a citizen has a right to call upon the state to provide educational facilities within the limits of its economic capacity and development. As the Government has neither resources nor the ability to provide for the same, the legislature has permitted the societies or trusts to start educational institution from the savings made by them from the unaided institutions. Though there is no fundamental right in respect of secondary education. Education is part of human development therefore; indisputably it is a human right.

**Article: 39 (d),** "the State has to ensure that there is equal pay for equal work for both men and women."

82. AIR 2004 SC 2236, 2004 AIR SCW2698.
Parliament has enacted the Equal Remuneration Act 1976 to implement Article 39(d). The Act provides for payment of equal remuneration to men and women workers for the same work, or work of a similar nature and for the prevention of discrimination on ground of sex. The Act also ensures that there will be no discrimination against recruitment of women and provides for the setting up of advisory committee to provides employment opportunities for women. Provisions are also made for appointment of officers for hearing and deciding complaints regarding contravention of the provisions of the Act. Inspectors are to be appointed for the purpose of investigation whether the provision if the Act are being complied by the employer. Non-observance of the act by government contractors has been held to raise question under Article 14.83

Beside the principle of gender equality in the matter specifically embodied in Article 39 (d) the Supreme Court has extracted the general principle of equal pay for equal work by reading Article 14, 16, and 39 (d).84 The Supreme Court has emphasized in Randhir Singh referring to Article 39 (d) that the principles of “equal pay for equal work” is not an abstract doctrine but one of substance. Though the principle is not expressly declared by the Constitution to be a Fundamental Right yet it may be deduced by construing Article 14 and 16 in the light of Article 39 (d). The word ‘socialist’ in the preamble must at least mean “equal pay for equal work.” The Supreme Court has observed in Grin kalian Kendra v. union of India 85

“Equal pay for equal work is not expressly declared by the Constitution as a Fundamental Right but in view of the Directive Principles of State policy as contained in Article 39 (d) of the Constitution “Equal pay for equal work” has assumed the States of Fundamental Right in service Jurisprudence having

83 People’s Union for Democratic Rights v. Union of India. AIR 1982 SC 1473.
84 Randhir Singh v. Union of India AIR 1982 SC 879.
85 AIR 1991 SC 1173.
regards to the constitutional mandate of equality in Article 14 and 16 of the Constitution.

The principle of “equal pay for equal work” may properly be applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing different scales of pay do identical work under the same employer.

The Supreme Court has explained the general principles as follows.\(^{86}\)

“We have interpreted and applied the doctrine even more widely to present discriminatory pay scales with in an organization which is owned by or is an instrumentality of the state, provided that the different pay scales exist in one organization are applied to employees doing work of equal value, and there is no rational explanation for the difference.”

As to applying the doctrine between two different organizations the court has warned.\(^{87}\)

When the same principle is sought to be extended, to compare pay scales in one organization with pay scales in other organization although employees doing comparable work, the stretching of the doctrine. If at all it is done must be done with caution lest the doctrine snaps.

The court has held that differentiation in pay scales among government servants holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation.\(^{88}\) As the principle of equal pay for equal work emerges out of a combined reading of Article 14, 16 and 39 (d), when ever a
question of infraction of this rule arises, the concept of reasonable classification
and all other rules evolved with respect of Article 14, and 16 come into play.89

Article 42

"Requires the State to make provisions for securing just and humane
conditions of work and for maternity relief."

Article 42 provides the basis of the large body of Labour law that
obtains in India. Referring to Article 42 and 43, the Supreme Court has
emphasized that the Constitution expresses a deep concern for the welfare of
the workers. The courts may not enforce Directive Principle as such, but they
must interpret law so as to further and not hinder the goals set out in the

In D.B.M. Patnaik v. State of Andhra Pradesh90 the Supreme Court has
suggested that Article 42 may ‘benevolently’ be extended to living conditions
in Jails the barbarous and subtle forms of punishment to which convicts and
under trials are subjected to offend against the letter and spirit of our
Constitution. By reading Article 21 along with several directive principles,
such as Article 39 (d) and (f), 41 and 42, the Supreme Court has given a very
broad Connotation to Article 21 so as to include therein “the right to live with
human dignity.” This concept “derives its life breath from the Directive
Principle of State Policy.

Women and Protective Labour Legislation

In the sphere of labour and industrial laws we have several protective
legislations particularly meant for the benefit of the women workers. Besides,
we also have specific provisions in certain other labour legislations for the
women working in the field. The Constitution of India, guarantees equal

90. AIR 1974 SC 2092
protection of all and contain provisions debarring discrimination against women in order to protect the interest of the women workers. We have committed to secure to all its citizens economic, social and cultural justice along with equality of status and opportunity. So women enjoy the same status and are treated equally along with their male counterparts. In the international sphere we also have international documents raising concern for the women workers particularly those working in the industrial sector which calls upon the states to take all precautionary and protection measures for their benefit. Thus, respecting the sentiments of national provisions and international documents we have several legislations, protective measures in other allied laws taking into considerations the health and other beneficial aspects of women workers working in various labour fields. We have Equal Remuneration Act, 1976, providing equal remuneration for men and women working in the same field and doing the same job, Maternity Benefit Act, 1961, a beneficial legislation to regulate the employment of women working in certain establishments for certain periods before and after the birth of a child and providing maternity and other benefits. The Employees State Insurance Act, 1948 and Regulations made consequently also provide for extending maternity benefits to the women workers. Besides we also have specific provisions in the Factories Act, 1948 and Mines Act, 1952 for the safety and benefit of women workers.

**Equal Pay for equal work**

Article 39 of the Indian Constitution specifically dealing with equal pay for equal works directs all the states to secure equal pay for equal work for both men and women. This has been meant to serve the purpose of women workers who are placed in a similar position and discharging similar duties but getting

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93. Act No 34 of 1948.  
94. Employees State Insurance (General) Regulation 1950.  
95. Act No 34 of 1948.  
96. Act No 35 of 1952.
differential treatment as regards the scale of pay is concerned. To remove this disparity while respecting the constitutional provisions, the Government enacted the “Equal Remuneration Act, 1976”\textsuperscript{97} to provide equal remuneration to men and women thereby preventing discrimination in employment basing on the grounds of sex.

**Equal Remuneration Act, 1976**

It is of interests to note that the principle of equal pay for equal work was not accepted in India even in large scale organized industries and considerable differences existed between the wages and earnings of men and women before the enactment of the Equal remuneration Act, 1976. That is the reason this Act is made to have an overriding effect superseding all laws, contracts, and awards making discrimination of women employees when the work is equal.

The Equal Remuneration Act, 1976, applies to an extensive range of classes of employment listed in the schedule, which include the formal sector provisions of the Equal Remuneration Act, 1976, have been extended to plantation, agriculture, mine and construction industry.

This Act also imposes duty upon the contractor to ensure equal pay for equal work irrespective of sex.\textsuperscript{98} Under the Equal Remuneration Act, 1976 an obligation is imposed upon the employer not to pay any worker employed in his establishment remuneration less favourable than those at which remuneration is paid by him to workers of the opposite sex in such an establishment for performing the same work of a similar nature.\textsuperscript{99}

The term ‘same work’ or work of a similar nature\textsuperscript{100} means work in respect of which skill efforts, and responsibility required are the same, when

\begin{itemize}
  \item \textsuperscript{97} Supra Note 91.
  \item \textsuperscript{98} Section 16 (b).
  \item \textsuperscript{99} Section 4 of Equal Remuneration Act, 1976.
  \item \textsuperscript{100} Section 2(h) of Equal Remuneration Act 1976.
\end{itemize}
performed under similar working conditions by a man or a woman and the
difference, if any, between the skill efforts, and responsibility required of a
man and those required of a woman are not of practical importance in relation
to the terms and conditions of employment. Admittedly, Equal Remuneration
Act 1976 was the first step in recognition that a woman’s economic worth and
their work in the economy was not less that of men. It is important to note that
the concept of equal pay for equal work will have validity only if a woman is
employed on like work with man and her work is of the same or similar nature.

It is essential that comprehensive schemes for Job evaluation as also
suggested by Supreme Court be introduced. By this, Jobs are assessed
according to the skill, efforts, and responsibility involved and consequently
awarded wages. Achieving pay equality requires comparing and establishing
the relative value of two jobs that differ in content buy breaking jobs down into
components or ‘factors’ and ‘sub-factors’ and assigning point to them. In
relation to analytical job evaluation methods, such factors generally include
skills, qualifications, responsibility efforts and working conditions. Two jobs
that are found to have same numerical value are entitled to equal remuneration.

Job evaluation is concerned with the content of job and not with the
characteristic or the performance of the persons doing the job.

As women and men tend to perform different jobs, in order to eliminate
wage discrimination on the basis of sex it is vital to establish appropriate
techniques and procedures to measure the relative value of jobs with varying
content. This application of this concept has come to be known as ‘comparable
worth’ could be defined under section 2 of the equal remuneration Act, 1976,
as work in which the level of skill, efforts and responsibility required are of
equal worth to the employer regardless of whether the work involves task of
similar or different nature.\footnote{Nomita Agarwal, Women and the Law, Delhi, New Century publication, 135 (2002).}
The concept of comparable worth had been introduced in the United States of America but there is a difficulty as regards its definition on what constitutes worth. Some define it in terms of skill, efforts and responsibility while others define it in terms of the value of the work to an employer or society at large.

The Act which is applicable to various establishments as provided in the Act lays down that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act, or in any instrument having effect under any law for the time being in force.\(^{102}\)

**Duty of the Employer to Pay Equal Remuneration**

Section 4 of the Act provides that it is the duty of the employer to pay equal remuneration to the workers, both male and female being employed by him in any establishment or employment for performing the same work or work of a similar nature. The section further provides that if there was existence of different pay structure for the same work or work of a similar nature only on the ground of sex, before the commencement of this Act, the higher structure should be payable to both men and women from the date of the commencement of the Act.

**Prohibition of Discrimination in Recruitment**

The Act stipulates that there should be no discrimination regarding the recruitment against any women as contained in Section 5 of the Act. This Section says that no employer shall, while making recruitment for same work or the work of similar nature or in any condition of service subsequent to recruitment such as promotions, training of transfer, make an discrimination

\(^{102}\) Equal Remuneration Act, 1976, Section 03.
against women except where the employment of women such work is prohibited or restricted by or under any law for the being in force.

Advisory Committee

The Act also provides appointment of an Advisory Committee consisting of at least ten persons (half of which should be women) to advise the Government on the matters relating to the employment of women in any establishment or employment. The said Committee is to regulate its own procedure and while tendering its advice, the Committee shall have regard to the number of women employed in the concerned establishment or employment, the nature of work, hours of work, suitability of women for employment, as the case may be, the need for providing increasing employment and such relevant factors as the Committee may think fit.

Besides appointing an Advisory Committee, the Government may also appoint authorities (not below the rank of a Labour Officer) for hearing and deciding complaints regarding the construction of any provision of the Act and claims arising out of non-payment of wages as equal to men and women workers for the same work or the work of a similar nature and may define the local limits whiting which each such authority shall exercise its jurisdiction. The authority receiving a complaint or claim, and after giving the applicant and employer an opportunity of being heard and after such enquiry, if it considers necessary it may direct the employer to settle the claims of the employee regarding non-payment of wages at equal rate and see that there is no contravention of any provisions of the Act.

103. Ibid., Section 06.
104. Ibid.
105. Ibid., Section 07.
Maintenance of Register and Documents

Section 8 of the Act makes it obligatory on the part of the employers to maintain certain prescribed registers and other documents in relation to the workers employed by him. Besides, the Government may by notifications appoint any such person as it thinks fit as Inspectors for the purpose of making investigation as to whether the provisions of this Act, or the Rules made there under are being complied with by employers. For this purpose, the Inspector may enter any building factory etc. at any "reasonable time, require any person to produce the register and other documents relating to the employment of workers, take on the spot verifications, examine the employer or his agent or servant and take copies of any of the registers or documents.106

Offences and Penalties

Section 10 of the Act provides for the penalties for violating the provisions of the Act. The Section says-

(1) If any employer being required by or under the Act, so to do-

(a) Omits or fails to maintain any register or other document in relation to workers employed by him; or

(b) Omits or fails to produce any register, muster roll or other document relating to the employment of workers; or

(c) Omits or refuses to give any evidence or prevents his agent, servant or any other person in charge of the establishment, or any workers from giving evidence; or

106. Ibid., Section 09.
(d) Omits or refuses to give any information, he shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both.

(2) If any employer;

(a) Makes any recruitment in contravention of the provisions of this Act; or
(b) Makes any payment or remuneration at unequal rates to men and women workers, for the same work or work of similar nature; or
(c) Makes any discrimination between men and women workers in contravention of the provisions of the Act; or
(d) Omits or fails to carry out any direction made by the appropriate Government under Section 6 (5), he shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with imprisonment for a term which shall not be less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.

(3) If any person being required so to do, omits or refuses to produce to an Inspector any register or document or to give any information, he shall be punishable with fine which may extend to five hundred rupees.

Section 11 of the Act relates to the offences committed by companies which says that if any person at the time of the offence, was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and punished accordingly, but such person win be excluded of the offence, if he proves that the offence was committed without his knowledge or he has taken all due diligence to prevent the commission of
the offence. Also where the offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company such persons shall be deemed to be guilty of that offence and are liable to be proceeded against and punished accordingly. Cognizance of Offence: Section 12 of the Act provides "no Court inferior to that of a Metropolitan Magistrate or a Magistrate of the First Class shall try any offence punishable under this Act. Such a Court may take cognizance of an offence either upon its own knowledge or a complaint made by the appropriate Government or an officer authorized by it in this behalf or a complaint made by the aggrieved person or by a recognized welfare institution or organization.

Thus trying to fulfill the constitutional obligation of providing equal remuneration to men and women, this Act has been enacted by making specific provisions and also providing for appointment of authorities to see that the principles and provisions of the Act are strictly adhered to violation of which will attract punishment for imprisonment and fine.

Maternity Benefit Act, 1961

To fulfill the constitutional obligation as provided in Article 42 which speaks that the state is to make provisions for securing just and humane conditions of work and for maternity benefit, the Maternity Benefit Act, 1961 was enacted. The Act aims at "to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for maternity benefit and certain other benefits". The Act which has been amended several times applies to "every establishment being a factory, mine or plantation including any such establishment

107. Ibid., Section 11 (1).
108. Ibid., Section 11 (2).
109. Supra Note 92.
belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances. Further the Act applies to "every shop or establishment within the meaning of any law for the time being in force in relation to shops an establishments in a state, in which ten or more persons are employed or were employed, on any day of the preceding twelve months. The State Government is empowered to apply the provisions of this Act to any other establishment, industrial, commercial, agricultural or otherwise by giving a notice of not less than two months with the approval of the Central Government.

Prohibition of Employment or work by women for certain period

Section 4 of the Act prohibits employment of or work by women for certain periods. As per the provision of this Section no woman will be employed by any employer knowingly nor will she work in any establishment during the six weeks immediately following the day of her delivery or miscarriage or medical termination of pregnancy. The Section further provides that no pregnant woman be required to work which is of an arduous nature or which involves long hours of standing or which in any way is likely to interfere with her pregnancy or the normal development of the fetus or is likely to cause her miscarriage or otherwise to adversely affect her health, during the period of one month immediately preceding the period of six weeks, before the date of her expected delivery or during the said period of six weeks for which the pregnant woman does not avail of leave of absence.

110. Maternity Benefit Act, 1961, Section 2 (1) (9).
111. Ibid., Section 2 (1) (b).
Entitlement as to maternity benefit

Every woman is entitled to maternity benefit and her employer is liable to extend such benefit at the rate of the average daily wages for the period of her actual absence only when she has actually worked in an establishment of the employer from whom she claims maternity benefit for a period of not less than eighty days on the twelve months immediately preceding the date of her expected delivery and the maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which maximum six weeks shall precede the date of her expected delivery.\(^{112}\)

In case of the death of the woman during the above mentioned period of twelve weeks, maternity benefit will be payable only for the days up to and including the day of her death. If the woman dies during or after her delivery leaving behind the child, the employer is liable to pay the maternity benefit for the entire period but if the child also dies during the said period the employer is liable to pay the benefit only for the days up to including the date of the death of the child.\(^{113}\)

Procedure for claiming maternity benefit

Any woman employed in any establishment who is entitled to maternity benefit should apply to the employer in the prescribed format by giving a notice in writing stating details of her maternity benefit and any other amount to which she may be entitled which may be paid to her or her nominated person and also stating that she will not work in any establishment during the period she receives maternity benefit. The pregnant woman shall state the date of her absent from work and such date

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112. Maternity Benefit Act, 1961 Section 05.
113. Ibid.
should not be a date earlier than six weeks from the date of expected delivery.\textsuperscript{114}

The concerned woman can give a notice as soon as possible after the delivery if she has not given the notice earlier and on receiving the notice the employer permits such woman to remain absent from work during the period she receives maternity benefit.\textsuperscript{115}

The employer is liable to pay in advance the amount of maternity benefit for the period preceding the date of her expected delivery on production of such proof showing that the woman is pregnant and the amount due for the subsequent period shall be paid by the employer within forty eight hours of the delivery of the child on the production of proof that the woman has delivered the child.\textsuperscript{116}

Besides the maternity benefit, the Act also provides for certain the benefits to a pregnant woman, which are enumerated below.

(i) \textit{Medical Bonus} - Every woman who is entitled to maternity benefit under this Act is also entitled to receive from her employer a medical bonus of two hundred fifty rupees in case the employer does not provide pre-natal confinement and post natal care free of cost.\textsuperscript{117}

(ii) \textit{Leave for miscarriage etc.} In case of a miscarriage or medical termination of pregnancy, the concerned woman on production of such proof as may be prescribed is entitled to leave with wages at the rate of maternity benefit for a period of six week immediately following the day of miscarriage or medical termination of pregnancy as the case may be.\textsuperscript{118}

\textsuperscript{114} Ibid., Section 6 (1) and (2).
\textsuperscript{115} Ibid., Section 6 (3) and (4).
\textsuperscript{116} Ibid., Section 6 (5).
\textsuperscript{117} Ibid., Section 08.
\textsuperscript{118} Ibid., Section 09.
(iii) **Leave with wages for tubectomy operation** - On production of such proof as may be prescribed relating to a tubectomy operation, the woman will be entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of such operation.\(^\text{119}\)

(iv) **Leave for illness arising out of pregnancy etc.** - If a woman suffers from illness arising out of pregnancy, delivery, pre-mature birth of a child or miscarriage, medical termination of pregnancy or tubectomy operation shall be entitled in addition to period of absence as mentioned above to leave with wages at the rate of maternity benefit for a period of one month maximum on production of such proof as may be required.\(^\text{120}\)

(v) **Nursing breaks** - Every woman who returns to duty after delivering a child is entitled to two breaks in the course of her daily work in addition to the regular intervals of rest allowed to her for nursing the child until the child attains the age of fifteen months.\(^\text{121}\)

(vi) **Dismissal during absence or pregnancy** - Where a woman absents her from work in accordance with the provisions of this Act, her employer cannot discharge or dismiss her during or on account of such absence. No notice shall also be served on her stating such discharge or dismissal. If such a discharge or dismissal takes place during the period of her pregnancy, such discharge or dismissal will have no effect on. Her maternity benefit or medical bonus or both.\(^\text{122}\)

(vii) **No deduction of wages in certain cases** - Where a woman who is entitled to maternity benefit is assigned a job which should not be arduous in nature or which may affect her pregnancy etc. and who gets a break for nursing the child in addition to the regular interval of rest,

\(^\text{119. Ibid., Section 9-A inserted by section 5 of the maternity Benefit (Amendment) Act 1995.}\)
\(^\text{120. Ibid., Section 10.}\)
\(^\text{121. Ibid., Section 11.}\)
\(^\text{122. Ibid., Section 12.}\)
is entitled to receive her normal and usual daily wages and no
deduction can be made from such wages because of concession
allowed to such women.\textsuperscript{123}

Appointment of Inspector and his powers: The Act provides for the
appointment of Inspectors by the appropriate Government and prescribe
limits of the jurisdiction for such Inspector to exercise the powers and
functions assigned to them\textsuperscript{124} and every Inspector so appointed shall be
deemed to be a public servant within the meaning of Section 21 of the
Indian Penal Code, 1860;\textsuperscript{125} The Inspector is empowered to enquire
and on his own or receiving a complaint from a woman worker
regarding non-payment of maternity benefit or any other amount to
which she is entitled after enquiry on being satisfied the inspector may
direct the payment be made in accordance with his orders. Regarding
complaints relating to discharge or dismissal during or on account of
her absence from work order may be passed which should be just and
proper according to the circumstances of the case.\textsuperscript{126}

\section*{Forfeiture of maternity benefits}

If a woman works in any establishment after she has been permitted
by her employer to absent herself from work for any period during such
authorized absence she shall forfeit her claim to maternity benefit for such
period.\textsuperscript{127}

\section*{Penal Provisions}

If any employer fails to pay any amount of maternity benefit to a
woman under this Act or discharges, dismisses such woman during or on

\begin{flushright}
\textsuperscript{123} Ibid., Section 13. \\
\textsuperscript{124} Ibid., Section 14. \\
\textsuperscript{125} Ibid., Section 16. \\
\textsuperscript{126} Ibid., Section 17. \\
\textsuperscript{127} Ibid., Section 18. \\
\end{flushright}
account of her absence from work in accordance with the provisions of this Act, he shall be punishable with imprisonment for a period not less than three months which can be extended to one year and with a fine ranging from two thousand rupees to five thousands rupees. Further, on contravention of any of the provisions of the Act will attract a punishment of imprisonment extended to one year and a fine up to five thousand rupees or both for the employer.

When, the contravention relates to the maternity benefit and any other amount and such benefit or amount has not been recovered the Court in addition to the penalty recover such benefit or amount as if it were a fine and pay the same to the person entitled there to. Where, the Inspectors appointed by the Government are obstructed by the employers from exercising their power conferred on them, concerned employers will be liable to be punished with imprisonment which may extend to one year or with a fine extending up to five thousand rupees or with both.

Cognizance of offence

A Magistrate of the First Class or a Metropolitan Magistrate, as the case may be are empowered to try an offence under this Act. Hence, any aggrieved woman, or on her behalf any office bearer of a registered Trade Union of which she is a member or any registered voluntary organization may file a complaint regarding the commission of an offence before the Court mentioned above. No, such complaint will be entertained after the expiry of one year of the alleged commission of offence.

128. Ibid., Section 21 (1).
129. Ibid., Section 21 (2).
130. Ibid.,
131. Ibid., Section 22.
132. Ibid., Section 23.
Chapter III

The Factories Act, 1948

Several sections of the Factories Act, 1948 specifically deal with welfare measures that are to be provided to women workers. The relevant provisions are as follows:

Latrines and Urinals - Section 19 (1) of the Act provides that in every factory -

(a) Sufficient latrine and urinal accommodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at the factory;
(b) separate enclosed accommodation shall be provided for male and female workers;
(c) Such accommodation shall be adequately lighted and ventilated, and no latrine or urinal shall, unless specially exempted in writing by the Chief Inspector, communicate with any workroom except through an intervening open space or ventilated passage;
(d) All such accommodation shall be maintained in a clean and sanitary condition at all times;
(e) sweepers shall be employed whose primary duty would be to keep clean latrines, urinals and washing places.

Work on or near machinery in motion - The Act provides that no woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, fabricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.\(^{133}\)

Creches - Section 48 of the Act provides that in every factory where more than thirty women workers are ordinarily employed, they should be

\(^{133}\) The Factories Act, 1948, Section 22 (2).
provided with suitable rooms for use of their children below six years of age. Such rooms which should be adequately sighted and ventilated shall provide accommodation and should be maintained in a clean and sanitary condition and should be under the charge of a woman who is adequately trained in the care of children and infants. Further, the section provides that the State Government may make rules.

(a) Prescribing the location and the standards in respect of construction, accommodation, furniture and other equipment of rooms to be provided under this section;
(b) Requiring the provision in factories to which this section applies of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;
(c) Requiring the provision in any factor of free milk or refreshment or both for such children;
(d) Requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.\textsuperscript{134}

Further Restrictions on employment of women

Section 66 (1) of the Act imposes certain other restrictions which should be supplemented to the already existing provisions. These are (a) no exemption from the provisions of Section 54 may be granted in respect of any women and (b) no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M. The State Government may by notification in the official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in Clause (b), but no such variation shall authorize the employment of any woman between the hours of 10 A.M and 5 P.M. (c) there shall be no charge of shifts except

\textsuperscript{134. Ibid., Section 48 (3).}
after a weekly holiday or any other. Further it is provided that the State Government may make rules providing for the exemption from the restrictions set out in Subsection (1) to such extent and subject to such conditions as it may prescribe, of women working in fish-curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material\textsuperscript{135} and such rules made under Sub-section (2) shall remain in force for not more three years at a time.\textsuperscript{136}

**Prohibition of employment of women in dangerous operations:**

Lection 87 of the Act provides that where the State Government is of opinion that any manufacturing process or operation carried on in a factory exposes any person employed it to a serious risk of bodily injury, poisoning or disease, it may make rules applicable any factory or class or description of factories in which the manufacturing process or operation is carried on, prohibiting or restricting the employment of women, adolescents or children in the manufacturing process or operation.

**The Employees' State Insurance Act, 1948**

Section 50 of the Employee's State Insurance Act, 1948 which deals with maternity benefit provides that "the qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period there of shall be such as may be prescribed by the Central Government.

**The Employees' State Insurance (General) Regulations, 1950**

Provisions for maternity benefit are being laid down under Regulations 87 to 94 to which an insured woman is entitled for. The Regulations are-

\textsuperscript{135} Ibid., Section 66 (2).
\textsuperscript{136} Ibid., Section 66 (3).
Notice of Pregnancy Regulation 87 provides that an insured woman, who decides to give notice of pregnancy before confinement, shall give such notice in Form 19 to the appropriate local office by post or otherwise and shall submit, together with such notice, a certificate of pregnancy in Form 20 given in accordance with these Regulations on a date not earlier than seven days before the date on which such notice is given.

**Claim for maternity benefit commencing before confinement**

As per Regulation 88, every insured woman claiming maternity benefit before confinement shall submit to the appropriate Local Officer by post or otherwise;

(i) a certificate of expected confinement in Form 21 given in accordance with these Regulations, no earlier than fifteen days before the expected date of confinement;

(ii) a claim for maternity benefit in Form 22 stating therein the date on which she ceased or will cease to work for remuneration; and

(iii) within thirty days of the date on which her confinement takes place, a certificate of confinement in form 23 given in accordance with these Regulations.

**Claim for maternity benefit only after confinement or for miscarriage**

Regulation 89 says that every insured woman claiming maternity benefit for miscarriage shall within 30 days of the date of the miscarriage, and every insured woman claiming maternity benefit after confinement, shall submit the appropriate office by post or otherwise a claim for maternity benefit in Form 22 together with a certificate of confinement or miscarriage in Form 23 given in accordance with these Regulations,
Claim for maternity benefit after the death of an insured woman leaving behind the child

As per the Regulation 89-A the person nominated by the deceased insured woman on Form 1 or on such other form as may be specified by the Director-General in this behalf and if there is no such nominee, the legal representative, shall submit to the appropriate office by post or otherwise a claim for maternity benefit, as may be due, in Form 24-A within 30 days of the death of the insured woman together with a death certificate in Form 24-B given in accordance with these Regulations.

Claim for Maternity Benefit in case of Sickness Arising out of Pregnancy, Confinement, Premature Birth of Child or Miscarriage

Regulation 89-B provides that (1) Every insured woman claiming maternity benefit in case of sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, shall submit to the appropriate office by post or otherwise a claim for benefit in one of the Forms [12-A, 13 and 13-A] appropriate to the circumstances of the case together with the appropriate medical certificate in Form 8, 9, 10 or 11 as the case may be given in accordance with these Regulations, (2) The provisions of Regulations 55 to 61 and 64 shall so far as may be, apply in relation to a claim submitted and certificate given in accordance with this Regulation as they apply to certification and claims under those Regulations.

Other Evidence in Lieu of a Certificate

Regulation 90 says that the Corporation may accept any other evidence in lieu of a certificate of pregnancy, expected confinement, confinement death during maternity, miscarriage or sickness arising out of pregnancy, if in its opinion, the circumstances of any particular case so justify.
Notice of Work for Remuneration

As per Regulation 91 except as provided in Regulation 89-B every insured woman who has claimed maternity benefit shall give notice in Form 24 if she does work for remuneration on any day during the period for which maternity benefit would be payable to her but for her working for remuneration.

Date of Payment of Maternity Benefit

Regulation 92 says that the maternity benefit shall be payable from the date it is claimed.

(iii) by a registered midwife who can issue certificate of pregnancy, of expected confinement or of confinement duly countersigned by the Insurance Medical officer. The Mines Act, 1952 Section 46 of the Mines Act, 1952 which speaks of employment of women lays down that

(1) No woman shall, notwithstanding anything contained in any other law, be employed -

(a) In any part of mine which is below ground;

(b) In any mine above ground except between the hours of 6 A.M. and 7 P.M.

(2) Every woman employed in a mine above ground shall be allowed an interval of not less than eleven hours between the termination of employment on any one day and the commencement of the next period of employment.

(3) Notwithstanding contained in subsection (1), the Central Government may, by notification in the Official Gazette, vary the hours of employment above ground of women in respect of any mine or class or description of mine, so, however, that no Employment of any woman between the hours of 10 PM and 5 A.M. is permitted thereby.