8.1 Conclusions

Rights are ‘claims and entitlements’ that entail development to every right-holder and are often explained by reference to values such as dignity and justice that are closely related to wellbeing of the individuals and society. Rights not only promote well-being of the individuals that is necessary to live fully with dignity but also bring about necessary social change as they are linked with the pursuit of collective good. Further, rights provide a basis for challenging the boundaries of the political authority which in turn allows one to comprehend legitimacy of State’s actions and inactions. Therefore, rights work as a protection against tyranny and the value of rights lies in its utility and influence factor. One can receive rights by either custom or contract, alternatively by national or international law, or because of being human. Whether natural, statutory, moral, or human right, all kinds of rights are important to humankind. Rights are always evolving and are rule-protected interests. Enforcement of rights depends upon the legal system. Rights are not absolute by nature as they could be subjected to restrictions imposed from the point of view of larger community interests.

As highlighted in Chapter II, there are many approaches concerning rights, which emerged from different circumstances and times. This would suggest that concept of rights is associated with historical, social, economic and political contexts. From natural law and natural rights to social contract theory point out that the scope and content of rights varied from time to time. Despite the utility of rights and its relevance, it is observed that there were some arguments advanced against them. Indeed, Karl Marx had argued that civil rights provide for a deeper social division. Similarly, another argument pointed out that rights only reinforce artificial social divisions between the social and the political, the public and the private accounting for the real bases of inequality. Therefore, there were many who believed that the language of rights could do harm than good. Theory of rights is said to be non-conclusive as there is no unified theory that can accommodate the different uses of the term ‘rights’. In spite of these arguments, in

1 Supra, Chapter II, pp. 38-48.
reality, rights do hold their utility and relevance. On the contrary, as highlighted in Chapter II,\(^2\) regardless of benevolence and emancipation that rights could offer to individuals they were subjugated to certain despotic regimes. During the Feudal order, State was focussed on military expeditions at the cost of neglecting affairs of society. Later, when the Third World and dependent countries celebrated the downfall of colonialism, it resulted in the practice of internal oppression as the countries that became independent grew into sovereignty conscious, and as a result, they were unwilling to accept any limitation including human rights that is viewed as limitations upon the State’s powers. Instead, the Governments started to supress rights movements. Oppressive rulership was mostly found in all parts of the Third World. This apart, the existence of total one-party governmental control also resulted in imposition of party ideals on the individuals that resulted in the elimination of free choice and individuality. Therefore, totalitarian society often employed tyrannical measures including use of force affecting individual freedom. Thus, freedom in totalitarian society was considered an illusion as totalitarianism denies the fundamental conditions of human existence. This would highlight the fact that totalitarian regimes did not believe in protection of basic rights of the people. Indeed, during this time, indigenous people were the most neglected and they only continued to enjoy the status of being vulnerable section of the population.

The seventeenth and eighteenth centuries had witnessed the development of nation-States under the authorities of absolute monarchs who used to grant privileges to the larger wealthy class that used to help the Governments. This would suggest that national Government could have provided differential treatment of people. On a global note, the desire of nation-States to expand their powers and territories resulted in fighting of many Wars, including the World Wars. In India, the British rule had provided for a unique mixture of good and the bad floors for rights of the individuals. The English laws were made applicable to Indians to determine their rights and liabilities. Simultaneously, either under the authorisation of the British or by being independent, the Moghul rulers and Hindu rulers exercised control over different parts of India. This would suggest that rights of the individuals had to depend upon the administrative norms of the then rulers. In each regime, the individual rights were regarded as non-absolute. During India’s

independence movement, the British had handled the freedom fighters brutally. Indeed, to do so, many laws were enacted which authorised deprivation of personal liberty and life of the individuals in the excuse of preventive detention and execution of rebels. This apart, the occurrences of communal riots and clashes between the Hindus and Muslims demanding for a separation caused sufferings to the innocent individuals.

These observations concerning the impact of despotic regimes on rights of the individuals would highlight that the authoritarianism, dictatorship, aristocracy and totalitarian form of Government primarily resulted in poor protection to individuals’ rights. Larger community interests came in the way of promotion, protection, and enjoyment of rights. However, people became serious about the need to protect their rights and even to put an end to such despotic regimes by resorting to engage in rights movements, demanded for governance by the Rule of Law. This idea was supported by few developments. For instance, in the sixteenth and early seventeenth centuries, the fall of the feudal order provided strength to the idea of equality. This in turn gave strength to the emergence of a new thinking around the theory that man has inherent and inalienable freedoms that nobody could take away. Therefore, the next objective was to establish constitutionalism and to recognise, protect and promote the idea of human rights.

Internationalisation of the human rights was chosen as the ideal path to empower all individuals by which they could lead their lives with dignity. Subsequently, many socio-political struggles were carried out against the then prevailing injustices in the forms of slavery, racism, patriarchy, and colonialism. In addition, socialist-labour movements and the free religion movements were also formed to be part of the promises of the American and the French revolutionary era. Thereafter, popular mass demands by the marginalised groups aided in giving content to the post-war human rights movement. Slowly the human rights movement that had begun in post-war Europe continued to spread its arms in such a way that human rights established itself as the minimum moral obligations for the States and individuals to respect. Development of human rights norms in the form of various international charters and conventions led to the creation of international human rights standards and laws. To supplement and strengthen human rights protection, several regional and national human rights protection systems were established.
It is well accepted that universalisation of human rights was a priority for the international world order in the backdrop of World Wars. The international community headed by the Allies wanted to create an international organisation to prevent aggressions and thereby to achieve international peace and cooperation. Accordingly, the United Nations Organisations was formed with a mandate of maintain international peace and security and to promote universal respect for human rights for all without discrimination. Though, the process of preparing the list of human rights formally commenced with the Universal Declaration of Human Rights 1948, some of the human rights contained in it were previously declared by the Habeas Corpus Act 1679, the Bill of Rights 1689, the American Declaration of Independence 1776 and the Constitution of the United States of America 1787, to name a few. Contemporary International Human Rights Law has evolved in stages and it commenced from the establishment of the United Nations. The Charter of the United Nations paved the way not only for integration of States, intergovernmental and non-governmental organisations but also aimed to develop those entities as the principal players in promotion and protection of human rights. The normative consolidation of International Human Rights Law was attempted by the UN successfully as it has adopted several international human rights standards such as the Universal Declaration of Human Rights 1948, the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966, among others. The Charter provisions that called for protection and promotion of human rights for all were accepted as obligations of all the members of the UN. This would suggest that the States’ claim that enforcement of human rights as a domestic subject lost its ground as protection of human rights became a subject matter of international obligation which has to be fulfilled by States on the basis of international cooperation. The human rights listed under the UDHR, 1948 functions as a common standard of achievement for all people and all nations. The next important development in the process of internationalisation of human rights occurred in the late 1960s and that continued until 1980s which witnessed adoption of regional human rights treaties and development of treaty-based human rights bodies, including, the Human Rights
Committee, the Committee on the Elimination of Racial Discrimination, the European Court on Human Rights and the Inter-American Court of Human Rights. Post 1980s and until date, the UN has been attempting to ensure States’ compliance of human rights obligations. This required the UN to constantly pursue the States to comply with human rights obligations by conducting conferences, diplomatic meetings, and even to undertake thematic studies and by resorting to special procedures that consists of individual experts, working groups and special rapporteurs to understand the difficulties of the States. The UN is also availing the services of individual experts, non-governmental organisations, and international organisations. It is admitted that universalisation of human right is a gradual and progressive process.

As regards to the importance, nature, and concept of human rights, it is imperative to note that human rights address who we were or who we are as human beings. Human rights are essential rights of men and women that are non-negotiable and inalienable. Human rights are believed to be ethical and moral obligations of the States. Human dignity is required to everyone living today and thus it is regarded as the vertebral column of human rights. Human rights are high-priority norms and they are not dependent for their existence on recognition by any national Governments. Instead, on the contrary, they shape national policies and legislations by being a minimum moral standard for all States to incorporate and observe at all times. In addition, human rights are seen as universal standards of evaluation to the States. However, human rights are not absolute, as they are laid open to restrictions imposed by laws enacted by the States in the interest of public, security, morality, health, and to analogous larger community interests. During public emergency, States may suspend certain human rights as permitted by the relevant international human rights instrument. This would then suggest that the list of derogable rights permitted by the human rights instruments varies from one another.

Quite a few formal attempts have been made to define human rights by different thinkers emerging from different social, economic, political, and cultural backgrounds. However, it is observed that no definition of human rights is contemporary and comprehensive as human rights keep evolving at all times. In addition, different facets of rights identified as human rights are difficult enough to be captured in a single definition. Nevertheless, some of the human rights definitions can be considered as successful in
defining the essential qualities of human rights. From the definitions considered in Chapter III, the following core characteristics of human rights may be summarised. Human rights are inherent and without which one cannot live as a human being and they allow us to completely develop and use our human qualities, intelligence, talents, and conscience to satisfy spiritual or other needs. They are based on inherent dignity and worth of each human being. Human rights are “minimal rights”, which every individual has against the State, or other public authority, by virtue of his being a ‘member of the human family’. This would suggest that other considerations such as nationality, creed, sex, place of birth, age, race, and economic, social, and political status of the individuals would not be considered. Human rights are rights relating to life, liberty, equality, and dignity of the individual that inhere in every human being by virtue of his birth as a member of the human family. These rights are non-negotiable, non-alienable, and indivisible and acts as ethical norms for the treatment of individuals. Human rights neither are a gift from the State nor from the Universal Declaration of Human Rights, 1948 because they only confirm existence of human rights. Human rights are closely connected to justice, the good, and democracy, however, they are not equivalent to those references. It is believed that human rights express weighty moral concerns, which normally override other normative considerations.

As a concept, human right is associated with history, society and political contexts. It is well accepted that the theories of human rights are poly-dimensional. It is observed that in traditional religions, the term ‘human right’ as such was not used, however, studies on religions have indicated that the groundwork for human rights was found in religions. Largely, almost all the religions consider human beings as sacred and that they have absolute and inviolable worth being created by God. This would suggest that rights are inalienable by moral authority as they emerge from a divine source. With specific reference to Hindu thought, the Hindus believed that Dharma was the way in which the cosmos was maintained. This is because, the Hindu thought begins with the cosmos consequently it accepts that individuals are part of it. The modern idea of human rights was based on natural law and natural rights. Natural law theory believed that rights are in accordance with nature and therefore they are unalterable and eternal. Thomas Aquinas had pointed out that God had conferred certain immutable rights upon
individuals that were known as natural rights. Another thinker, John Locke had viewed that human beings existed in a state of nature and this would suggest that human beings were in a state of freedom, able to determine their actions. The contribution of natural rights theory is that it holds rights available to all individuals as they are bestowed by nature upon all human beings. The historic approach to human rights visions human rights as a utility of culture and environment by utilising space and time factors. This approach sees rights as the product of history.

Another theory of human rights, that is the Positivists approach, claimed that law protects all rights including human rights. Positivist philosophers rejected the idea of rights being conferred by nature. The Marxist approach to human rights, which emerged in the era of industrial revolution, claimed that in capitalist societies, human rights cannot and do not exist as human beings are not autonomous and individual rights were nothing but a bourgeois illusion. The Marxist approach was ephemeral in nature and subsequently, the expansions in natural and social sciences provided a ground for new understandings of which the Sociological school focused on development of the institutions, which has impact on human rights. Further, this school had believed that intense recognition must be given to range of human wants, human demands, and social interests as ordering of human relations through politically organised society required consideration of the same. It was also suggested by the school that people create practices and ideas concerning human rights in particular historical, social, and economic circumstances. Therefore, human rights must be understood in the light of social progression.

The next set of theories of human rights that requires mentioning is the interest theory and the will theory. According to the former approach, human right is justified only if it has aim to secure essential interests to human persons. This ideology is indeed founded on the assumption that there are certain shared essential attributes of all human beings, for instance, among others, life with capacity for development, and sociability or friendship. This would suggest that this theory rotates around identification of certain biological and social prerequisites of human beings that enable them to lead a minimally good life. The latter theory revolves around the personal autonomy of the individuals. This is because the theory believed that enjoyment of human rights is based upon the
capacity of the individuals. The next important approach to human rights is ‘Consequentialism.’ It is said to be a modern moral philosophy that embraces utilitarian theories and believes that human rights are for securing the greatest happiness to all the concerned. Jermy Bentham, one of the thinkers of this school, had believed that every human decision would be made on some calculation of pleasure and pain that in turn would mean that all political decisions must essentially be based on the same calculation, which is maximising the pleasure over pain. The critics had challenged this idea as imprecise and unrealistic. Consequently, the subsequent thinkers improvised the idea by claiming that the ultimate outcome of human rights is ‘revealed preferences’. However, it may be said that such updating too suffers from vagueness much like its predecessor.

The Social Contract theory of human rights views that in the primitive society men had no Government and no law to regulate them which resulted in hardships and oppression on the sections of the society by the powerful few. Therefore, people entered into agreement either to submit to an authority the whole or part of their freedom and rights. The said agreement also required the authority to protect life and property of everyone. This would suggest that persons’ moral or political obligations were annexed to contract to form the society in which they live. According to Thomas Hobbes, human beings’ natural longing for security, order, and self-protection guided them to enter into a contract with a competent authority to safeguard their life and property. Next important theory of human rights was based upon justice. John Rawl had claimed that rights are based on justice, as he had believed that, the principles of justice accord a way of assigning rights and duties in the basic institutions of society that could not be subject to political bargaining. In this view, the principles of justice provided for suitable distribution of the benefits and burdens of social cooperation. Rawl had further opined that each person had equal right and basic liberties compatible with a system of liberty for everyone by which he advocated for distributive justice. A divergent approach to human right is Cultural Relativism, which highlighted practices that contravene universal human rights and called for its justification on grounds of moral or cultural relativism. The Universalist approach is that human rights are universal but this is not supported by this theory, as it believes that human rights do not give recognition to the cultural diversities. This would suggest that the idea of universal human rights confronts with its
own proposition that everyone has a right to preserve cultural diversities, practice tradition, and custom. Similarly, the idea that human rights are universal is contended by feminist approach. The feminist approach to human rights contend that human rights are not gender neutral and that women were neither consulted sufficiently nor involved in the process of drafting the contents of human rights instruments. Therefore, feminists claim that women’s rights were largely ignored under the human rights instruments, which would suggest that human rights law is non-objective. These above-mentioned approaches to human rights have their own merits and demerits, however, none of the theory of human right is comprehensive to accommodate the other possible notion of human rights. Each theory of human rights has nexus with the ideology of its professor. Therefore, theories differed as to the purposes and meaning of human rights.

Regarding evolution of human rights, it would be best to describe it is to trace the instances of violence itself, as with each instance of violence that the humankind has witnessed such as World Wars, Nazi atrocities it is believed that, there was increase in the discourse on the importance of human rights. The origins of human rights can be traced to both Greek philosophy and various world religions. The roots for the protection of the rights of a man may be traced as far back as in the Babylonian Laws. However, it is well accepted that the modern conception of human rights had its origin in the philosophy of natural law. It is supposed that Hellenistic Stoicism played an important role in formation and spread of theory of natural law, whereas the Roman law allowed for existence of a natural law. It is observed that after the Middle Ages, natural law doctrines was closely associated with natural rights theory. For the idea of human rights to hold its ground, it was necessary that changes in the beliefs and practices of society to take place. It is believed that in the Age of Enlightenment, individuals came to be seen as autonomous as they were endowed by nature with certain inalienable fundamental rights that they could invoke against a Government. The Magna Carta (1215), Petition of Rights (1627), and the Bill of Rights (1688) in England, and the Declaration of the Rights of Man and Citizens (1791) adopted by the French National Assembly in 1789 after the French Revolution had also contained essential fundamental freedoms of the individuals. These rights later became elementary preconditions for an existence of human dignity. In the Middle Ages, and later during the renaissance, the decline in power of the Church
allowed the society to focus on the individuals so that their rights could flourish. During this period, the positivists claimed that essential rights of men like any other rights had to be protected by legal framework created by the Government. Consequently, the development of various human rights conventions and human rights protection mechanisms by the United Nations to fulfil its mandate of protecting and promoting human rights as proclaimed in the Charter of the United Nations, 1945 resulted in creation of a new era for human rights. The obligation of States Parties to the United Nations even resulted in enactment of domestic laws and Constitutions of States based on the model of human rights norms and standards contained in the Universal Declaration of Human Rights, 1948 and the International Covenants on Civil and Political rights and Economic, Social and Cultural rights of 1966.

Human rights are the moral rights that enjoy universal morality notwithstanding the diversity of moral and act as a minimum moral common standard of achievement comprising of universal principles, which are primarily ethical demands. This would suggest that the purpose of human rights is to secure essentials that the legal frameworks and institutions must protect because morality involves standards and ideals of behaviour that can be used as social pressure against violators of those standards. The Charter of the United Nations that called all State Parties to commit themselves to the protection and promotion of human rights did not deal with contents of human rights. Consequently, with the adoption of the Universal Declaration of Human Rights, 1948 (UDHR) a list of human rights was prepared and this list was subsequently improvised in number of human rights instruments such as the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the European Convention on Human Rights 1950 and the American Convention on Human Rights 1969.

Although internationalisation of human rights was recognised as the ideal way to give better protection to human rights, there were certain arguments raised against it. First of the argument is grounded on cultural relativism that claims that the idea of universal human rights did not only ignore cultures of few States but also compelled them to accept international human rights standards. Therefore, according to this view, the UDHR, 1948 attempts to impose Western values on all States. Besides, critics had argued
against internationalisation of human rights and acceptance of the UDHR as according to them human rights is not consistent “objective moral standards”. Indeed, according to them, the transient nature of norms of existing cultures and civilisations would not allow something to be called as objective moral standard. Another argument was raised from the perspective of sovereignty of the States because it was believed that internationalisation of human rights interfered with the sovereignty of the States as human rights are perceived to be limitation on State powers. In addition, it was argued by the critics that human rights results in individualism and makes the individuals selfish or egoistic in tendency. One more argument was raised against the expression ‘human rights’ that it is very vague and it depended upon the ideology of the interpreter. Feminists argued that International Human Rights Law ignored the specific concerns of women therefore it that was not objective.

Despite existence of the above-mentioned arguments against human rights, its internationalisation has provided for a better protection system compared to whimsical style of individual States protection to human rights. It has even transformed human rights norms as higher law principle. As a higher moral law, human rights gives the State authorities a standard of evaluation for its policies and laws because they protect a number of universally important values such as peace, diversity, freedom, identity, development and distribution of justice. Therefore, human rights are universally accepted as the fundamental moral principles for the world order. Learning from the distresses such as wars and authoritative regimes, international community decided to create and develop legal frameworks providing for protection and promotion of human rights. This required international cooperation, maintenance of international peace and order, giving recognition to human rights and for this purpose the UN was created, which since its establishment has been playing an instrumental role in not only developing human rights norms and standards but also in ensuring that States Parties observe them. The UN has taken the lead role in promoting ‘culture of human rights’ by working through its principal organs, namely, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and a Secretariat and their subsidiary organs. Each of these organs either directly or indirectly works on the UN’s mandate of promotion and protection of human rights. The UN
monitors discharge of human rights obligations by the State Parties. For this purpose, it has developed different human rights protection tools such as periodic reports, special procedures, country mandates, thematic studies, individual experts, and special rapporteurs. The formation of a body of International Human Rights Law is one of the United Nations’ greatest achievements. The United Nations has further helped in formation of many human rights treaties and declarations focusing on the rights of women, children, persons with disabilities, minorities and indigenous peoples.

In addition, the UN developed International Bill of Human Rights comprising of the UDHR 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic Social and Cultural Rights 1966, and the Optional Protocols to the two Covenants. The UDHR, 1948 provides a list of universal human rights that were un-enumerated under the Charter of the United Nations. The rights contained in the UDHR are interdependent and indivisible. At the time of its adoption, the Declaration was not a legally binding instrument but with passage of time, some of its provisions now claim the status of customary international law or general principles of law. The Declaration contains broad set of human rights. Thus, the Declaration has served as a standard model for many domestic constitutions, laws, regulations, and policies that aims at protection of fundamental human rights. The ICCPR is a descendant of the Declaration but it was designed to be binding from its inception. This apart, the ICCPR provides for a detailed enumeration of civil and political rights and contains principles that structure the practices of the States in matters of derogation of rights. The ICCPR also provided for a Human Rights Committee that is a body responsible for the implementation of rights guaranteed by the Covenant. Under the Optional Protocol I to the ICCPR, State Parties have the option of recognising the competence of the Human Rights Committee to consider communications from the individuals who claim to be victims of a violation of the rights conferred by the Covenant. The Second Optional Protocol to the International Covenant on Civil and Political Rights provided for abolition of death penalty.

The ICESCR, 1996 protects and promotes economic social and cultural rights that are subjected to limitations that flow from the very nature of the rights, which is full realisation of the rights, would require resources, and depends upon progression of the
society. According to the Covenant, States Parties must be allowed to determine to what extent they would guarantee rights guaranteed by the Covenant, with due regard to human rights and their national economy. The Committee on Economic, Social and Cultural Rights was established to monitor the implementation of the rights contained in the Covenant. In recent times, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2013, conferred the Committee the authority to consider communications from individuals that claim that their rights under the Covenant have been violated. The Committee also has the authority to carry out inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant, and even to consider inter-State complaints.

Considering the time of recognition and circumstances surrounding the grant of such recognition, human rights are classified into generations. The three generations doctrine aids to trace evolution of human rights. First in the sequence of evolution of human rights were the civil and political rights, thus, they are also known as the ‘first-generation’ or ‘first-dimension’ of human rights. It is believed that these rights emerged during the French and the American Revolutions and they involve duty of the States to abstain from intruding with the freedom of its citizens, as they are minimum set of rights to which everyone is entitled to being a member of the civilised society. Second-generation rights consist of social, economic and cultural rights that are considered as gradual rights of a moral character and their full realisation require progressive and affirmative measures to be undertaken by the States. Thus, they are dependent upon State’s resources. Largely, the economic, social and cultural rights are non-justiciable yet fundamental in State governance. The third-generation of human rights consists of the right to development, right to peace, right to disaster relief assistance, right to a healthy environment, right to ownership of the common heritage of humankind, and the right to communication. The third-generation of rights belongs to individuals, the groups, and collectives such as the people, nation, the society or humanity as a whole that has these rights. Indeed, all generations of human rights casts obligations upon the States to respect, protect and promote human rights for all. This apart, human rights may also be classified based on the beneficiaries of rights such as rights of children, rights of the

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3 The International Covenant on Economic, Social and Cultural Rights 1966, Article 2 (1).
minorities, rights of women, rights of labourers, rights of the disabled persons, rights of the aged, rights of the transsexuals, rights of the homosexuals, rights of the indigenous people, rights of the aliens, rights of the HIV affected persons and rights of the refugees, among others. These rights are recognised as ‘rights for specific categories of persons’.

It is observed that categorisation of human rights into generations and in particular, the third-generation of rights are criticised. Critics argue that the expression ‘generations’ is unsuitable in the context of human rights, as they believe that generations succeed each other but ‘generations of human rights’ does not. It is also argued by the critics that it is unclear as to who holds these rights then against whom they are held and that categorisation of rights into generations would bring with it different priorities which is bad in the context of human rights. With regard to the contents of third-generation rights, it is argued by the critics that they are already contained in established human rights. Notwithstanding these arguments, it is pertinent to note that each generation of rights has its unique attributes and all of which are important to individuals to enjoy their lives and to prosper. Since human rights are indivisible and interdependent, the classification of rights must be understood as a mere formality than a necessity. All categories of human rights must be protected and promoted by the States and this would mean that creation of human rights protection mechanism is a necessity.

Since human rights are universal, its protection mechanisms are established at the national, regional and international levels which together is known as global human rights protection mechanism. At the international level, the UN human rights system plays an important role in protection and promotion of human rights. It comprises of Charter-based bodies, established under the Charter of the United Nations 1945, and the Treaty Bodies created under human rights treaties. Generally, the treaty bodies are composed of independent experts who are independent and their chief mandate would include examination of periodic reports submitted by the States Parties which would help the treaty body to monitor the processes and measures chosen by the States to implement their treaty obligations. In addition, some of the treaty bodies such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee Against Torture are authorised under the respective human rights treaties to examine individual complaints. Further, the treaty bodies even receive and consider
complaints submitted by the States Parties concerning alleged breaches of human rights obligations carried out by another State. Besides, the treaty bodies undertake studies, research and inquiries into serious or systematic treaty violations by States parties. Consequently, the treaty bodies may provide its ‘General Recommendations’ and ‘General Comments’ in response to issues or how it interprets the provisions of the relevant treaty. On the other hand, they are not binding upon the States but they guide the subsequent interpretation of the treaty in question. The functions of any treaty body must be understood in the light of relevant human rights treaty under which it is established and this would suggest that neither all treaty bodies do have same set of powers nor they follow same procedures.

The Charter-based bodies are created under the Charter of the United Nations and unlike treaty bodies that hold specific or limited mandate, the charter-based bodies hold general and broad mandates concerning human rights. The Charter-based bodies include the Human Rights Council, the Office of the High Commissioner for Human Rights, and the Principal Organs of the UN. The Human Rights Council replaced the Human Rights Commission due to its politicization, ineffectiveness and other inherent drawbacks. The Human Rights Council holds the mandate to promote and protect all human rights and to addresses all situations of violations of human rights, including gross and systematic violations. The Human Rights Council is expected to accomplish its mandate on the principles of universality, impartiality, objectivity and non-selectivity. The Human Rights Council’s major contribution emerges from its recommendations. In addition, the Human Rights Council observes compliance of State obligations through the Universal Periodic Review (UPR) that consists of fact situations existing in countries, details about measures (legislative, executive and judicial measures) undertaken by the States to comply with human rights obligations, difficulties faced by the State in complying with human rights standards. After considering the UPR, the Human Rights Council may decide to provide to State any technical assistance or to share best practices in human rights with the States and other stakeholders. The Human Rights Council, through its “Institution-Building” programme has established a new complaint procedure that may be regarded as an improvement over procedure under Resolution 1503 of the ECOSOC to address consistent patterns of gross and reliably attested violations of all human rights and all
fundamental freedoms. This apart, the Human Rights Council has adopted Special Procedures comprising of independent experts, working groups and special rapporteurs who act as ‘think tank’ for the Human Rights Council. The Office of the United Nations High Commissioner for Human Rights (OHCHR), *inter alia*, supports the work of the High Commissioner for Human Rights. By virtue of the Charter of the UN, the High Commissioner has the prime responsibility for human rights, even to educate world community on human rights, to take all crucial actions to empower individuals and to assist States in protection of human rights. The OHCHR also handles theme-based studies.

At the regional level, various instruments deal with protection and promotion of human rights. However, large numbers of them aim to protect and promote the first-generation of human rights and this would suggest that very few among the regional institutions deal with second-generation rights. Though the regional human rights instruments are based on the Charter of the UN, the UDHR, 1948, the ICCPR, 1966 and the ICESCR, 1966, they differ from them with regard to the extent of recognition given to certain category of rights, principles relating to derogation of rights, implementation mechanisms and procedures as highlighted in Chapter IV. At the national level, human rights protection system is primarily found in States’ constitutions and other laws. A specific National Human Rights Institutions (NHRIs) may complement this system. NHRIs are growing in their number particularly after the General Assembly had decided to encourage the States to establish and to avail services of NHRIs in their efforts to protect and promote human rights. Currently, the NHRIs hold a chief role in monitoring the State’s compliance with international human rights obligations. Besides, they carry out research on human rights and human rights violations with intent to disseminate information on human rights, promote human rights literacy, and decide complaints involving human rights violations or to make recommendations to the Government on human rights issues. According to the Paris principles, the NHRIs have a broad mandate to ensure harmonisation of national laws and practices with the international human rights instruments to which a State is a party. This apart, NHRIs aim to encourage States to ratify human rights treaties to which it is not a party and NHRIs contribute to the

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reports that States are required to submit to United Nations bodies and to other institutions, pursuant to their treaty obligations.

In the context of protection of human rights, the discussion would be incomplete if the role of Non-Governmental Organisations (NGOs) and International Organisations’ (IOs) is not mentioned. Indeed, various NGOs are operating at different zones and levels associated with varieties of human rights issues. The NGOs aim to highlight abusive human rights practices carried out by the States with intent to sensitise the international community on human rights issues. Realising their abilities to contribute, the UN has provided consultative status to many of the NGOs. Among the NGOs dealing with human rights, one may identify that either NGOs limits its studies to specific human rights issues or they aim at overall development of the human rights. In general, NGOs’ major contribution lies in standard setting, promotion of human rights, offering technical assistance, dissemination of information, and pursuing Governments to comply with international human rights standards. Generally, the IOs are created between the States, either through bilateral or multilateral treaties and at present, there are thousands of them. IOs acts as a forum to its member countries, non-member countries, individual and independent experts, courts, tribunals, media, NGOs, NHRIs, individuals and other organisations operating at international, regional and domestic levels to come together and discuss on human rights issues and measures with intent to create and sustain better environment in which individuals can enjoy all human rights.

With regard to scope and ambit of international human rights standards, following conclusions are drawn. The International Bill of Rights identifies wide range of essential civil and political rights as well as economic, social, and cultural rights that must be protected and promoted by all States at all times as they are universal minimum moral standards for all nations to achieve. Though human rights are interdependent and indivisible, their enforcement depends upon the States. This would suggest that because of their sovereignty the States might decide upon the extent of obligations that may be undertaken by it by becoming a party to a human rights treaty. This would further suggest that the States might selectively give recognition to certain human rights standards. Besides, the States can formulate reservations or provide for interpretative declarations. Reservation can be formulated and withdrawn in accordance with the terms of the
relevant human rights treaty and if a treaty to which reservation has to be formulated remains silent on reservation then the Vienna Convention of 1969 is usually followed. Declaration differs from reservation as the former echoes a State’s understanding of a specific provision without excluding or modifying that provision in its application to that State which occurs when the State formulates its reservation to a human rights treaty. The reservation to human rights treaties would lower the minimum human rights standards contained in a particular treaty for the reserving States and in turn dilutes the principle of universality of human rights. In addition, reservation frustrates the attempts of the international community to establish a universally accepted human rights regime. Therefore, the international community has chosen to deal with this concern in a persuasive manner, which is asking the reserving States to avoid formulation of reservations and even to withdraw reservations at the earliest.

These apart, human rights are not absolute because they are subjected to reasonable restrictions, which the States may impose from time to time from the point of view of community interests. Human rights are also subjected to limitations as determined by law to protect morality, public order and the general welfare in a democratic society. Another limitation to international human rights is that they are amenable to derogation. The fact that ICCPR and the regional human rights Conventions such as the American Convention on Human Rights and the European Convention on human Rights provide for derogation from the State obligations in emergencies suggests that derogation is an exception for the human rights obligations contained in such instruments. However, human rights treaties contain principles that govern and guide the States while taking recourse to derogation. Some of the important principles are as follows: the States can derogate from its human rights obligations during public emergency only upon information being provided either through the competent authorities or directly to other State Parties as to the reasons for derogation. Derogating State must not only indicate the reasons for derogation but also specify duration of and provisions identified for derogation. Largely, human rights instruments provide for certain ‘non-derogable’ provisions. However, the list of derogable rights and non-derogable rights vary from one instrument to another and the same is highlighted in
Chapter IV. Since the second-generation rights are programmatic in nature and depend upon States’ affirmative actions, the United Nations’ Committee on Economic and Social Council developed a concept of “minimum core” to commit States to a minimum legal content and to provide for the claims of economic and social rights. In the view of the Committee, supply of essential foodstuffs, essential primary health care, basic shelter and housing or of the most basic forms of education is the minimum core obligation of all States notwithstanding its economic development. This ensures that the States Parties have an immediate obligation to ensure the discharge of minimum obligations for all subjects within their jurisdiction. Further, it is affirmed that non-absoluteness of human rights, dependency of human rights upon States, variations in protection mechanisms at global level make human rights vulnerable to State’s despotic actions. The prominence given to first-generation rights overshadows second-generation rights. Human rights contained in the International Bill of Rights require States to take necessary measures to give effect to international human rights standards. India, without being an exception to this obligation has provided for human rights protection in its legal framework.

It is observed that formally India is committed to human rights by its constitutional instrument though history reveals that essential rights existed in all ages, known in different names and in fact, the visions to secure human rights existed even in Vedic times as highlighted in Chapters III and V. It is further observed that the contemporary form of human rights jurisprudence was devised in India starting from the British rule as people of India were discriminated in the enjoyment of their civil and political liberties. Indeed, as a result, this practice came to be criticised and questioned by the freedom fighters by carrying out collective movements demanding among others for justness in treatment and access to basic rights. The demand for rights continued to appear continuously in sessions held by the National Congress. The Government of India Act, 1915 gave partial recognition to this demand but full realisation of the said demand could be traced to the Constitution of the independent India. The Constituent Assembly was aware of the impact of World War II as well as significance of the contents of Universal Declaration of Human Rights 1948. The Constitution of India makes available principles of administration, rights and limitation of State power that aim to form social

\[5 \text{ Ibid. pp. 191-196.} \]
and economic revolutions within India. The Fundamental Rights are protected by the Courts to ensure that the individual, his personality and other things associated with his personality are free from State’s interference except where it is reasonable for the State to interfere with it in accordance with law.

By their nature, Fundamental Rights are not absolute as they are subjected to reasonable restrictions imposed by the law. In addition, Fundamental Rights are amenable to suspension during national emergency proclaimed under Article 352 of the Indian Constitution. Largely, Part III of the Constitution of India guarantees civil and political rights contained in the UDHR, 1948 and the ICCPR, 1966, while Part IV of the Constitution guarantees economic, social and cultural rights contained in the UDHR 1948 and the ICESCR, 1966. Provisions of Part III cast negative obligations upon the States and as a result, States must refrain from arbitrarily denying or restricting individual liberty or doing acts contrary to rights guaranteed by Part III. The provisions contained under Part IV acts as aspiration and they require affirmative steps to be taken by the State depending upon the growth of its economy and availability of resources. Thus, the standards contained in Part IV are meant to be progressively realised. Right to equality as guaranteed by Article 14, protection in respect of conviction for offences as contained in Article 20, right to life and liberty as provided by Article 21, safeguards against arbitrary arrest and detention as per Article 22, and freedom to profess, propagate and practice any religion of one’s choice as assured by Articles 25-28 are available to both citizens and non-citizens. This would suggest that all other rights guaranteed by the Constitution are solely available to Indian citizens. According to Article 37 of the Constitution, the Directive Principles of State Policy are non-justiciable but they are fundamental in the governance of the country. However, the Supreme Court did not confine to textual interpretation of this provision as the Court recognised that for a comprehensive enjoyment of the fundamental liberties guaranteed by Part III, the implementation of social and economic rights contained in Part IV becomes antecedent. This perception of the Court has not only emphasised on the importance of Part IV but also resulted in indirect enforcement of the provisions contained therein. Indeed, as highlighted in

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6 The Constitution of India, Articles 19 (2) to (6) and 25 (1).
7 Safeguards conferred by Article 20 against arrest and detention are not available to enemy aliens.
Chapter V, the Court reads Fundamental Rights and the Directive Principles of State Policy as supplementary and complementary to each other and uses harmonious construction in case of conflict between the two.

Though the provisions of Part III and Part IV are inspired by the universal human rights, there are distinctions amongst them. The first distinction between human rights and the Fundamental Rights can be found with regard to whom they are addressed. Since, the Fundamental Rights relates to a system of governance one can enjoy it if only he/she has an affiliation to such a system in the form of ‘citizenship’. On the other hand, human rights are universal in nature, which would suggest that there is no requirement as to citizenship or nationality to be eligible to enjoy human rights. The Fundamental Rights are only those that are guaranteed by the Constitution of a State but on the other hand, human rights are not limited to the Constitution as they revolve around the idea of natural rights and what human beings is entitled to live fully in the capacity of being human. Another distinction is that most of the Fundamental Rights guaranteed by the Constitution are primarily limited to citizens and only some of them are extended to aliens.\(^8\) This classification does not arise in the case of human rights. Further, the Civil and Political Rights (CPR) protected under Part-III are made enforceable whereas, the Economic, Social and Cultural Rights (ESCR) contained under Part-IV of the Constitution are non-enforceable. This would indicate the deviation from international human rights standards where such a distinction concerning enforceability of CPR and ESCR is not made under International Human Rights Law (IHRL), except that ESCR is said to be progressive in nature. Individually, human rights and the Fundamental Rights can be suspended during the times of national emergency. Still, the important distinction between the two in this context is found in the way the IHRL and the Constitution orders rights as ‘derogable’ and ‘non-derogable’.\(^9\) This apart, under the IHRL, the States can take recourse to preventive detention only during emergency whereas, in India, preventive detentions can be used by the State both in emergency and in peacetimes. Furthermore, distinction between international human rights standards and Fundamental Rights can be found in its implementation mechanisms. Generally, the IHRL makes use

\(^8\) The Constitution of India, Articles 14, 20, 21, 22 and 25-28.

\(^9\) Supra, Chapter V, pp. 225-227.
of State reporting, inter-State communications, Conciliation, individual communication, UPR, and special procedures to implement human rights. However, enforcement of Fundamental Rights primarily depends upon the Supreme Court or the High Court. Lastly, certain human rights like, right to legal aid, right to work, equal pay for equal work are recognised under Part IV of the Indian Constitution while rights like- right to privacy, right to clean environment, right to shelter, right to found a family, and speedy trial, remain un-enumerated. This would suggest that the framers of the Indian Constitution have not only given selective recognition to international human rights standards but also refrained from giving recognition to certain international human rights standards.

The Hypothesis that Indian Constitution has not given recognition to all international human rights standards stands proved as the following international human rights are constitutionally not specified: right to security of a person, right against slavery or servitude, slavery and the slave trade in all their forms, right against torture or to cruel, inhuman or degrading treatment or punishment, right against any incitement to discrimination, protection from arbitrary exile, right to a fair and public hearing before the independent and impartial tribunal in the determination of one’s rights and obligations and of any criminal charge, right against arbitrary interference with one’s privacy, family, home or correspondence, and attacks upon one’s honour and reputation, right to leave any country, including his own, and to return to his country, a guarantee of equal rights as to marriage, during marriage and at its dissolution and a recognition that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, right to seek, receive and impart information and ideas through any media regardless of frontiers, right against compulsion to belong to an association, recognition that all children, whether born in or out of wedlock must enjoy equal social protection, recognition that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms and that the right to education shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and that further the maintenance of peace, right of self-determination, rights of the detenue to be treated humanely with dignity, protection from imprisonment in the case of inability to fulfil a contractual
obligation, right to exclude press and the public where publicity would prejudice the interests of justice, right to compensation for injustice, right to social insurance, right of protection and assistance to the family for its establishment, the right of everyone to be free from hunger, right to travel abroad, right to privacy, right against solitary confinement, right to human dignity, right to speedy trial, right against custodial violence, right against death penalty, right to health care and medical assistance, right to shelter, right against handcuffing, and right to pollution free environment, which are recognised under multiple human rights instruments.

The non-recognition of these rights coupled with non-ratification of certain human rights conventions\textsuperscript{10} have resulted in large-scale human rights violations in the form of torture, ill-treatment of human rights defenders, extrajudicial, summary and arbitrary executions, child prostitution, child pornography, poverty, hunger, atrocities against women, human trafficking, deaths in police custody, atrocities against weaker sections, disappearances of persons and arbitrary detentions as highlighted by NHRIs and civilised societies in their reports to the Human Rights Council.\textsuperscript{11} Therefore, lack of legislative protection of human rights coupled with occurrences of day-to-day abuses of human rights made the victims to approach the Courts in India to protect their rights. In this process, the Supreme Court intervened to ameliorate the conditions of the people and to give recognition to some of the constitutionally not specifically incorporated international human rights standards by adopting the technique of judicial incorporation of rights.

The judicial technique of incorporation of rights is essentially based upon liberal interpretation of laws and involves making of extensive references to international human rights instruments. Therefore, “judicial incorporation” is a judicial trend in which common law courts are deserting their dualist orientation in its work by utilising non-ratified human rights instruments or unincorporated human rights. The technique of judicial incorporation of human rights is even regarded as a response of the Courts to the pressure between historical common law dualism and the modern era of human rights.

\textsuperscript{10} The Convention Against Torture, the Conventions on the Rights of Migrant Workers and their Families, on Refugees and Stateless Persons, Convention on the rights of Indigenous and Tribal People, and Optional Protocol to CEDAW and Optional Protocols 1 and 2 to the ICCPR, 1966.

\textsuperscript{11} Supra, Chapter V, pp. 227-236.
internationalism.\textsuperscript{12} This technique is strengthened through transnational judicial dialogue. During ‘Bangalore Principles of judicial colloquium’, it was highlighted that erosion of strict dualism was to keep up with the rising appreciation of both the universality of international human rights norms and the superior role of the judiciary in interpreting and enforcing such norms.\textsuperscript{13} This would imply that unincorporated treaties could play a ‘gap-filling role’ in interpreting domestic law. This in addition, represents a departure from strict common law dualism. In fact, according to ‘Bangalore Principles’, there is proliferation in monistic approach that is resulting in judicial incorporation of International Human Rights Law into the common law legal system.\textsuperscript{14} Indeed, incorporation techniques would also highlight the judicial interest to ensure that human rights norms are accommodated all domestic laws. Further, it is believed that in this technique, a court refers to international human rights treaty provisions as a thoughtful additional support to its interpretation of a domestic law. This is a powerful judicial tool for embedding international human rights obligations into domestic law.

The Indian Courts are using International Human Rights Law to fill the gaps found in legislative protection of human rights and the same is accepted by the Supreme Court of India in \textit{Gramaphone Company of India Ltd. v. Birendra Bahadur Pandey}.\textsuperscript{15} The technique of ‘judicial incorporation of human rights’ is an example for judicial activism. The Supreme Court of India has used this technique to give better protection to the human rights of the people in India by giving recognition to certain constitutionally not specifically incorporated human rights as part of ‘enumerated’ under the Constitution of India. However, this technique is less effective in the case of economic, social and cultural rights as their enforcement depends upon the State’s economic development, resources and affirmative actions.

The technique of judicial incorporation has number of features as studied in Chapter VI. Firstly, liberal interpretation by the Court is the starting point for all judicial incorporations. Secondly, the nature and extent of judicial incorporation carried out by the Court rests on sensitivity and creativity of the judge. Thirdly, while using this

\textsuperscript{12} \textit{Supra}, Chapter VI, p. 245.
\textsuperscript{13} \textit{Ibid}.
\textsuperscript{14} \textit{Ibid}.
\textsuperscript{15} \textit{AIR 1984 SC 671}.
technique, judges consider international standards in the absence of domestic legal framework. Indeed, the Courts use it to fill the void existing in the domestic law when there is no inconsistency between the domestic law and international law. Fourthly, the court chooses a right that is to be incorporated into the Constitution by considering the facts and circumstances of the case. This would suggest that all cases of incorporation of rights are selective by its nature and thus there is no general recognition provided to all the unincorporated rights at the same point of time in one single case. It is equally important to note that the court is not bound to incorporate rights in every case that it decides, as the technique of incorporation is a discretionary judicial tool that is developed and used to promote better recognition and protection to human rights of the people in India. Non-recognition to certain international human rights standards, lack of legislative incorporation of human rights coupled with legitimate deprivations, inefficient implementation of human rights has resulted in violation of certain basic rights of the individuals. These factors have made the Court to make effective use of the technique of judicial incorporation of rights to further the protection of human rights by giving recognition to the constitutionally not specifically incorporated international human rights within the scope of enumerated rights. Indeed, it is the interdependent nature of human rights which has made the Court to undertake this effort.

Since the Constitution of India has not given recognition to all the international human rights standards and has conferred justiciability status only to ‘civil and political rights’ while disregarding that status to ‘economic, social and cultural rights’, human rights may be classified into three sets under the Indian legal system. First set of human rights comprises of constitutionally specifically incorporated rights, second set involves of constitutionally not specifically incorporated human rights and the third set identifies human rights that are neither constitutionally specified nor judicially incorporated. As highlighted in Chapter VI,\textsuperscript{16} the Court has incorporated right to live with dignity, right to livelihood, right against sexual harassment, right to compensation for breach of Fundamental Rights, right to health, medical care and treatment, right against delayed execution, right against imprisonment in cases of breach of contractual liability, right to just procedure, right to privacy, right to seek, receive and impart information, right to

\textsuperscript{16} Supra, Chapter VI, pp. 254-296.
travel abroad, humane treatment of prisoners and protection from custodial torture and fake encounters, right to speedy trial, right to shelter and right to decent environment, right to be presumed innocent, and right to select medium of education, into the Constitution by using the technique of judicial incorporation.

From the cases discussed under Chapter VI,\(^\text{17}\) it would be clear that the Court has incorporated those rights by referring to international human rights instruments notwithstanding the fact that whether the Government of India has ratified such instrument or otherwise. Indeed, Court has used the UDHR, 1948 as a guiding force to interpret the scope of the enumerated civil, political, economic, social and cultural rights under the Constitution. The Court construes Parts III and IV of the Constitution as part of human rights gives recognition to International human rights Conventions and norms while applying and interpreting domestic laws or when there is void in domestic law. The Court remains open to the international instruments and applies the same to a given case when there is consistency between the international laws and the domestic norm occupying the field. In addition, the Court has also resorted to relaxation of the rule of laches concerning exhaustion of constitutional remedy with intent to provide protection to the fundamental freedoms notwithstanding any delay in bringing the legal action to enforce the abridged rights.

This apart, the Court has tried to enforce provisions of Part IV by reading them with Part III, wherever and whenever it is possible. As a result, right to equal pay for equal work, right to cleanly environment, right to free legal aid, right to food, right to health, right to livelihood, right to social security, right to work, right to education, right to economic empowerment, right to medical and disability benefit to workmen that are contained in part IV of the Constitution have been read as part of right to life which is guaranteed by Article 21 of the Constitution. The Court has relied upon harmonious construction and international human rights instruments to achieve this result. However, the Court has failed to give similar enforcement to all the provisions in Part IV. This would suggest that the Court has been giving selective enforcement to the provisions contained in the Directive Principles of State Policy. In addition, the Court has referred to the fundamental duties as a valuable guide and a precious aid to construction of

\(^{17}\) *Ibid.*
constitutional provisions including the provisions contained in Parts III and IV. Further, the idea of Public Interest Litigation that emerged from judicial activism has contributed to the protection of Fundamental Rights and has been playing an important role in its development as well. Right against torture and inhuman treatment of prisoners, right to family, home or correspondence, right against arbitrary interference with privacy, right to gender equality and right against sexual harassment, right to compensation for violation of Fundamental Rights, right to speedy trial, right against environmental pollution and industrial hazard, right against starvation, right to food, right of fair trial, right to water, right against handcuffing, right to health, and right against bonded labour are incorporated into the Constitution by the Court through Public Interest Litigations. This would suggest that the technique of judicial incorporation, which is an instance of judicial activism, could be clubbed with other creations of judicial activism.

As highlighted in Chapter VII, the Court is erratic in its approach and attempts to safeguard the rights conferred by the Constitution. In particular, the Court had remained as a weak guardian of rights in its initial years as well as during proclaimed national emergencies. In its initial attempts, while interpreting right to life and liberty, the Court mechanically gave importance to the letter of law by missing the 'spirit of law'. This led to narrow interpretation of ‘procedure established by law’ and ‘liberty’ in A.K. Gopalan v. State of Madras and that interpretation lasted for more than twenty long years up until it was overruled. This would suggest that until the ruling in A.K. Gopalan’s case was overruled, there prevailed pitiable protection to individuals’ right to life and personal liberty. During emergency, the Court in ADM Jabalpur v. Shiv Kant Shukla had ruled that it could not examine ultra vires or malafide actions of the detaining authorities and that writ of habeas corpus could not be issued. The Court did not consider the consequences of its decision. This apart, as highlighted in Chapter VII, in deciding questions concerning validity of preventive detention laws, the Court only tried to shield the liberty of the individuals from the abuses of subjective satisfaction of the Executive and decided legality of such laws on case-basis. This would indicate that the Court failed

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18 Supra, Chapter VII, pp. 302-327.
19 AIR 1950 SC 27.
20 AIR 1976 SC 1207.
21 Supra note 18.
to aim at abolishing the State’s use of preventive detention laws in peacetimes which consequently could have achieved two important objectives. First, such a decision by the Court would have promoted consistency between human rights norms and the domestic law. Second, the decision of the Court would have provided improved safeguard to right to liberty of the individuals, but this has not happened.

From the late 1980’s especially after the decision in *Maneka Gandhi’s case*, the Court has been an ‘active protector’ of the rights. In this case, the Court applied the principle of reasonableness to ‘procedure established by law’ which demands the law that deprives life and liberty to be a just law and the procedure adopted for deprivation of life or liberty to be just, fair and reasonable. Since then the Court has continued to interpret the ‘rights provisions’ liberally. This change in interpretation, point toward the Court’s intention to rectify its previous mistakes committed in the rulings of *A. K. Gopalan’s case* and *ADM Jabalpur’s case.* Indeed, the Court was sensitised about the importance of fundamental human rights during the emergency period. Though the liberal interpretation of ‘rights provisions’ in the Constitution has led to incorporation of certain constitutionally not specifically incorporated international human rights standards, the hypothesis that Court has not been successful in giving effect to all constitutionally not specifically incorporated international human rights standards stands proved. This is because the Court has failed to give recognition to right against exile, right against death penalty, right to protection, assistance to the family for its establishment, care and education of dependent children, and establishment of special measures of protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage, right against compulsion to belong to an association, and right of social insurance.

Regarding the payment of compensation for violation of Fundamental Rights as a remedy under public law, the Court has done a commendable job as it has brought strict accountability to the State for its actions affecting Fundamental Rights. The Court has made extensive references to Article 9 (5) of the ICCPR 1966, which deals with payment

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22 International Human Rights Law permits preventive detention only during emergency, whereas, Indian Constitution allows it both during emergency and peace times.
24 *Supra* note 19.
25 *Supra* note 20.
of compensation for unlawful arrest and detention, to award compensation in cases involving of arbitrary arrest and detentions. Nevertheless, the Court has failed to address two important issues associated with the right to compensation for violation of Fundamental Rights. First, the Court has failed to change its mechanical manner of awarding compensation by paying due regard to adequacy of compensation. Second, the Court has only been awarding compensation for breach of certain Fundamental Rights, such as either right to life and right to liberty, or for arbitrary or unlawful arrest and detentions. This would suggest that the Court has failed to extend the right to compensation to all the Fundamental Rights equally. Likewise, though the Court has managed to address the issue of non-specificity as to the application of ‘Fundamental Rights provisions’ to the foreigners, it has failed to uphold the basic principle of human rights that is universality, indivisibility and interdependency as the Court has selectively pointed out the Fundamental Rights made available to the foreigners. Regarding the issues concerning ‘reservation policy’, the Court has successfully resolved many of them as highlighted in Chapter VII. On the other hand, the Court has failed to consider that reservation policy excludes ‘minorities’ from the list of its beneficiaries, that the Scheduled Caste is restricted by religion only to Hindus, Sikhs and Buddhists which would suggest that the current reservation policy welfares only certain sections of the community. Therefore, it is argued that the reservation policy is not in accordance with international human rights standards.

The cases discussed on the Directive Principles of State Policy would clearly indicate that there exists selective approach of the Court. That is the Court selects and enforces only some of the second-generation rights. Indeed, right to work, right to livelihood, right to equal pay for equal work, right to just conditions of work, right to education, right to health, right to cleanly environment, right to protection of ecology, flora and fauna are much consistently enforced by the Court at the cost of other

26 Despite the fact that India had formulated reservations to Article 9 of the ICCPR, 1966.
27 In RudulSah v. State of Bihar, (1983) 4 SCC 141, the Court had awarded Thirty Thousand Rupees as compensation for the loss of fourteen precious years of one’s life in jail due to the negligence of the State. Similarly in Saheli v. Union of India. (1990) 1 SCC 422, for the death of a child aged nine years, caused due to police beatings, Seventy Five Thousand was awarded by the Court.
28 Supra, Chapter VII, pp. 322-325.
29 The Universal Declaration of Human Rights, 1948, Articles 1, 7, 10, and 21 (2).
30 Supra, Chapter VII, pp. 348-357.
economic, social and cultural rights contained in Part IV of the Constitution. Further, as highlighted in Chapter VII, \(^{31}\) the Court has been successful in determining the enforceability of economic, social and cultural rights based on economic progress of the State than understanding it from the point of view of human rights, which are interdependent. Since the enforcement of economic, social and cultural rights depends upon the resources available within the State, it is considered as one of the limitations on the Court’s power. This is because the State cannot implement the rights in accordance with the Court’s order without the required resources. Further, the Court relies upon the appropriate authorities for the execution of its directions or orders, sometimes against which allegations involving violations of human rights are made. These limitations affect the pro-active role undertaken by the Court in enforcing fundamental human rights.

As to the contributions made by the Court, it is pertinent to note that the Court has developed a number of doctrines such as ‘Doctrine of Waiver’, ‘Doctrine of Eclipse’, ‘Doctrine of Colurable Legislation’, ‘Doctrine of Reasonable Classification’, ‘Doctrine of Judicial Review’, ‘Doctrine of Basic Structure’, ‘Doctrine of Proportionality’, through which it has attempted to ensure better protection to human rights contained under the Constitution, as highlighted in Chapter VII. \(^{32}\) The Court has been extending these doctrines to the construction of judicially incorporated rights. The Court has also worked on developing the principles to interpret Fundamental Rights, according to which Fundamental Rights must be addressed by taking into account the development of the society, as it would provide a case for contemporary understanding and that they are comprehensive checks against the excesses of the State authorities including the legislative power, then the procedure established by law that affects life or liberty of the individuals must be “just and fair” and not arbitrary. The court has called for purposive interpretation of Fundamental Rights to facilitate the citizens to enjoy their rights fully. In addition the court has viewed Articles 14, 19 and 21 as a golden triangle upholding equality and the Rule of law. These principles of interpretation not only call for consistent approach of the Court but also ensure furthering the objectives of Fundamental Rights.

\(^{31}\) Ibid.
\(^{32}\) Ibid. pp. 326-348.
This apart, the Court has successfully addressed the issue concerning application of Judicial Review over subjective satisfaction of the Executive in matters of declaration of emergency. This is an important contribution because a declaration of emergency can affect the Fundamental Rights and arbitrary declaration of emergency would amount to breach of Rule of Law. Therefore, being the final interpreter of the Constitution the Court has chosen to exercise its power of Judicial Review on all actions arising from any constitutional provision. Further, the Court has provided a meaning to the expression ‘reasonable restrictions’ that could be imposed upon the Fundamental Rights. The Court has also expounded many principles and tests to ascertain reasonableness of such restrictions. Among them, the primary test is whether the restriction imposed on the rights of a person is arbitrary or proportional in nature or is it beyond what is required in the interests of the public. Similarly, the Court has emphasised that a law that is valid alone can impose such reasonable restrictions.

It is admitted that the Court consults and considers international human rights standards and norms to address questions relating to both the ‘enumerated rights’ and ‘un-enumerated rights’ under the Constitution. On evaluation, the efforts made by the Supreme Court of India in safeguard of the human rights and Fundamental Rights could be labelled as a ‘blend of accomplishment and failure’.

8.2. Suggestions

1. It is observed that the framers of the Constitution considering the then prevailing capacities of the individuals and of that of the State had decided to incorporate certain international human rights standards into the Constitution. However, in the current time, the capacities of the State and of the individuals have changed. Therefore, it is suggested that revisiting the Constitutional framers’ choice of human rights is the need of the hour and in this regard, the role of specialised bodies like Human Rights Commission at the Centre and at State level, along with that of the Law Commission is going to be significant in proposing appropriate recommendations to the Government to give recognition to all international human rights standards.
2. It is suggested that the Legislature and the Executive ought to take necessary steps by which judicially incorporated economic, social and cultural rights are protected and enforced in an efficient manner. In addition, where, such authorities fail to give effect to the Orders passed by the Court, the Court must initiate contempt proceedings in exercise of its power under Article 129 of the Constitution.

3. It is suggested that the Legislature in particular must expressly incorporate the judicial decisions that paved way for un-enumerated rights into the Constitution of India. This would ensure that stricter obligations are created for the State authorities to implement the judicial orders.

4. The Constitution and the Protection of Human Rights Act, 1993 must be amended to include the rights incorporated by the Court and in addition to include all the un-incorporated international human rights standards.

5. It is suggested that the Court must aim to enforce all economic, social and cultural rights contained in Part IV of the Constitution equally based on the idea of interdependency of human rights. The prominence given by the Court to right to education, right to work, right to environment must be extended to all other economic, social, and cultural rights equally.

6. It is suggested that the Court must extend all the fundamental human rights guaranteed by the Constitution of India to foreigners similar to the case of citizens based on the interdependence and universal attributes of human rights.

7. Though the Court has done well by incorporating the right to compensation for breach of Fundamental Right, it is suggested that the Court must ensure and award just and adequate quantum of compensation in such cases.

8. Further, it is suggested that the Court must incorporate the right against exile, right against death penalty, right to protection, right to assistance to the family for its establishment, care, and education of dependent children, right against compulsion to belong to an association, and right of social insurance.

9. The Court must necessarily review its failure and rectify its mistakes to continue as the most trusted organ of the State that can protect the rights of the individuals as guaranteed by the Constitution.
10. Further, it is suggested that there must be improvement in quantity and quality of initiatives taken by the Government concerning the protection and promotion of human rights. Rights cannot be asserted if individuals do not know and it is unfortunate that many, especially the vulnerable in rural areas, are still not aware of their rights. Therefore, vast improvement is required in the prevailing practice of dissemination of information on human rights. In this regard, united efforts by the Government and human rights literates, media, educational institutions, and NGOs can alone give a new dimension to the single-handed efforts of the judiciary.

Undoubtedly, the Judiciary has assumed a key role in protection of human rights. The technique of judicial incorporation of rights is useful and innovative in providing optimum protection to the fundamental human rights of the individuals. The rights incorporated through this technique require effective implementation and the Government must take necessary steps to supplement the judicial efforts in a manner suggested above.