CHAPTER 5

HUMAN RIGHTS IN INDIA:
PROBLEMS AND ISSUES
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Human Rights which is inherent rights of person face many problems. These problems may be related with police, prisoners, children, women and socially vulnerable people. Another issue, which is needed to be discussed, is related with environment. Directly or indirectly it affects human being. Apart from the above problem of enforcement of human rights is a major issue which is to be discussed.

A. Human Rights and Police:

The word police is derived from the Greek word politeia or its Latin equivalent poletia\(^1\). The term poletia stands for the State or Administration\(^2\). At present the term police connotes a body of civil servants whose primary duty is to preserve order, prevention and detection of crime and enforcement of law\(^3\). The police functions generally relate to promote public welfare by restraining and regulating the use of property and liberty of persons\(^4\).

I. Organisation of Police in India:

\(^2\) Ibid
\(^3\) Ibid
\(^4\) Ernest Froud ‘The Police, Policy and Constitutional Rights’ in Supra note 1, p.281
The systematic organisation of police has been existing from the very ancient time. During the period of Mahabharata, Ramayana, the reference of police system is found. In Manu Smriti the great law giver Manu emphasized the need of police forces. The ancient history of India also reveals that there was a well organized police system during Hindu Rulers. The Gupta period had very good law and order situation because of very well organised police system. The chief of the police force during this period was called Mahadandadadhikari, and subordinates were called Dandadhikari. During Harshavardhan period the nomenclature was changed. The Sandik, Chowrochharnik and Dandpashik were the official to maintain law and order. In Mughal period the chief of the police was called Fauzdar which had number of Subordinate Darogas and Kotwals.

The British Government in India constituted the system of police of Mughals in each provinces with certain modifications. According to the regulations of 1816 the village headmen were the ex-officio heads of police. After the first war of independence in India (1857) the Indian Police Act, 1861, came into force. The object of this Act was to recognize the police and to make it more effective instrument for the prevention and detection of crime.

5 Supra note 1 p.282
6 ibid at 283
7 ibid
8 ibid
9 ibid
10 ibid
11 Supra note 1 p. 284.
12 The preamble of the Indian Police Act, 1861.
After the Independent of India in 1947 the old police system after modification continued despite the end of colonial rule in the country. In spite of new democratic, secular, socialistic, welfare and humanitarian values as provided in the Constitution of India, the Indian police are still following the philosophy of Paramilitarism, which believes in mechanism of awe, threat and coercion.

The hierarchy of police officials working in police force comprises of Inspector General of Police, Deputy Inspector General of Police, Superintendent of Police, Circle Inspectors Inspector Assistant Sub Inspector, Head Constables etc. In 1981 National Police Commission recommended in large cities where population is ten lakes or more, the system of police commissioner should be adopted. Many of the cities like Delhi, Kolkata, Mumbai, Madras, Nagpur, Pune adopted this system. In this system police officers are directly in-charge of police and not only supervisor. The major problem in the appointment of police commissioner is the opposition of IAS lobby, because their magisterial power may be deepened and it would be great blow on their prestige.\textsuperscript{13}

The primary aim of a State Administration is to undertake activities for the prevention of crime. It is duty of the State to enforce the law in proper way so that crimes may not be committed. Subsequently criminals should be reformed, so that

\textsuperscript{13} Supra note 1 p.287
they should not repeat crime. Therefore there are two approaches, firstly, prevention of crime by the enforcement of law strictly, secondly, if crime is committed then through investigation and punishment. Because of punishment other will not try to commit crime.

Apart from above, after independence of India women police have also been recruited in the police system. This police mainly deals with the offence relating to women and juveniles.

II. Role of Police:

The police are an important part of criminal justice system and are main point of contact between the population at large and the system. The police is primarily concerned with the control of crime and the maintenance of law and order. The police are charged with the responsibility of protecting precious human rights of the citizens. Whenever there is invasion or threat of invasion of ones human rights, it is to the police that citizens rush for help. Unfortunately the contribution of the police in this behalf is not realized and only his negative part is noted, highlighted, and criticised. This is because, our police believe more on fist rather than on wits, on torture more than on culture. In any criminal

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15 ibid
17 Supra note 13 p. 116
19 ibid
20 Siddiqui Ahamad SMA Qadri, *Criminology*, Lucknow, Eastern Book Co.,
case first stage is investigation\textsuperscript{21}. The manner through which the police investigation are conducted is very important to the functioning of criminal justice system. If police officer collects vitiated evidence there will be miscarriage of Justice, because our system is based on proved evidence, and wrong evidence may hold an innocent person for an offence. It is duty of the police to investigate fairly and thoroughly, to collect evidence, whether for or against the suspect\textsuperscript{22}.

Protection of the society being the paramount consideration, the law, procedure and police practices must be of such a way as to ensure that the guilty are apprehend and punished with utmost dispatch and innocents are not harassed. The aim of the investigation must be to collect truth only. But police perceive themselves bound to do everything possible to curb crime and investigate the cases successfully to meet the peoples expectations. In this process they often opt shortcut method and exhibits negative traits of police subculture like rudeness, use of third degree method, defensiveness in face of criticism, lack of innovativeness etc\textsuperscript{23}.

\section*{III. Difficulties of Police:}

Police face many difficulties which became hindrance in

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\textsuperscript{21} Section 2 (h) of the Criminal Procedure code, 1973 provides investigation includes all proceeding under the code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) or who is authorized by the Magistrate on this behalf.

\textsuperscript{22} Supra note 17 p. 87.
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speedy investigation\textsuperscript{24}. These are as follows.

1. Excessive workload due to inadequacy of manpower and long working hours even on holidays and absence of shift system.
2. Non co-operative attitude of the public at large.
3. Inadequacy of logical and forensic back up support.
4. Inadequacy to trained investigating personals.
5. Inadequacy of the training facilities in investigation, particularity in service training.
6. Lack of coordination with the other sub-system of the criminal justice system in crime prevention, control and search of truth.
7. Distrust of laws and Courts.
8. Lack of laws to deal attentively the emergency areas of crime such as organized crime money laundering etc.
10. Political and executive interference.

Apart from the above the 4th report of National Police Commission after a survey said that, police forces are devoting only 27\% of his time, rest of the time is devoted on other duties, like, VIP band bust, Court attendance and other Administrative work\textsuperscript{25}. The Law Commission of India discussed these problems faced by the police and recommended in its 154 report that investigating agency should be separated from the law and order.

\textsuperscript{23} ibid \\
\textsuperscript{24} ibid \\
\textsuperscript{25} Supra note 17 p.91
maintaining agency\textsuperscript{26}. The investigating policemen would be plain clothes men and they would be able to develop good relation with the public\textsuperscript{27}.

The Committee on Police Reform, constituted by the Government of India under the Chairmanship of Sri K. Padmanabhaiah also recommended separation of investigation from law and order wing\textsuperscript{28}. Many states are following this method\textsuperscript{29}

\textbf{IV. Problems Regarding Human Rights:}

Police has become a difficult and complex endeavor. Though the main function of the police is prevention and detection of crime, but the police have to deal with wide range of problems also, which are not criminal in nature. The police use a wide range of methods which are formal and informal to deal with the problems. The police have to recognize that their role in society is broader than mere enforcement of criminal law. Police have to analyse the problems and find out which of the alternatives are best suited to deal with the problems. Police have to work together with the community to find out solutions to the problems\textsuperscript{30}. But most of the time they do not perform their role properly. These are the following activities of police which cause negative effect

\textsuperscript{26} Supra note 24 p. 93
\textsuperscript{27} ibid
\textsuperscript{28} ibid
\textsuperscript{29} U.P. has followed it in 2000. Maharashtra is also following, Tamilnadu and Andhra Pradesh has followed this system.

towards human being.

(a). Non Registration of Cases:

Chapter 5 of the Criminal Procedure Code, 1973 deals with the arrest of a person\textsuperscript{31}. Despite the constitutional safeguards provided in the Constitution of India\textsuperscript{32}, sometimes police are found misusing their power. The first stage of investigation is started from lodging F.I.R.. The officer in-charge of police station is mandate to register every information oral or written, relating to the cognizable offence\textsuperscript{33}. But police evade to register this information. Non registration of cases is a serious complaint against police.

(b). Custodial Torture:

Apart from this custodial torture and custodial death which is perhaps the worst crimes in civilized society is a major violation of human rights. A person, in police custody can not prove that torture has been committed against him because at that moment whole thing will be in control of police officer.

\textsuperscript{31} Section 41 of Cr. P.C. provides that a person may be arrested without warrant in certain situations. Section 42 empowers a police to arrest a person who commits an offence in his presence or where such person has been accused of committing of non-cognizable offence and he refuses to give his name or residence to his officer. Section 47 enables the police officer to enter a place if he has reason to believe that person to be placed has entered that place or is within that place. Section 48 empowers the police officer to pursue the offender at any place in India. Section 50 creates an obligation upon the police officer to communicate to the person arrested, full particulars of the offence for which he has been arrested. Section 53 and 54 provides for medical examination of the arrested person at the request of the police officer or at the request of the arrested person as the case may be. Section 56 provides that the accused person shall be produced before the magistrate within 24 hours exclusive of the journey time.

\textsuperscript{32} Article 22 of the Constitution of India.
(c). Police Unnecessarily brutal:

Police lathicharge and firing on mob violates human rights if they are demonstrating peacefully. One cannot expect tackling the problem of 21st century with the law of 19th century (Police Act, 1861), which was primarily enacted to suit the need of the British imperialistic forces. Some of the recent happening like, Godhra incident, Gurgaon police lathicharge or Gohna incident, police firing in Nandigram of West Bengal, exposes the failure of police department to tackle the situation considering human right approach. Godhra incident reflected the sectarian colour of the police department. One police officer in this case has admitted that where society has opted for certain colour in particular issue it is very difficult to expect the policeman to be totally isolated and unaffected. This statement shows that up to what extent sectarian prejudice have steped in police system in the country. In Gurgaon incident whole of the country watched the police action where police had cruelly beaten the employees. It reflected insensitivity and total inability to tackle the sensitive issues. In another incident of Gohna shows lack of promptness and understanding of the gravity of situation. The result of which was to give opportunity to some section of the society to cause harm to same disadvantageous section of the society. In Gohna police

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33 Section 154 of the Criminals Procedure Code, 1973
35 ibid
36 ibid
unresponsiveness towards caste ridden society was at galore. Here the police department failed totally to anticipate the possible breach of public peace that might result from absence of effective action on complain of non-cognizable offence\textsuperscript{37}. In recent incident of Nandigram on 14th March 2007, where farmers were demanding for their land were beaten by police is an example of police brutality and is gross violation of human right\textsuperscript{38}.

(d). Fake encounter:

Besides above fake encounter is also a problem. Some time police for personal promotion or for monetary benefits do it. Some time due to police- politician nexus they commit fake encounter. The example of it is Soharauddin’s encounter case, where Deputy Inspector General of Police Dr. G. Vanzara is charged for fake encounter of Soharauddin, and arrested. Subsequently he was sent to the jail\textsuperscript{39}. The report of the fake encounter is submitted by Inspector General of Police, Geeta Johari, which speaks the collusion of State Government\textsuperscript{40}. Apart from the police there are several other Governmental authorities like Directorate of Revenue, Intelligence Directorate of Enforcement, coastal guard, Central Reserve Police Force, Border Security Force, Central Industrial Security Force, State Armed Force etc. are also doing torture and fake encounter. This is the

\textsuperscript{37}Supra note 34
\textsuperscript{38}Article 11 of the Economic Social and Cultural Rights and Article 47 of the Constitution of India provides about the adequate standard of living.
\textsuperscript{39}R.K. Raghvan, ‘Key Issue in the Soharauddin Case’, The Hindu, 7th May 2007, p.10
\textsuperscript{40}The Hindu, 5th May 2007, p.1
reason why the Second Administrative Reform Commission (Beerappa Moyalee Report) 2007 recommended that AFSA in Manipur should be ended. One suggestion is also given by the Commission that police officer who are on duty they should not remain at one place for more than 3 months.

The following are the basic issues which have been discussed in this chapter.

(1) Politicization of the Police.
(2) Need for attitudinal change.
(3) Use of Police resource.
(4) Lack of Responsiveness towards Community.

(1). Politicization of the Police:

There is overwhelming agreement that the police had been unduly politicized and police officer's functioning is governed more by consideration of political expediency rather than those of strict adherence to Law. It is revealed by Ex. DG of BSF Mr. T. Anantachari. It is a negative repercussions. It was also felt that some time political interference in police functioning goes beyond way what is reasonable and legitimate. So it was felt that followings are necessary to be considered.

(a) Head of the police must be selected on the basis of merit:
The head of the department should be appointed merit basis. It should not be on the mercy of the Chief Minister. The National Police Commission recommended that the selection of the head of

41 Report of the Roundtable Conference on Police Reform Chennai, August
the police be done from panel from three I.P.S. officers prepared
by the Committee headed by the Chairman of Union Public
Service Commission\(^\text{42}\).

(b) **Objectivity in allocation of posting**: The posting of police are
governed not by merit but by extraneous consideration. Officers
affiliated with the opposition or having no overt political affiliation
are shunted to punishment postings\(^\text{43}\). This thing should be avoided
and objectivity in allocation should be considered.

(c) **Security tenure**: There is no fixed tenure for the police
officers. As soon as he refuses to follow the politician’s
recommendation, he is shifted from there to other places. This is
against the integrity of the police and discourage the honest and
upright officers\(^\text{44}\).

(2) **Need for attitudinal change**: The image of police in the eyes
of common people is very low. Policemen are known as corrupt
and brutal especially for weaker and vulnerable groups. This is the
reason why at the time of investigation no one dares to come
forward to tell truth. The traditional stereo type of police who
exercise their authority by instilling fear needs, to be replaced with
an image that inspires confidence in the mind of the public. The
police must realise that they are for the people and have to work
towards securing justice to the people. There are three groups who
are particularity vulnerable in the society. These are women,

\(^{30}\) 2003, Commonwealth Human Rights Initiative, New Delhi, p.5
\(^{42}\) ibid
\(^{43}\) Supra note 41, p.5
\(^{44}\) Supra note 41, p. 6
minorities and socially and economically disadvantaged groups. (a) Women are also receiving police brutality. The ratio of women police to male police is 1:52\textsuperscript{45} while the nationwide sex ration is 933:1000\textsuperscript{46}. There should be gender valence within police. If there is any problem to the women the female police officer can be better than male to investigate that case. (b) Minorities are the persons who always of have fear of security in his mind. This is proved by incident of Gujarat. The police must show minorities that once they don their uniform they rise above narrow religious differentiations and can be expected to act impartially\textsuperscript{47}. A common complaint is that rather than being protective agency against communal strife the police are feared by minorities even during normal time\textsuperscript{48}.

(c) Members of scheduled castes / tribes have fear towards police and there is a deep sense of alienation amongst them as they feel that the police is an instrument of repression used by dominant classes to further interests and maintain iniquities in society. Distrust of the police by these groups prevents them from approaching the police\textsuperscript{49}.

(3) Use of Police Resources: It is found that police resources are used in other activities rather than its main role, e.g. VIP security. It prevents police from concentrating on their core function, not

\textsuperscript{45} 'Crime in India 2000', National Crime Record Bureau, Ministry of Home affairs in Supra note 41.
\textsuperscript{46} Census of India 2001
\textsuperscript{47} Supra note 41 p. 7.
\textsuperscript{48} ibid

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only this but regarding counter-terrorism operation civil police is not designed to tackle organized militant activity. With the growing incidence of terrorism and insurgency in the country the time has come to think about creating separate force for countering terrorism and insurgency which will free the police to perform their mandate duties. Police officers in Delhi and Chennai devote only 4.27% to 13.64% of their time to crime investigation. Rest of the time they involve in other activities like VIP security and others.

(4) Lack of Responsiveness towards the Community: As the Chairman of Madras Institute of Development Studies Dr. M. Anand Krishnan said that the police is not responsive to people’s needs to function independently of society. They should establish good contacts with the public and involve community participations at the time of making planning. If there is lack of community consultation, and minimum involvement of community in policing functions, there will be a gap between police and public. If some one is coming to complain against corrupt police officers he must be assured by such officer that his name will not be disclosed.

(5) Police Accountability: The last but not least issue which is in

49 ibid
50 Supra note 41 , p. 8
52 ibid.
the mind of every one is the police accountability. The police accountability is an area requiring urgent intervention as ineffectiveness of accountability mechanisms, is directly contributing to a culture of impurity. It is necessary for the people to know that if any police officer is guilty of misconduct or negligence, disciplinary action can be taken against him. It will inspire public confidence and improve police image.

The above are the problems and main issues regarding police. To make police personals more active the present Police Act, 1861 is required to be changed, because it does not recognize the responsibility of the Government to establish an efficient and people friendly police. The new Police Act should be the piece of legislation requiring the police to be professional, service oriented, accountable and free from illegitimate extraneous influences. The new Act should insulate the police from illegitimate political control. As recommended by second National Police Commission the power of Superintendence of the State Government over the police should be limited for the purpose of ensuring that police performance is in strict accordance with the law. Undoubtedly Human Rights Commission is doing good work in dealing with police related complaints. The scope of the work of Commission is extensive but resources are limited. The Commission is receiving so many complaints against police for custodial torture, death exertion. These facts must be considered in new Act.

54 Supra note 41, p. 10
55 Supra note 41, p. 11
B. Human Rights and Prisoners

Law is to protect liberties, but state authority and its duty to maintain law and order at any cost are always in conflict with the human feeling and liberty of the people. \(^{56}\) In India a well organized prison system has been existing from the ancient time. A greater emphasis was laid on the spiritual aspect of human life and therefore sufficient opportunities have been provided to the prisoners. \(^{57}\) The object of punishment during the Hindu and Mughal period in India was to deter offenders from repeating crime. In Mughal period prisoners were ill treated and tortured. But in British period the authorities trend to improve the conditions of Indian prisons and prisoners. In this way the Prison Enquiry Committee in 1836 was set up to prevent the workers (prisoner) working on the road. \(^{58}\) The Second Jail Enquiry Committee in 1862 expressed insanitary conditions of Indian jail, which emphasized the need for proper food and clothing for the prisoners and medical treatment for ailing prisoners. \(^{59}\) The Third Jail Enquiry Committee in 1877 had also given some suggestions and recommendations due to which the Prison Act, 1894, came in to the existence. It empowered the authorities to make law and order in jail and provide proper facilities for prisoners. Dispite that there

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\(^{56}\) Naresh Kumar, Constitutional Rights of Prisoners, 1986, Delhi, Mittal Publication, p. 3
\(^{57}\) Supra note 1 p.358.
\(^{58}\) ibid
\(^{59}\) ibid
is no change in the condition of prisons. The freedom movement changed the position of jail. The prisoners classified into two categories (1) Violent prisoner (2) Non-violent prisoner. It caused additional burden on jail, which also attacked the budget of jail.

The Indian Jail Reform Committee 1919-20, after inspection in various jails came to the conclusion that there is need for approach to prisons. The committee recommended that maximum intake should be fixed\(^6^0\). In 1949 Pakwasa Committee accepted the system of utilizing prisoners as labor and payment of wages to them. After Independence prison came in seventh schedule that is why Union Government is not paying proper attention towards jail, even in each five year plan a very low priority is given to prisons\(^6^1\).

The Government of India in 1951 invited Dr. Walter C-Rackless an United Nation expert to recommend on prison reform, which resulted the appointment of a committee to prepare all India Jail Manual in 1957. Following were the guidelines regarding reformation of prisoners\(^6^2\).

(I) The connectional services should form an integral past of the Home Department of each state and a Central Bureau of connectional services should be established at the Centre.

(II) The reformatting methods of probation and parole should be used to lessen the burden of prisons.

(III) State after care unit should be set up in each state.

\(^{60}\) ibid

\(^{61}\) Supra note 56 p., 230.

\(^{62}\) ibid
(IV) Solitary confinement as mode of punishment should be abolished.

(V) The State Jail manuals should be revised periodically.

In this connection a model Jail was established at Lucknow in 1949 where handloom machines were provided to the prisoners. The first women jail was established in Maharashtra. Open jail and community services are provided to the prisoners.

The Government of India appointed All India Jail Reforms Committee in 1980, Justice A.N. Mulla was appointed as Chairman of it. Committee recommend to set up National Prison Commission. The committee recommend that juvenile should not be clubbed with the heinous criminals. It also recommended that mentally disturbed prisoners should be shifted to the mental asylum. The committee recommended that the condition of prisons should be improved, the prison staff should be trained. Probation system should be adopted. Media and public should be allowed to visit the prison, under trial prisoners should be separated from convicted prisoners. The National Expert Committee on Women Prisoners, headed by Justice V.R. Krishna Iyer, submitted its report in which it was recommended that more women police should be recruited in jail police.

Despite the above reformatory measures the general condition of prisons in India is not satisfactory. They are still facing a lot of problems. Amnesty International have also documented in detail the violation of human rights both inside and

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63 ibid
outside the prisons. National Human Rights Commission in its Annual Report, has mentioned that the situations in prison are not good. It is pointed out that the Tihar jail is over crowded. Open jail in Hyderabad is under-utilized. Within the state the conditions of jails varies from jail to jail. The Commission saw some jail like Central Jail Bangalore which was clean and quality of food was reasonable. But many other jails were squalid.

Problems:

The basic problems regarding the prisons are as follows:

1. Problem of over crowding.
2. Problem of prison discipline.
3. Problem of prisoners health.
4. Problem of criminality in prisons.

(1) Problem of over crowding:

The prisons in most part of the India are over crowded, that is why segregation does not take place between hard core criminals and criminal of petty offences. They cause undue influence over petty offenders this problem also occurs because of insensitivity of the Courts. Even in petty offences the offenders are not released on bail. It also caused sex exploitation in the jail. Though Law Commission of India in its 78th report recommended that condition to release on bail should be liberalised. In place of imprisonment extensive use of fine as an alternative should be

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66 Supra note 56 p.364
exercised. Parole system should be followed. But the problem is that the recommendation has not been implemented properly.

(2) Problem of prison discipline:

The object of imprisonment is to deter the criminals from repeating crimes and generating a feeling of dislike for prison life among members of society. A prison characterize rigid discipline, strict security arrangements and monotonous routine of life. The prison personals do not have proper training in their field. So they misuse the power. Sometime being greedy they take bribe from one prisoner and provide such type of facilities which are prohibited like providing mobile phones and cameras. Some time dangerous things are also supplied in the jail. It shows recklessness of jail personals because it may be dangerous for other prisoners. This should be ensured that safety and security of prisoners should be maintained. The other problem is riot in the jail. This is because of the combined venture of the prisoners. The general cause of such riots are, political instigation, monotonous routine of prison life, separation from the members of the family, differences with the prison staff and step motherly treatment of wardens and guards towards certain prisoners.

(3) Problem of prisoners health:

Health problem of prisoners is a major problem, though it is duty of jail doctors to inquire the prisoners suffering from serious disease at the time of entering in to the jail. There are certain disease which are communicable like T.B., AIDS. Persons

67 Section 37, 3A, 3B, 3C, of the Prison Act, 1894
suffering from these disease should be identified and to be kept in separate cell. Sometimes jail officers are negligent and do not inquire to the jail. Homosexuality is a common practice in the jail. Another problem is poor nutrition, poor ventilation lack of food, which are also the cause of various disease. It is demand of time that proper attention should be paid for improving these situation because it is realized that one does not become less of human being by being in a prison.68

(4) Problems of criminality in prisons:

There are many causes for criminality in the prisons, frequent quarrelling is a common phenomenon in the jail. Every prisoner wants to establish its superiority over his fellows prisoners. Other negates it. This results groupies in the jail, which causes criminality. Another cause of criminality is the continuous long absence from normal society and family, which deprives prisoners from their sex gratification which is one of the basic need of human being. Not being able to control the sex desire they indulge in unnatural sexes, home sexuality, sodomy etc. These offences are very common in the jail. Though some of the advanced countries have permitted periodical conjugal visit for inmates to pacify the sex urges.69 But in India this system is not applied.

Another problem is that the jail officials are rough and tough towards the inmates. Some of them do undue favour to certain inmates in exchange for petty gains. This cause resentment among

68 George Bernard Shaw ‘The crime of Imprisonment’ in Supra note 63 p.164.
prisoners. Apart from the above situations the prisons are also becoming breeding grounds of criminals because of long exposure of minor offenders to the company of hard core criminals.\(^{70}\) There is thus multipronged violation of human rights of prison inmates.

(5) Problem of Wages of Prisoners:

The prisoners are engaged in productive works and are paid wages. But the problem is that they are paid very few amount which is violation of human right as well against Directive Principle of State Policy. They should be paid proper remuneration, whole amount of remuneration can not be given to him. Jail officers can open the bank account in the name of such prisoner. Few percent of this amount can be sent to his family.

(6) Problems of Under-trial Prisoners:

The problems of under trial prisoner is a major problem of recent years. Many of them are undergoing in various jail for periods much longer than the maximum term for which they could have been sentenced if convicted. Many of them are innocent who are waiting for their trials. When speedy Justice is component of right to life under Art. 21 of the Constitution of India, the delayed trials constitute serious violation of human rights of the under trials having adverse impact on the society as whole.\(^{69}\) The situation becomes worse on account of unnecessary delay.\(^{71}\) Court's busy calendar, prolonged police investigation and unsatisfactory bail

\(^{69}\) Supra note 56, p. 366
system are the basic reasons to keep under trial prisoners inside the jail. The poor are generally subjected to pre-trial detention, because they cannot afford sureties and personal bonds. Though there are provisions which enumerates constitutional rights,\textsuperscript{72} to provide free legal aid services and service of counsel of their own choice. Same provision is given in Criminal Procedure Code, 1973.\textsuperscript{73} But fact remains that the functioning of the Judicial system still weighs heavily against the poor as compared with non-poor.

Apart from the above problems the custodial tortures in prison is a common practice. The children who do not know the meaning of offences are residing with the mother inside the jail. This is also the violation of human rights of children.

The researcher’s experience at Bhopal Central Jail in 2005, when a visit took place. Shri Purshottam Kunwar was the Jail superintendent of that Jail. The Jail had I.S.O. The researcher entered inside the Jail. It was found that inmates had their orchestra

\textsuperscript{71} ibid
\textsuperscript{72} Articles 22 (i) of the Constitution of India, provides ‘No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be depend by a legal practitioner of his choice’. Article- 39 A of the Constitution of India provides ‘The State shall secure that operation of the legal system promotes justice on a basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
\textsuperscript{73} Section.303 of the Cr. P.C., 1973, provides Any person accused of any offense before a criminal Court or against whom proceeding are instituted under this code, may have right to be defended by pleader of his choice. Sec 304 of Cr. P.C., 1973 says, where in trial before the Court of session, the accused is not represented by pleader and it appears to the Court that the accused has not sufficient means to engage pleader, the Court shall assign a pleader for his defense at the expense of the State.
team and folk song team. Thereafter visit to women barrack took place, though facilities were there, but scene was pathetic, small children were with the women prisoners. They saw the outsiders and were looking innocent. They did not do any offence but were in the jail. By this experience the author’s view is that the system should be changed and women prisoners who have small kids should not be kept in jail. They should be kept in separate places. Special care of women as prison inmates is essential for the protection of their human rights.\(^7^4\) There is need for the custodial safety and gender justices. Women are approximately 3 percent of the total prison population in India.\(^7^5\) That is why it is need for separates jail to the women. Some extract from the report of National Expert Committee on Women Prisoners (1986-87) chaired by J. Krishna Iyer are: “Now our report contemplates one fundamental postulate that woman have a special claim to compassion, defence of dignity and human rights and protection of her sensitive needs and personal integrity. The state must secure for her this dimension of social justice while she is in peril or under the process of being custodialised in a manner detrimental to her womanliness.”\(^7^6\)

(7) **Problem of Female prisoner:**

Another problem is regarding female prisoners. For women prisoners imprisonment itself is very painful.\(^7^7\) To bring a female

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\(^7^4\) Supra note 69 p. 132  
\(^7^5\) ibid  
\(^7^6\) ibid  
\(^7^7\) Dr. (Prof.) Deepti Srivastava ‘Problem of Female Prisoners in India’ in *The Indian Police Journal*, Vol LIII No.3, July-September 2006, p. 19
prisoner inside fore walls of enclosure segregating her from outside the world and at the same time depriving her from the autonomy leads psychological problems.\textsuperscript{78} Actually the term problem means the various harmful situation faced by prisoners during incarceration. The population of male prisoners are more than female. In year 2003 out of 316519 prisoners only 12780 were female prisoners.\textsuperscript{79} Unequal treatment towards female prisoners is a major problem. Female prisoners in correctional institutions do not have same types of facilities, vocational training, job in prison, industries and others. Correctional system have not been aggressive in providing programme in services to female due to relationally small number of female prisoners.\textsuperscript{78} Many officials have attitudes that women do not need same type of treatment as men.

Neglected Medical care is also a problem for the women. There is no proper medical treatment periodically. No qualified lady doctors are attached to meet female prisoners. Expectant mothers in custody are not being given proper nutrition. Because of non regular visit of doctors, no proper nutrition cause serious health problems to women in jail.

Apart from the above during incarceration female prisoners need strong psychological support but hardly they are being provided such type of facilities. Forced separation is also a problem not for the women who has to go to prison but there children also, because they have responsibility of children and

\textsuperscript{78} ibid

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family. Basically for those children who are above six years old because they cannot go with mother.

Despite forgoing, fear of social stigma and problem of rehabilitation is a great problem for women prisoners. Social stigma is more attached to female than male. During incarceration they always feel that who will accept them. Sometime because of this fear they end their life. Generally family members and relatives of such woman are not prepared to accept her in the family. That is why after release from the jail they may involve in any short of crime. There may be further chance of exploitation. Their children may be removed from school. Even in joint family no proper care is done towards the children of that woman.

This is the reason why remedial measures like, abolish discrimination, equal treatment, Job training should be given to the women prisoners. If possible, alternative sentence for the women prisoners should be provided. A special consideration to the children of female prisoners is required to be given. An other need which is very important for women is that, the Government as well as community should make a joint effort to assist the women prisoners for the rehabilitation in society because 65% of women say that they have fear of social stigma.80

(8) Problem of self harm in Indian prison:

Prisoners sometime feel that their problem is more than they can deal with. That is why they commit suicide in jail. This type of unnatural death is mostly in case of depressed and under

79 ibid
trial prisoners. In 2002 it was found that out of 45 self harm death Haryana was highest that was 11.\textsuperscript{81} In 2003 out of 45 self harm death Tamilnadu reported highest that was 11.\textsuperscript{82} Whereas in 2005 West Bengal recorded highest number of self harm death was 28, followed by Tamilnadu 20.\textsuperscript{83} The majority of those who commit self harm are men. The common method of self harm are by hanging. The causes of self harm are, single marital status, drug addiction, medical negligence, depression, and loss of family and friends.

Living conditions in most of the jails are sub human which leads interpersonal conflicts among the prisoners and also with the authorities. There is need to bring about the paradigm shift in the attitude of jail authorities in dealing with reasonable grievances of the prisoners, particularly in the light of all pervasive human rights guaranteed by various conventions and laws.\textsuperscript{84} Though N.G.O.s are performing better role for prisoners. They have started reformation programme for the prisoners. Round table and ladies circle. No. 17 Secunderabad is an NGO who is performing this duty.\textsuperscript{85} Inner Wheel Club Gauhati Distributed indoor game materials.\textsuperscript{86}

\textsuperscript{80} Supra note76 p. 27.
\textsuperscript{81} Supra note 76, p. 35
\textsuperscript{82} ibid
\textsuperscript{83} ibid, p. 37
\textsuperscript{84} R.P. Singh ‘Prisoners and Human Right:A Perspective’ in Indian Police. Journal Vol. LIII No 2, April- June 2006, New Delhi, Bureau of Police Research and Development, Ministry of Home Affairs, Government of India, p. 92
\textsuperscript{85} Compendium of Non-Governmental Organisation in India, 2007 Bureau of Police Research and Development, Ministry of Home Affairs, Government of India, New Delhi-p.1
\textsuperscript{86} ibid
A agr agami Mahila Samity distributed books, playing materials in the jail. Satyam Institute of Yogik Studies, Patna, Bihar, running yoga programme in Jail. Inner wheel club Raipur, Chhatisgarh organized cultural programme for women prisoners. Indian Jan Sangthan, Raipur, Chhatisgarh is running training programme for women prisoners for knitting, tailoring and other products. Centre for social Justice, Ahmadabad, Gujrat, provided free legal aid for prisoners. Apart from above NGOs, there are number of NGOs who are running such types of programme in jails.

There are so many issues regarding the prison system and prisoners which are the matter of debate.

A. INADEQUATE FACILITY: The first issue is regarding food and treatment, overcrowding of jail which is causing a lot of problems for jail inmates and the budget allotted for jail becomes insufficient. That is why prisoners are facing problem of food, illtreatment and of other facilities.

B. NO NATIONAL POLICY: The second issue is that there is no National prison policy. Though majority of legislators served jail spell but they did not think about this policy.

C. CIVIL RIGHTS OF PRISONERS: Third issue is regarding civil rights of the prisoners. Are prisoners have

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87 ibid
88 ibid, p. 3
89 Supra note 76, p. 7
90 ibid

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civil rights? A prisoner who is convicted and after spending his life in the jail period he comes out. If he was in government service he would be deprived of that service which is a matter of double jeopardy. Because firstly he is punished for the offence committed by him and secondly for that offence he is deprived from the service. It is matter of concern because it is against reformatory theory of punishment. According to this theory a convict after coming from the jail must be rehabilitated. But present position deprives them from their livelihood which may be violation of human rights, because human right is the matter of constitutional governance. The prisoners whether convicted or under trial or awaiting for trial cannot be deprived of their human rights, except right to liberty. Prisons are for reform and rehabilitation and not for deterrence and punishment only.

D. VOTING RIGHT OF PRISONERS: Another issue is voting rights of prisoners. A prisoner may be M.P. or M.L.A. but he cannot caste his vote. There are many examples where people have contested elections while in jail and some of them became M.P. and M.L.A. It is a question mark of electoral system. Access to media is also an important issue. Whether Journalists should be able to have access to prisoners. There are circumstances in which it

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is desirable for the interest of prisoners that journalists should access to interview prisoners. And it should be allowed to publish if there is miscarriage of justice but in present situation they are not allowed to do so.

There is no provision for regular visit to jail by appropriate person like member of Human Rights Commission and University people for the purpose of research. It will be useless to discuss all the issues, if we do not discuss the issue of inadequate provisions for basic needs. The basic needs provisions may not be problematic so far as Delhi and other Metropolitan cities are concerned but when it comes to other states like U.P., Bihar it becomes serious issue. Here toilets and bathrooms are not sufficient. Even the shop and oil provided by the officials are not sufficient. These things are used by officials. Therefore, Delhi High Court opined that the condition of Tihar central Jail in Delhi is not up to the mark.\textsuperscript{93} Besides above unequal treatment in jail prison society is inherently unequal. The source less, lower class inmates invariably occupy the lowest position in the hierarchy. They are not only subjected to lawful and legitimate command of prison officials, but are also treated as subjects by the influential convicts and the mafia undertrials.\textsuperscript{94} The existing prison system sustains the social hierarchies enjoyed out side even inside the prison by clarifying the prisoners into B, C, classes or 1st and 2nd

\textsuperscript{93} The Hindu 24 July, 2007.

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classes for conferring prison privileges.\textsuperscript{95} Though Jail Manual Committee and All India Jail Reform Committee recommended for doing away with the classification, based on social status education and mode of living.\textsuperscript{96}

The Duggal Committee\textsuperscript{97} has also recommended the striking down on constitutional grounds the classification into B and C class prisoners. The committee recommended that “after a person is guilty of charged with infraction of law as consequence whereof he is confined in the institution maintained by the state. The law has to take care, and every violation of law ought to be treated equally and there is no justification for any disparities to be recognized or maintained inside the penal institution on the basis of earlier background”.\textsuperscript{98}

Apart from the above, delay in execution of death sentence is also violation of human rights of the convicts. Similarly mode of execution applicable in India is hanging through rope which is more cruel because it takes more time to cause death\textsuperscript{99}.

From the above discussion regarding problem and issues there is need for creating space for civil society in prison system and following changes should be considered:

(i) To make prison system more transparent and accountable.
(ii) To create greater community awareness and state in the key

\textsuperscript{95} ibid
\textsuperscript{96} ibid
\textsuperscript{97} The Committee was set up to examine Delhi Prison Rules, 1988.
\textsuperscript{98} Supra note 93.
role of prisons.

(iii) To invoke community participation in prison functioning.
(iv) To create a cadre of social activist to ensure prisoners rights within the community.

C. Human Rights and Women

Men and Women are the pillar of a society. Their roles, rights and duties are complementary for each other. If either of the two is weak the structure of society shall demolish. Both of them are created by the same creator. Their rights and duties are equally divided by him. But men are taking undue advantages because of strong muscle power and unreasonable custom. Although traditional customs are declared unconstitutional even then the rights of women are being violated. There is still need for improvement. Because present society is under the impression of age-old dogma that woman is inferior to man. Religion is wrongly interpreted and women are at the receiving end not from today but from earlier ages. The abduction of Sita by Ravana, abduction of Brhaspati’s wife Tara by Soma and birth of Pururva out of illicit union between Buddha and Illa are the example of

101 ibid
exploitation of women by men in earlier era. These problems of society is still continued.

Mahatma Gandhi has also supported the cause of improving women's condition through education and reform of marriage laws. He declared himself to be uncompromising in the matter of women's right. Our constitution makers felt that sex equality is crucial for the development of country and tried to remove inequality and created awareness for the exercise of human rights. The Constitution of India provides right to equality and right against exploitation. It also directed the State to adopt the policy to remove inequality. Apart from the Constitution of India, there

102 Supra note 98
103 ibid
104 Article 14 of the Constitution provides, "The State shall not deny to any person equality before the law or equal protection of laws within territory of India. Article 15, (1) says "The state should not discriminate against any citizens on the grounds only of religion race caste sex place of birth or any of them. Article 15 (2) provides "No citizen shall on grounds only of religion race caste sex, place of birth or any of them be subject to any disability liability restriction or condition with regard to:
(a) access to shops, public restaurants hotels and place of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. Article 15 (3) provides that nothing in this article shall prevent the state from making any special provision for women and children. Article 16 (2) provides that no Citizen shall on grounds only of religion race caste sex, descent place of birth residence or any of them be ineligible for or discriminated against in respect of any, employment or office under the State.
105 Article 23 provides, traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
106 Article 38 (1) provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social economic and political shall in form all the institution of the national life.
Article 38 (2) provides that the State shall in particular strive to minimize the inequalities in home and endeavor to eliminate in equalities in status facilities and opportunities not only amongst individuals but also amongst group of
are provisions in Indian Penal Code, 1860, Criminal Procedure Code, 1973, Indian Evidence Act 1872, and some of the special statutes like, Protection of Women from Domestic Violence Act, 2005, Maternity Benefits Act, 1961, Dowry Prohibition Act, 1961, etc. on National level. Apart from above, Convention on Elimination of all forms of Discrimination Against Women, also provide safeguards to the women. But the problem regarding human rights of women remain same. Although there are provisions in the constitution but the main problem is of the enforcement.

(a) Problem Regarding Education: The first problem regarding women is the education. It is the basic human right of everyone but women who are the half of the population are generally deprived from this human right. This is because either they are suppressed to be the parents or they have been socialized to be the bearer of tradition. It is thinking of the society that after the marriage they will have to move another’s house. Though by educating women a country can reduce poverty, improve productivity, ease population pressure and offer its children a better peoples residing in different areas or engaged in different vocations. Article 39 (a) provides that the citizens men and women equally have the right to adequate means of livelihood. Article 39 (d) provides about equal pay for equal work both for men and women. Article 39 (e) mentions that the health and strength of workers men and women and tender children are not abused. Article 42 provides that the state shall make provision for securing just and human condition of work and for maternity relief. Article 44 provides that the State shall endeavor to secure for citizens a uniform civil code throughout the territory of India.

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future. However according to 1991 census the member of female illiterates continues to be much higher than male illiterate. The National Policy on Education adopted by Government of India in 1996, wherein it is said that under education women’s education is vital component for securing equality and social justices in education. But position did not change much. The reason is that boys are given more priority over girls. Maximum number of drop out students from schools are girls. Besides above drop out of girls from the school there are some other reasons also. For example there are no facilities of basic needs in schools, such as toilet and urinals and they have to go either their own houses or some other places which are far away from there. Another reason for drop out is pregnancy of girls, may be before or after the marriages. Lack of school and colleges is a major problem due to which drop outs of girls are more.

(b) Problem Regarding Marriage: Another problem is regarding marriage of immature girls. In the society generally consent of girls are not taken for marriage. It is decided by parents that who will be the bridegroom of such girl. Though there are provisions to restrain child marriage. The Child Marriage Act 1929 has been repealed and new Act The Prohibition of Child Marriage Act,2006 came into existence which provides that child marriage shall be

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108 ibid
109 ibid
110 Child Marriage Restraint Act, 1929 (Sharada Act, 1929) amended in 1976
voidable at the option of the contracting party. But still it is continued. The girl after the marriage becomes mother of child though her body is not developed to be a mother. Consequently she is always ill. Apart from this, in some of the community of society (e.g. Muslim) polygamy is valid. A Muslim male can marry with four wives. But a muslim wife can not marry with more than one male. If she does so she will be liable for bigamy.\(^{111}\) If a Muslim male enters into marriage with more than one wife he can not do equal justice towards other wife.

(c) **Economical Problem of women:** In general women are not economically independent and secured though they contribute about 2/3rd of total working hours.\(^{112}\) They receive only 1/10th of income and owned less than 1/100th property.\(^{113}\) This shows that women have Law status and are exploited and over burdened with house responsibilities. In India the situation in rural areas having 80% of female population is even more alarming.\(^{114}\)

(d) **Health Problem:** At global level every minute one woman dies from problems related to child birth and pregnancy.\(^{115}\) Many of them dies due to unsafe abortion. Apart from the above malnutrition is cause of anemia which is major cause of maternal death. Low wages for women also perpetuate poor nutrition and ill health. In orthodox families generally women go to bed without having food and do not disclose it to others.

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\(^{111}\) Section 494 of the Indian Panel Code, 1860.

\(^{112}\) Supra note 105, p. 73

\(^{113}\) ibid

\(^{114}\) ibid.

\(^{115}\) Supra note 110.
Following are the major issues that have been discussed.

A. **Discrimination against Women:** Article 1 of the Convention on Elimination of All Forms of Discrimination against Women 1979\textsuperscript{116} explains that despite the existence of other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society. But problem of this convention is that it does not provide for individual’s complaint system. That is why Optional Protocol on the Convention on Elimination of All forms of Discrimination against Women came in to force in 1999. India has ratified the convention on July 9, 1993. Ratification of the convention obliges India to honor the obligations imposed by the convention. About fifty seven years of independence passed even then equal treatments towards women has not been paid in India. Advancement and empowerment of women have to be recognized as an important aspect of development, women’s participation in political process also has not been commensurate with their proportion in population. The Constitution of India provides equal rights to men and women. But the factual position of women shows a far below status, despite that women were in the forefront of the National development. Though there are many provisions on National and International levels which provide equality to the

\textsuperscript{116} Article 1 says any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human being and fundamental freedoms in the political economic, social, cultural, civil or any other field.
women but were inscription of promises. In 1990, National Commission for Women Act was enacted by the Parliament which established a National Commission for Women. The Commission has all power to ensure speedy development of women. However the constitution and other statutes could not change the factual position. Tall promises for improving the plight of women were made in 2001 which was declared as ‘Women’s Empowerment Year’ but they were far away from being fulfilled. National Policy for Women Empowerment was placed before a group of minister but policy has not been adopted. Further the outlook of men towards women has not been charged. Women reservation bill in Parliament and State Assembly is an example of it. Bill produced so many times before the parliament but did not pass till now.

B. Violence Against Women: Violence against women is gross violation of human rights of women which is a major issue of debate. In India the common violence against women are wife beating, harassment torture, bride burning, slavery, exploitation, forced prostitution, sexual harassment, female feticides and infanticide. Late Smt. Indira Gandhi, former Prime Minister of India, once told, ‘Our women have more rights than women of other countries, but there are large areas wherein women are suffering, where may be, they are not conscious of their right. Violence against women may be in different forms like (i)

117 Dr.Krishna Chandra Jena, ‘Violence Against Women A Human Right Violation’ in Human Right Education Law and Society, 2004, Hyderabad, Nalsar University, p. 91
Domestic Violence, (ii) Sexual abuse, rape and sexual assault, (iii) Female foeticide and infanticide (iv) Sexual Harassment at work place (v) Trafficking in women and forced prostitution.

(i) Domestic Violence: It includes all types of violence against women. It includes physical, psychological, sexual, economical, emotional and verbal. The emotional includes threat of dispossession of child from mother. Though Protection of Women from Domestic Violence Act, 2005 came in to existence to short out this problem, but there is lacunas. The Act provided that only male can be respondent\textsuperscript{118} exceptionally may be female, other than this the Domestic violence Act, 2005 has some serious lacunae that may stand in the way of the law's effective implementation. The most trouble some issue revolve around the rights and privileges of protection officer (P.O.) and provisions for the shelter of abused women. That is why the law may lose teeth unless the rights of the P.O. as defined in the Act are adequately defined and strengthen.\textsuperscript{119} The Act does not empower the protection officers

\textsuperscript{118} Section 2 (q) of the Protection of Women from Domestic Violence Act, 2005, provides that respondent means any adult male person who is or has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. Provided that an aggrieved wife or female living in relationship in the nature of marriage may also file a complaint against relation of the husband or the male partner.

\textsuperscript{119} Section 5 of the Act provides: A police officer, service provider or Magistrate who has received complaint of domestic violence or is otherwise present at the place of incident of the domestic violence or when the incident of domestic violence is reported to him shall inform the aggrieved person-(a) of her right to make an application for obtaining a relief by way of protection order of the availability of the services of service providers of the availability of the services of the protection officers of her right to free legal services under the legal services Authority Act, 1987 and of her right to
to ensure that the complainant has a right to dignified residence. PO is supposed to work as outreach officer of the Court for women for aggrieved women. But the problem is the absence of adequate machinery and support system.\textsuperscript{120} The Law does have provision for shelter home for any body who complains of being a victim of domestic violence. But it does not make it mandatory for shelter home to provide assistance to the aggrieved and leaves it to their discretion and also on the availability of facilities with them.\textsuperscript{121} There are very few shelter homes and the condition of those are very bad. Hence not giving PO the right to protect women in her own home weakens law. The Protection of Women from Domestic Violence Act,2005, does not speak of any funding and has not set any mechanism in place to the safety of women facing thereafter of violence. So there is urgent need for more specific provisions supported by adequate funding. The Act however has good intention but is still a long way from providing help to those affected by domestic violence. Till the loopholes are plugged it will be a while before women mother, daughters, wives or domestic workers can be safe even within the four walls of their one home.

(ii) Sexual Abuse, Rape, Sexual Assault, Abduction and Cruelty: Beauty of the woman is her most valuable jewel. Everyone has a word of praise for that. But taking woman as sex

\textsuperscript{120} Minisha Jain ‘Slowroad to Succor for Abused Women’ in The Telegraph, Guwahati, 29th November, 2006 p. 11.
\textsuperscript{121} ibid
symbol and a beautiful think to play with is legal wrong.\textsuperscript{122} Any person who tries to do so shall be punished under section 509 of Indian Penal Code\textsuperscript{123} but the punishment is very less. That is why Law Commission of India in its report suggested that the accused in this section should be punished with three years imprisonment.\textsuperscript{124} The word abuse has a very wide meaning. Everything which is contrary to good order established by uses amount abuse. Physical or mental treatment is also an abuse. An injury to genital in attempt to sexual intercourse is a sexual abuse. Forcing a woman into sexual relationship against her will\textsuperscript{125} forcing her to watch certain sexual act without her consent amounts to sexual abuse.\textsuperscript{126} In case of rape normal sexual

\textsuperscript{122} Supra note 98 p. 161

\textsuperscript{123} Section 509 provides that whoever intending to insult the modesty of any woman utters any sound or gesture or exhibits any objects intentionally that such word or sound shall be heard or that such gesture or object shall be seen by such woman shall be punished with simple imprisonment of one year or with time or both.

\textsuperscript{124} Law Commission of India 172nd Report 2000 see also Arun Kumar Singh ‘Human rights and crime victims right to compensation’inJJPL Vol 12007 p89

\textsuperscript{125} Section 375 of Indian Penal Code, 1860 provides , A man is said to commit rape who except in the case here in after excepted has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

\textbf{First} Against her will  
\textbf{Secondly} Without her consent  
\textbf{Thirdly} With her consent, when her consent has been obtained by putting her in whom she is interested in fear of death or of hurt.  
\textbf{Fourthly} With her consent when the man knows that she is not her husband  
\textbf{Fifthly} With her consent when at the time of giving such consent by reason of unsoundness mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance she is unable to understand the nature and consequence of that to which she gives consent.  
\textbf{Sixthly} With or without her consent when she is under sixteen years of age.  
\textbf{Explanation} - Penetration is sufficient to constitute sexual intercourse.
intercourse with voluntary consent of women above sixteen years of age is not an offence. The explain action of rape says that penetration is sufficient to constitute sexual intercourse. But there is no definition of rape or sexual intercourse. Apart from the above the exception of 375 says if the wife is not less than fifteen years sexual intercourse is not a rape. Therefore this section provides validity to marital rape.

The Law Commission of India in its 172 report in

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**Exception- Sexual** intercourse by a man with his own wife not being under fifteen years of age is not rape under Indian Penal Code.

126 Section 192(1) provides for the purpose of subsection (2) a book, pamphlet, paper, writing, painting, representation figures or any object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or it its effect or (where it comprises two or more distinct item) the effect of any one of its items is taken as a whole such as to tend to deprave and corrupt person who are likely having regards to all relevant circumstances to read, see or hear the matter embodied in it.

Subsection (2) Says whoever:

a. sells lets to hire distribute publicly exhibits or any manner puts into circulation or for purpose of sale hire distribution public exhibition or circulation makes produces or has in his possession any obscene book pamphlet paper drawing painting representation or figure or any other obscene objects whatsoever or

b. imparts, exports or conveys any absence objects for any of the purpose aforesaid or having reason to believe that such object will be sold let to hire distributed or publicly exhibited or in any manner put in to circulation or

c. takes part or receives profit from any business in the course of which he knows or has reason to believe that any such obscene objects or for any of the purposes aforesaid made produced purchased kept, imported, exported, publicly exhibited or in any manner put in to circulation or

d. advertise or makes known by any means what so ever that any person is engaged or ready to engage in any act which is an offence under this section or that any such obscene object can be procured from or through any person or

e. offers or attempts to do any act which is an offence under this section;

Shall be punished with two years imprisonment and with fine two thousand rupees (for first conviction) and in the event of second or subsequent conviction for a term of five years imprisonment and also with fine which may extend to five years and fine of five thousand rupees.

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2000, recommended to amend section 375 of Indian Penal Code.\textsuperscript{127} The Commission has also recommended to amend section 376.\textsuperscript{128} The Commission has recommended that the punishment for sexual assault should be enhanced up to life imprisonment but not less than seven years. The Commission has also suggested that the conviction for sexual assault on his own wife who is under sixteen years of age shall be punished with three years imprisonment in place of two years. The Commission also

\textsuperscript{127} Section 375, Sexual assault Sexual assault means:
(a) penetrating the vagina (which term shall include the \textit{Labia majoria}) the anus or urethria of any person with (i) any part of the body of another person or (ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes.
(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the \textit{Labia majoria}) the anus or the urethria of the offender by any part of the other persons body.
(c) Introducing any part of the penis of a person in to the mouth of another person.
(d) engaging in cunnilingus or fellatio or
(e) continuing sexual assault as defined in clause (a) to (d) above in circumstances falling under any of the six following descriptions.

\textbf{Firstly} against the other persons will

\textbf{Secondly} without the other person\textsc{'}s consent

\textbf{Thirdly} with other persons consent when such consent has been obtained by putting such is interested, in tear of death or hurt.

\textbf{Fourthly} where the person is a female with her consent when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be law fully married.

\textbf{Fifthly} with the consent of other person when at the time of giving such consent by reason of unsoundness of mind or intoxication or be the administration of offender or through any other person of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

\textbf{Sixthly} with or without other person\textsc{'}s consent, when such other person is under sixteen years of age.

\textbf{Explanation} penetration to any extent is penetration for the purpose of this section.

\textsuperscript{128} The Law Commission of India, 172nd Report, \textit{Review on Rape Law}, 2000
suggested to modify the section 376-A and to enhance the
punishment. The Commission recommended to include new
section i.e. 376 E.\textsuperscript{129}

The offence of rape is heinous crime. But this problem is
increasing continuously. Once a woman is forced to illegal sexual
relationship her honor comes to the lowest ebb. Society rejects her
and moreover she faces trial like an accomplice in the hands of the
police, lawyer and Judges.\textsuperscript{130} Just imagine a legal intercourse
between husband and wife takes place in complete privacy and at
the same time nobody likes to discuss it.\textsuperscript{131} The prosecutor is
supposed to repeat the experience in front of many people.
Surprisingly no body as well as law believe her without

\textsuperscript{129} Section 376 E of Indian Penal Code, 1860, Unlawful Sexual Contact
means:

(1) Whoever with sexual intent touches directly or indirectly with a part of
the body or with an object any part of the body of another person not being the
spouse of such person without the consent of such other person shall be
punished with simple imprisonment for a term which may extend to two years
with fine or both.

(2) Whoever with sexual intent, invites counsels or incites a young person
to touch directly or indirectly with a part of the body of any person including
the body of the person so invites counsels incites or touches with sexual intent
directly or indirectly with a part of the body or with an object any part of a
young person shall be punished with imprisonment of either description which
may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young
person or is a person with whom the young person is in a relationship of
dependency or touches directly or indirectly with sexual intent with a part of
the body of such young person shall be punished with imprisonment of either
description which may extend to seven years and shall also be liable to fine.

\textbf{Explanation} - young person in this subsection and subsection (2) means a
person below the age of sixteen years.

\textsuperscript{130} Supra note 98 p. 155.
\textsuperscript{131} ibid

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producing the evidence. Though our legal system is showing positive response up to some extent. It accepts medical report as an evidence. The provision of camera trial is also there. All these provisions are available even to the women of easy virtue, but much more are required. Therefore the recommendation suggested by the Law Commission of India need to be accepted by the Government. The punishment for the rapist is required to be more stringent. Unfortunately the offence of rape did not downwards, because the process of law is very technical. That is why rapist are not being caught by law.

Apart from the forgoing principles adultery is an offence provided in section 497 of Indian Penal Code 1860. According to this section a man commits the offence of adultery with the wife of another man without the consent or convenience of the husband. The object of this section is to preserve the sanctity of the marriage. Society abhors marital infidelity. In the provision the wife of adulteror is expressly prohibited from prosecuting her husband is the exception of the rule that anyone can set the criminal law in motion. Therefore these is no good reason for not noting out similar treatment to wife who has sexual intercourse

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132 ibid

133 Section 497 provides ,Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape is guilty of the offence of adultery and shall be punished with imprisonment either description for a term which may extend five years or with fine or with both in such case wife shall be punishable as abettor.
with a married man. Besides above section 494\textsuperscript{134} of Indian Penal Code, 1860 says that bigamy is an offence. The second marriage is void by reason of taking place during the subsistence of first marriage. In other words it would be bigamy only when the marriage is otherwise valid. The first as well as second marriage must be valid. Prosecution has to prove that the second marriage was validly performed during the existence of first marriage. If there is any lapse in following the customary rule regarding the second marriage, it would not be applied. It is not always easy to prove long after the marriage that all the rituals were duly performed. Thus the second wife will be denied the right to receive the maintenance. Section 125 of the Criminal Procedure Code, 1973\textsuperscript{135} provides for maintenance to the neglected wife. Since such a woman is defacto the wife of the man, but in the law she is not a wife. Quite often the man marries again suppressing his earlier marriage. In such situation the second wife cannot claim the benefit of section 125 of Criminal Procedure Code, for no fault

\textsuperscript{134} Section 494 provides Whoever having husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

\textsuperscript{135} Section 125 of Criminal Procedure Code, 1973, provides: If any person having sufficient means neglects or refuses to maintain his wife:

\begin{enumerate}
\item[(e)] A Magistrate of the first class may upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife.
\end{enumerate}

Provided further that Magistrate may during the pendency of the proceeding order such person to make a monthly allowance for the interim relief.

\textbf{Explanation} – For the purpose of this chapter:

\begin{enumerate}
\item[(b)] Wife includes a woman who has been divorced or has been obtained
of hers.\textsuperscript{136} The husband is absolved of his responsibility to maintain his second wife.\textsuperscript{137} This is manifestly unfair and unreasonable. The man should not be allowed to take advantage of his own illegal acts. The law should not be insensitive to the suffering of such women.\textsuperscript{138} The women in this section should include a woman who was living with man as his wife for long period during subsistence of first marriage. Committee on Reforms of Criminal Justice System (Malimath Committee Report) has also suggested that the definition of word ‘wife’ in section 125 of Cr. P. C.1973, should be amended so as to include a women who was living with the man during the subsistence of the first marriage.\textsuperscript{139} Like wise suitable provisions be incorporated to overcome the difficulties of section 497 of Indian Penal Code. The suggestion of Malimath Committee must be incorporated in section 497of Indian Penal Code,1860. The Committee has suggested that to overcome these practical difficulties it should be included that if man and wife were living as husband for a reasonable long period they shall be deemed to have married in accordance with customary rites of either party thereto. This shall be rebuttable presumption an civil proceeding.\textsuperscript{140} Another problem is regarding the Muslim women. This section 497of I.P.C. is discriminatory, towards the women of Muslim women, because a Muslim male can enter in to marriage

\textsuperscript{137} ibid
\textsuperscript{138} ibid
\textsuperscript{139} Supra note 133 p. 189

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with four wives but a Muslim female cannot enter into second marriage during the existence of first marriage. The woman who lives with the husband and his family after the marriage is excepted to receive affection and care and not cruelty or harassment. If cruelty or harassment is done by the husband or his relatives, they may be punished under the section 498 - A of Indian Penal Code, 1860.\textsuperscript{141} Cruelty for the purpose of the section means willful conduct that is likely to drive the woman to commit suicide or cause grave injury or damage to life, limb or health mental or physical. In the Indian tradition the woman quietly suffers without complaining many conveniences, hardship and even insult, with the sole object of making the marriage a success. She even tolerates a husband with bad habits.\textsuperscript{142} However, when her suffering crosses the limit of tolerance she even commits suicide.\textsuperscript{143} For the Indian woman marriage is a sacred bond and she tries her best not to break it. Sometime divorce takes place. Because of being this section (498 A) non bailable and non compoundable it makes reconciliation and returning to marital

\textsuperscript{140} Supra note 133 p. 190

\textsuperscript{141} Section 498 A Whoever being the husband or the relatives of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. \textbf{Explanation} For the purpose of this section cruelty means (a) any willful conduct which is of such nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life limb or health (whether mental or physical) of the woman or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. See also 304 B of Indian Penal Code.

\textsuperscript{142} Supra note 133
home almost impossible. This section provides remedy against cruelty. If a woman, victim lodges FIR alleging commission of offence under section 498-A of Indian Penal Code. Then husband and inlaws would be arrested immediately. But if she has no proper source of income and want to return to natal family. She can not do so, because offence is non-bailable. And second thing is that, if husband is suspended from the service because of arrest he cannot maintain his wife also. Thus woman is neither from here nor there. She is just fallen from fry pan to fire. So this section is neither helpful for wife nor husband. It is therefore necessary to make the offence bailable and compoundable to give a chance to the spouses to come together.  

Apart from the above eve teasing, molestation and act of outraging the modesty of women are also violation of women’s human dignity. Eve teasing has led to grave cases where girls are deliberately run over the speedy vehicle, oil is thrown on their faces etc. Although simpler form of eve teasing and molestation are provided in Section 294 of Indian Penal Code, but its graver form which is accompanied by gesture, indicating the threat or use of force are covered by section 354 of Indian Penal Code.
C. Prostitution And Woman Trafficking: Besides the forgoing issues prostitution is a major issue regarding human rights of women. It is an old age institution. According to Immoral Traffic (Prevention) Act, 1956 as amended in 1986 prostitution as sexual exploitation or abuse of person for commercial use.\textsuperscript{147} This definition includes male and female both. But prior to 1986 the prostitution was the act of female offering her body for promiscuous sexual intercourse for hire whether in money or in any other kind. The present definition is not continued to the act of a female offering her body for promiscuous sexual intercourse with her but includes sexual exploitation or abuse of male for commercial purpose.

V.C. Mahajan Committee has identified ten types of prostitutes like street walkers, religious prostitutes, prostitute in brothel, singing and dancing girls, bar nude, massage parlour and some call girls.\textsuperscript{148} The age group of the prostitutes below 20 years of age are 75%, 21 to 30 years 40%, 30 to 35 years 18%, and above 35 years 12%.\textsuperscript{149} The major reason for induction in prostitution is poverty, unemployment or lack of appropriate rehabilitation. Apart from this _devdasi_ system in Hindu minor girls are sent to serve temple as dancing girls. Though the State

\textsuperscript{147} Section 2 (f) Immoral Traffic (Prevention) Act, 1956 as Amended by the Act 44 of 1986.
\textsuperscript{148} Supra not 98 p. 67
\textsuperscript{149} ibid

which may extend to two years or fine or both.
Government tried to prohibit the devdasi system but without any success. The definition of prostitution under section 4 of the Act 44 of 1986 which provides punishment for the prostitution. But it is a matter of argument that it violates article 21 of the Constitution of India. Article 21 includes right to livelihood. If cabaret dancers are deprived of doing dance, they can be deprived of livelihood. Deprivation of her from bread infringes her fundamental rights of livelihood. These prostitutes are not only facing the problems of livelihood but health problems also. The HIV epidemic is a newly emerging phenomenon which requires immediate effective control. In India when people talk about AIDS, the single group of the people that comes to their mind most commonly is that of prostitutes. This perception, however perhaps represents the reality. In India prostitutes are indeed extremely vulnerable to AIDS.\textsuperscript{150} Though at present HIV infection is spreading in rural and urban areas but a group of clients of prostitutes are major factor in spreading AIDS. They transmit this disease to their wives and other prostitutes. There is one in three chance that infected women if pregnant transmit the infection to their new born babies.\textsuperscript{151}In the law prostitution for commercial purposes is prohibited.\textsuperscript{152} But it has been seen that going girls from Nepal, Bangladesh and India are imported and exported. People indulge in selling and buying the girls by giving false processes of marriage and other benefits. In this case not only a gang of lower section but high profile

\textsuperscript{150} Supra note 133 p. 77  
\textsuperscript{151} ibid  
\textsuperscript{152} Immoral Traffic (Prevention) Act, 1956 Amended in 1986.
persons and police is also involved. In Gujrat it is found that one MLA of BJP was involved in it. The police in place of protecting this practice help this profession because they may get good benefits. The attempts made by the legislatures though the laws to eradicate this problem but the law has its one limitations and it can eradicate only legal problems.¹⁵³ For the eradication of social evils a change of social behavior is required. V. C Mahajan Committee has recommended the masseurs for the protection of human rights of prostitution and their children. Which are as follow;¹⁵⁴ There should be child development and care centre such centers are to be situated in (a) The vicinity of red light areas, (b) The vicinity of other areas identified as having concentration of prostitutes (c) Those areas where there is a concentration of communities among whom prostitution is the traditional occupation of women and girls.

One more problem is also there that if it is a matter of physical enjoyment with the consent of both of the parties it is no offence. But it is prohibited by law if is done for commercial purposes. It means if it is done not for the commercial purposes it is valid. However, it is matter of legal interpretation only. For the rehabilitation of prostitutes it is necessary that they should be provided livelihood and socioeconomic empowerment. Economic empowerment is the crucial factor which can prevent the girls to attract in prostitution. At last it can be said that prostitution cannot be eradicated and suppressed unless a strong action is taken against all the erring persons.

¹⁵³ Supra note 133 p. 80
D. Abortion of Female Foetus: With the advance of medical
science it is possible to know the sex of child in mother womb.
People adopt this method to kill female child. It can cause health
problem to mother of that child. Though there are provisions in
India Panel Code, 1860, Medical Termination of Pregnancy Act,
1971, Prenatal, Diagnostic Techniques Act, 1994. Section 312\textsuperscript{155},
313\textsuperscript{156}, 314\textsuperscript{157} of Indian Penal Code, deal with miscarriage.
However Medical Termination of Pregnancy Act, 1971 validate
the termination of pregnancy under certain circumstances. These
circumstances are that pregnancy can be terminated in good faith
and by registered medical practitioner with the consent of such
woman\textsuperscript{158}. Since woman in India believe in her family and

\textsuperscript{154} ibid.
\textsuperscript{155} Section 312 of Indian Penal Code, 1860, provides: "Whoever voluntarily
causes a woman with child to miscarry, shall, of such miscarriage be not
caued in good faith for the purpose of saving the life of the woman, be
punished with the imprisonment of either description for a term which may
extend to three years and fine or both and of the woman be quick with child
shall be punished with imprisonment seven years and shall also be liable to
fine".
\textsuperscript{156} Section 313 of Indian Penal Code, 1860, provides: "Whoever commits the
offence depend on the last preceding section (section 312) without consent
of the woman is quick with the child or not shall be punished with
imprisonment for life or with imprisonment of either description for a term
which may extend to ten years and shall also be liable to fine".
\textsuperscript{157} Section 314 of Indian Penal Code, 1860, provides "Whoever with intent to
cause the miscarriage of woman with child does not does any act which causes
the death of such woman shall be punished with imprisonment of either
description for a term which may extend to ten years and shall also be liable to
fine, and if the act is done without the consent of woman shall be punished
either with imprisonment for life of with the punishment above men timed".
\textbf{Explanation} It is not essential to this offence likely to cause that the offender
should know that the act is death.
\textsuperscript{158} Section 3 of Medical Termination of Pregnancy, Act 1971 provides that:
(i) if pregnancy is less than 12 week and the opinion of two medical
husband and if husband is not agree in female child the wife also give consent though under compulsion. One provision is also there that above termination shall be done in Government hospital or any hospital approved by the Government for this purpose.\(^{159}\) But the important issue is that, can a women have absolute right to decide whether or not to continue a pregnancy? The Medical Termination of Pregnancy Act does confer or recognize any absolute right on any person to cause an abortion or termination of pregnancy. Even then the woman cannot terminate her pregnancy except the provisions mentioned in the Act. Indian society is a male dominated society. The attitude of it is to must have a son and has not been changed yet now. It shows that discrimination against woman starts in mother womb. This social behavior is unethical. This social bias problem can be solved if there are lots of opportunities available to the girls so that they shall have means to serve her parents. The Medical Termination of Pregnancy Act, 1971 provides that abortion can be done with the consent of woman with positive opinion of Doctor. This gives a lot of scope of practitioner is that the pregnancy of woman involves a risk of life or injury to her physical or mental health or if there is risk to health of child which is to borne;

(ii) if the pregnancy is caused by rape which cause injury to the medical health of woman.

(iii) if the pregnancy is caused by the failure of any contraceptive method which is used by the married couple which causes injury to the mental health of the woman.

(iv) if the pregnant woman is minor or lunatic, her pregnancy shall be terminated by taking consent of the pregnant woman

(v) the pregnancy in no.(i) can be terminated when the opinion of the medical practitioner is formed in good faith and pregnancy in no.(ii), (iii) and (iv) can be terminated when the consent of pregnant woman is there.

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under the shadow of Doctor’s opinion to misuse the Act.¹⁶⁰ That is why the Act should be followed strictly and abortion on above mentioned ground should be allowed in some selective hospitals which fulfill all the prescribed norms. If mother or doctors has given false opinion they should be penalized.

D. Human Rights and Child

Children are the supreme assets of any nation,¹⁶¹ they being the great gift to humanity are the potential and useful human resources for the progress of the country.¹⁶² Children are innocent but defenseless. They are not burdened by prejudice fears and hypocrisy. They need appropriate attention and proper support to grow well.¹⁶³ If we neglect and do not provide bare needs of food health and education, heavy price will have to be paid in future. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood, socially economically, physically and mentally, the nation gets deprived of potential human resources for social progress.¹⁶⁴ Abandoning children and excluding food foundation of life for them is a crime against humanity. Millions of children live in difficult circumstances, such

¹⁵⁹ Section 4 of Medical Termination of Pregnancy, Act 1971,
¹⁶⁰ Supra note 98 p. 108.
¹⁶¹ Justice Shivraj Patil ‘Children Supreme Asset of the Nation’ in All India Reporter, 2005, p. 5
¹⁶² ibid
¹⁶³ ibid
¹⁶⁴
as orphans, refugees, street children, children working in hotels, tea stall etc. Van Bueren argues that children’s right can be distilled down to four core elements identified as protection, precaution, provision and participation which she calls the four P.\textsuperscript{165} Gandhiji said about the children and their role in peace and human development: “If we are to reach real peace in this world, and if we are to carry on real war against war, we shall have to being with children. And if they will grow up in their natural innocence, we won’t have to struggle, we won’t have to pass fruitless, idle resolutions, but we shall go from love to love and peace to peace, until at last all the corners of the world are covered with that peace and love for which consciously or unconsciously, the whole world is hungering.”\textsuperscript{166} India is home to almost nineteen percent of the world children.\textsuperscript{167} More than one third of the country’s population around forty four million are below 18 years.\textsuperscript{168} About forty percent of those children are in need of care and protection which indicate the extent of the problem.\textsuperscript{169} Children are the most vulnerable section of the society. The problems and issues like child education, health, protection, development, child abuse and neglect like female feticide and infanticide, girl child discrimination, child marriage, trafficking of

\textsuperscript{164} Ibid
\textsuperscript{166} Infra note 174, p.72
\textsuperscript{167} Smt. Deepa Jain Singh in \textit{Study on Child Abuse in India} 2007, p. III.
\textsuperscript{168} Ibid
\textsuperscript{169} Ibid

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children etc are discussed here. Article 21 of the Constitution of India\textsuperscript{170} includes right to life with human dignity. This right to life includes right to live with human dignity enshrined in Article 21, derives its life breath from the Directive Principle of State Policy and particularly clause (e) and (f) of Article 39\textsuperscript{171} and Article 41\textsuperscript{172} and Article 42.\textsuperscript{173} Apart from the above legislations, The Prohibition of Child Marriage Act, 2006 and The Commission for the Protection of Child rights Act, 2005 also provide protection to childhood. The Prohibition of Child Marriage Act, 2006 provides that every child marriage is voidable. The Commission for the Protection of Child Rights Act, 2005 provides for the constitution of National and State Commission for the protection of children. Some states have formulated state specific legislation to

\textsuperscript{170} Article 21 provides ‘No person shall be deprived of his life or personal liberty except according to the procedure established by law’.

\textsuperscript{171} Article 39(e) provides that the state shall in particular direct its policy towards securing that health and strength of workers men and women and the tender age of children are not the abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age of strength. Article 39(f) provides that the state shall in particular direct its policy towards securing that children are given opportunities and facilities to develop in a health manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and national abandonment.

\textsuperscript{172} Article 41 provides the state shall within limits of its economic capacity and develop make effective provisions for securing the right to work, education and to public assistance in care of unemployment old age sickness and disable3ment and in other case of undeserved want.

\textsuperscript{173} Article 42 provides that the state shall make provision for securing just and human condition of work and for maternity relief.

\textsuperscript{174} infra note 178
deal with child abuse e.g. Goa and Tamil Nadu\textsuperscript{174}. Even then minimum requirements to enable a person to live with human dignity are not fulfilled.

**Problems Regarding Children:** One of the characteristics of modern society is heavy reliance on law to bring about social change. The task of social reconstruction, development and nation-building all call for major changes in the social order, to which legislation is one of the main instruments. But legislation cannot by itself change society. To translate these rights into reality is the task of other agencies. The judiciary and the executive have a major role to play. Mass media used for publicity for certain measures taken up by the government has been conspicuously silent about social legislation. There is a wide gap between promise and performance\textsuperscript{175}. Following are the problems faced by children in India.

**(a) Malnutrition:** Nineteen percent of worlds children are living in India. According to 2001 census, 44 million people of the country are aged below eighteen years. But position of children are terrible. According to the recently released National Family Health Survey - 3 for 2005-2006, 46% of children below seven years are underweight down from 47% in 1998-1999.\textsuperscript{176} It is disappointing

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\textsuperscript{176} A. K. Shiva Kumar 'Why are Child Malnutrition not improving in' *The
that despite the acceleration in economic growth in the country there has been only one percent reduction in the proportion of underweight children at the end of seven years.177 Three out of four children in India are anemic children under 3 of the age are 79%.179 According to National Health Survey – 3, 2005-2006 child born with low birth weight are 46%.180 The most crucial factor regarding malnutrition is public health messages are not reaching families with children. Doctors always suggest breast feeding during first six months of baby’s life. Despite that in 2005-2006 only 23 percent of infants up to five months old were exclusively breastfed.181 Apart from the above child malnutrition are closely linked with the care of women receive during pregnancy and thereafter. NHF – 3, reveals that there is marginal progress from 1998-1999 to 2005-2006. The proportion of birth assisted by doctor, nurse or health workers went up 42 to 48 percent while birth rate went up from 36 to 41 over the same period. Working Group Report on Women and Children for the Eleventh Five Years Plan (2007-2012)182 revealed that 2.5 million children age in India every year, accounting for one in five death in the world with girls being 50% more likely to die. One out of 16

177 ibid
179 ibid
180 ibid
181 Supra note 170

children die before they attain one year of age and one out of 11 die before they attain five years age. India accounts 35% of the developing worlds low birth weight babies and 40% of child malnutrition in developing countries one of the highest level in the world. A high India’s neo-natal mortality rate declined in 1990 from 69 per 1000 live birth in 1980 to 53 per 1000 live birth in 1990. It remained static dropping only four points from 48 to 44 per 1000 live births between 1995 and 2000. From the above study it becomes important to focus on improving intent feeding and carrying practices as well as nutritional well being of mothers because intergenerational transfer of malnutrition from mother to child captured in the high proportion of low birth weight babies. It is essential to be checked. New born babies and children under the age of 3 years needs top most attention.

(b) Problem of Child Education: In 1974 National Policy for Children came into existence, which declared that children are supreme assets of the Nation. It pleaded that measures and safeguards are needed to protect them. But unfortunately ten Five Year Plans have not allocated adequate resources to meet the needs of the children. However, Article 21 A\textsuperscript{183}, Article 45\textsuperscript{184} and 51-A\textsuperscript{185} of the Constitution of India, ensures for free and compulsory

\textsuperscript{183} Article 21 A. provides, The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may be law, determine.

\textsuperscript{184} Article 45 provides, “the State shall endeavor to provide early childhood care and education for all children until they complete the age of six years”

\textsuperscript{185} Article 51- A (k) of the Constitution of India provides, “It shall be the duty of every citizen of India who is parent or guardian to provide opportunities for education to his child or as the case may be ward between the age of six and
education for the children. But insensitivity of the Government is a hindrance to achieve this goal. Total expenditure on children in 2005-2006 on health, education, development and protection together amounted to a mere 3.86%, in 2006-2007 it reached 4.91%.¹⁸⁶ Let alone others even available resources have also not been utilized effectively for achieving UNESCO report. Only 29% of pre-primary age children are enrolled in educational institution in India.¹⁸⁷ Spending money on child education is not expense on public exchequer but asset in the long run. It is the best infrastructure that could be laid for the prosperity of a nation. About 42 million children in the age group of 6-14 do not have access to basic education.¹⁸⁸ Female education which famous jurist Palkiwala called priority of priorities is hampered not only by deep-rooted prejudice culture but also due to lack of real concern. According to the statics provided by UNICEF, out of India’s 7 lakh rural primary and upper primary schools only one in six have toilets, which deter girls from attending school¹⁸⁹, initiative like operation blackboard, Sarva Shiksha Abhiyan and mid-day meal scheme have been running, so that school drop out rate is curtailed. But we must ensure the policies and efforts to serve the propose must be consistent and continued.

(c) **Child Labour:** Problem of child labour is not only a disgrace
to developing but is also a problem of future generations.\textsuperscript{190} It is violation of their childhood also. As a consequence of development child labour is a symbol and symptom of inequality in which hundreds of children are excluded from a normal childhood and denied their fundamental rights in India\textsuperscript{191}. Considering the perpetuation of the practice of bonded labour in the agrarian rural structure in India such development is adversely affecting the children belong to the deprived communities\textsuperscript{192}. Millions of half fed, half naked and illiterate children contribute 20\% of total income of Gross National Product to a nation of one billion people.\textsuperscript{193} It is one of the most pressing problems which the International Community facing. According to ILO estimated 2000, 211 million children between 5 to 14 years of age work in developing countries, and 50 to 60 million children between the age of 5 to 11 are working in hazardous activities.\textsuperscript{194} Convention on Rights of Child, 1989, also provides for the protection of children.\textsuperscript{195} Apart from this the Constitution of India provide that no child below the age of fourteen years shall be employed in any

\textsuperscript{190} Suresh Babu GS ‘Child Labour in India’, \textit{Think India’ Quarterly Vol-9 No.3} July-September, 2006 p.47
\textsuperscript{191} ibid
\textsuperscript{192} ibid
\textsuperscript{193} Latika Srivastava ‘Child Labour and Adjudicatory system in India’ \textit{Delhi Law Review} Vol. XXVI, 2004 p. 214
\textsuperscript{194} Dr. H. O. Agarwal \textit{Human Rights} 2005,Allahabad Central Law Publication p. 112
\textsuperscript{195} Article 32, provides rights against exploitation of child labour . Article 24 Para I provides Right to the enjoyment of the highest attainable standard health and to facilities for the treatment of illness and rehabilitation of health.
factory or mine or engaged in any other hazardous employment.\textsuperscript{196} The first Act dealing with child labour was The Employment of Children Act, 1938, which prohibited the child labour by the children below the age of fourteen years in railway. But the Act did not apply to the other industries though they are hazardous. After the independence many other enactment came in to force.\textsuperscript{197} Which prohibited employment of children in different occupations. Thereafter in 1986 Child Labour (Prohibition Regulation) Act came in to force. This Act repelled the Employment of Children Act 1938. Part A of the Schedule to the Act 1986 mentions the name of the occupations where no child can be employed or permitted to work. They are the occupation connected with (1) transport of passengers goods or mail by railway, (2) cinder, picking, clearing of an ash pit or building operations in railway premises, (3) work in catering establishment at railway station involving the movement of vendor or any other employee of the establishment from one platform to another or in to or out of moving train, (4) work relating to construction of railway station or with any other work where such work is done enclose proximity to or between the railway live, (5) a part authority within the part. Part B of the schedule contains name of the process where no child can be employed or permitted to work. They are, beedi making, carpet weaving, cement manufacturing including begging

\textsuperscript{196} Article 24. 
of cement, cloth printing, dying and weaving, manufacturing of matches, explosive and fins work, mica cutting and splitting shellac manufacture, soap manufacture fanning wool cleaning and building and construction industry. Section 3 of the Act prohibits children in employment of certain occupation but has certain exceptions,¹ such as children can continue to work if they are part of the family which is doing labour. Further the children may continue in the industries which are not specified in Part A or Part B of the schedule. The children can be employed in any school which is established by the Government. If any person employs any child or permits to work in contravention of the provision of section 3 of Child Labour (Prohibition) Act, 1986, shall be punished up to one year imprisonment which will not be less than three-months and fine up to 20,000 which will not be less than 10,000.² But Act did not lay as to rehabilitation of the child once the employer is prosecuted.

Apart from the above general problems following are the problems faced by the girl child on the legal front³:

(i) All aspects of a child's development are not protected by law, irrespective of its sex.

(ii) There are no laws that discriminate in her favour to give added

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¹ Section 3 of the Act provides, “No one shall be employed or permitted to work in any of the occupations set forth in part A of the schedule or any workshop wherein any of the process set forth in Part B of the schedule is carried on provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by receiving assistance or recognition from the Government.”
² Section 14 of the Child Labour (Prohibition and Regulation) Act, 1986.
³ Supra note 173, p.69.
protection.
(iii) There are laws but these are not implemented.
(iv) The economic and welfare structure that is absolutely essential for securing implementation of laws does not exist.
(v) The civil rights and freedoms enumerated in the Constitution are available to adults as well as to children but no specific measures relating to the girl child has been given effect to.

From above problems it appears that following issue is needed to be discussed.

**Child Abuse:** Child abuse is a series issue of the society. It is gross violation of human rights of children. The National Child Abuse Study carried out by *Prayas* Institute of Juvenile Justice as part of global study on child violence by the United Nation has revealed that close 5% of the children in the country face some form of abuse. 4 The term child abuse may have different connotations in different cultural milieu and socio-economic situations. A universal definition of child abuse in the Indian context has not been defined. 5 The working definition of child abuse as is as follow. 6 ‘Child abuse refers to the intended, unintended and perceived maltreatment of the child, whether habitual or not including the following:

1. Physical and psychological abuse, neglect, cruelty, sexual

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4 *The Hindu*, April 14, 2007
6 Supra note 172
exploitation and maltreatment. Any act, deed or word which debases degrades or deems the intrinsic worth and dignity of a child as a human being. Unreasonable deprivation of his or her basic needs for survival, such as food and shelter or failure to give timely medical treatment to an injured child resulting in serious impairment of his or her growth and development or in his/her permanent incapacity or death.'

Child abuse can be classified in the following categories.

(1) Physical abuse: Physical abuse means inflicting physical injury upon a child. This may include hitting, shaking, kicking, beating or otherwise harming a child physically. The parent or caretaker may not have intended to hurt the child but some time over discipline is inappropriate to the child abuse.\(^7\) In Indian society like most of the societies across the world is patriarchal in structure where the chain of command is definite and unavoidable.\(^8\) In such power structure parents and teacher adopt harsh method of disciplining children.\(^9\) Severe physical maltreatment also takes place outside the family and forms of it are corporal punishment in school and physical abuse at workplaces. The indication for identifying physical abuse is, physical indication in the child, behavioral indication in the child and parental indication in family where abuse is going on. About 76.7\% of subjects reported physical abuse. The most common perpetrators of physical abuse are father (55.2\%) followed by policemen.

\(^7\) ibid
\(^8\) Supra note 172 p.43
\(^9\) ibid
(29.7%).\textsuperscript{10} Physical abuse was found to be significantly associated with domestic violence use in family, step parent. Apart from this physical abuse in school also referred corporal punishment. About 65% of children get beaten at schools across the country.\textsuperscript{11} Out of those 54.28% were boys and 45.42% were girls.\textsuperscript{12} Older children were beaten more in school as compared to younger ones.\textsuperscript{13} The very high percentage of corporal punishment was reported in government and municipal schools.\textsuperscript{14} Despite the ban on corporal punishment in Andhra Pradesh, Delhi, Madhya Pradesh, Maharashtra, Goa, and West Bengal the high rate of incidence from these states is a matter of concern.

Apart from above physical abuse of children in institutions is also a major violation of human rights of children. If is found that there are large number of people without parental care, vulnerable and need of care and protection. The states set up the institutions to provide food shelter clothing and education to children who were not living in the family environment. But the standard of care in these institutions are very low. Children are often subjected to physical abuse within and out side of the institutions by care givers, peers, police staff, and members. It is found that about 56.37% of abuse is in correctional institutions.\textsuperscript{15} Among them girl’s physical abuse is very high.

\textsuperscript{10} Supra note 172 p. 45
\textsuperscript{11} Supra note 172 p. 52
\textsuperscript{12} ibid
\textsuperscript{13} Supra note 172 p. 54
\textsuperscript{14} ibid
\textsuperscript{15} Supra note 172 p. 57
Besides above the child domestic workers are also physically abused. The children who work as domestic workers are the most vulnerable and exploited. The works are like carrying babies, handling fuel, work for long hours without rest with little or no remuneration. They are deprived of schooling, play and social activities. They do not get affection from friends and their families. A study conducted by Save the Child and Tulir in 2006\(^\text{16}\) revealed the position of the West Bengal that 31% of child domestic workers did not get any rest during the day while 41% had only two or less than two hours rest in a day.\(^\text{17}\) About 50.2% of the domestic workers worked seven days a week\(^\text{18}\) out of total working children 23% child domestic workers among these 81.16% were girls. Among total number of working children 11.2% children were at tea kiosk and restaurants.\(^\text{19}\) Out of total children working in tea kiosks and restaurants 22.55% reported physically abuse, among then 91.94% were boys.\(^\text{20}\) Out of total number of working children, 7.8% were involved in bidi rolling, among them 83.33% girls.\(^\text{21}\) Besides above the position of street children are not good. One of the study conducted by Human Rights Watch in 1996 reported that the street children in India were routinely detained, illegally beaten and tortured and sometime killed by police. About 66% percent of street children living with their parents but only

\(^{16}\) ibid
\(^{17}\) Supra note 172 p. 58
\(^{18}\) ibid
\(^{19}\) ibid
\(^{20}\) ibid
\(^{21}\) ibid
58.8% were provided food by them. About 20% children brought their food by themselves.

(2) Sexual abuse of children: Sexual abuse means inappropriate sexual behavior with a child. It includes fondling a child’s genitals, making the child fondle the adult’s genitals, intercourse, incest rape, sodomy, exhibitionism and sexual exploitation. To be considered that these acts are generally committed by person responsible for the care of child like baby sitter, parents or related to the child. If a stranger commits these acts it would be considered as sexual assault and solely will be handled by police and criminal Courts. ²² Child sexual abuse includes, inducement or coercion of a child to engage in any unlawful activities, the exploitative use of child in prostitution or other unlawful sexual practices, the exploitative use of children pornographic performance and materials. But it is not limited up to the above only. It also includes some severe form of sexual abuse. These are assault including rape and sodomy, touching or fondling a child, exhibitionism (forcing a child to exhibit his/her private body parts), photographing a child in nude. There are some other forms of sexual abuse also likewise (a) forcing kissing (b) sexual advances forwards a child during marriage situations (c) sexual advances towards a child during travel (d) exhibitionism (e) exposing a child to pornographic materials. The National Child Abuse Study carried out by Prayas Institute of Juvenile Justice as part of global study on child violence by the United Nations has revealed that close to fifty

²² Supra note 172
percent of the children in the country face some form of abuse. The Study on Child Abuse India, 2007, a study conducted by Ministry of Women and Child Development. In which the questionnaire administered to 12,447 children. Out of total child respondents 53.22% reported having faced one or more forms of sexual abuse. Among them 52.94% were boys and 47.06% girls. Out of total child respondents 20.90% were subjected to severe forms of sexual abuse which include sexual assault, making the child exhibit private body and being photographed in nude. Out of these 57.30% were boys and 42.7% were girls. Besides it out of 12447 child respondents were 51%, reported being subjected to other forms of sexual abuse that included forcible kissing exposure of pornographic materials.

(3) Emotional Abuse: It is also known as verbal abuse, mental abuse and psychological maltreatment. It includes act or failure to act by the parents, caretakers which cause or can cause serious behavioral cognitive emotional or mental trauma. This can include parents caretakers using extreme and/or bizarre forms of punishment, such as confinement in closet or dark room or threatening or terrorizing child. According to World Health Organization Report, 1999 of the Consultation on Child. Abuse Prevention, Geneva, emotional abuse includes the failure to provide appropriate supportive environment including availability

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23 The Hindu, 14 April, 2007.
24 Supra note 172p. 74
25 ibid
26 ibid
27 ibid
of primary attachment figure so that the child can develop a stable and full range of emotional and social competencies commensurate with her or his personal potential and in the context of society in which the child dwells.\textsuperscript{28} There are various forms of emotional abuse like, humiliation, comparison, etc. Humiliation of a child refers to degradation of the self esteem of a child by parents, caretaker or any other persons in presence of others. Some time parents or caregivers compare one child with others in terms of their physical appearance. It mentally affects the child.

A research conducted by Ministry of Women and Child Development in 2007 resulted that out of 12447, 48.37% children reported emotional abuse of one form or other among them 49.99% are boys and 50.1% are girls. Out of total number of children 44.13% reported facing humiliation, and out of all the child respondents 20.06% reported emotional abuse through comparison. Out of which 48.86% were boys and 51.4% girls.\textsuperscript{29} Apart from this girl children are neglected. This is failure to provide all round development of a girl child. Suggestions from the above study point out that there is need to discuss the critical issues of child abuse and child protection so that we can resolve the problem of human rights violation of children. Government agencies themselves cannot deal with it. While dealing with the issue of abuse, it is imperative to identify the forms of abuse. The way in which the funds allocated to it are used and to empower the child to resist abuse. The understanding must be translated in to

\textsuperscript{28} \url{www.who.int/volence-injury-prevention/violence/neglect/en}

\textsuperscript{29} Supra note 172 p. 110
action not only central or state government but civil society families and children themselves, to need and to understand the human rights. It is also important to create atmosphere wherein child is protected from exploitation and abuse.

(4) **Child Neglect:** Child neglect is an act or omission or commission by any person denies child’s basic needs. Neglect can be (a) Physical neglect (b) Educational neglect (c) Emotional neglect.

(a) **Physical neglect:** Not to provide adequate food or clothing, appropriate medical care, supervision or proper weather protection like heat and cold are covered in the purview of physical neglect. It may indeed abandonment of child from liability. Somehow Constitution of India tries to provide protection under article 39(e).³⁰

(b) **Educational neglect:** It includes failure to provide proper schooling or special educational needs. Though the Constitution of India guarantees fundamental rights to free and compulsory education to the children.³¹ But it is not sufficient. Apart from above Article 45 of the Constitution of India provides, about the facility for the education of the child under six years of age.³² Besides it part IV-A of the Constitution of India imposes obligations on each and every parent/guardian to provide education.³³ But it is found neither the State nor the guardians are

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³⁰ Supra note 167.
³¹ Supra note 178
³² Supra note 179.
³³ Supra note 180
performing their duty properly and child neglect is going on continuously.

(c) Psychological neglect: Psychological neglect includes lack of any emotional support and love, never attending to the child substances abuse including allowing the child to participate in drug and alcohol use, to take them part in right and cabret dance\textsuperscript{34}. These problem generally comes from high society or the children from slum areas. The problem of child abuse which is a major problem regarding the human rights of children is spread not only on National levels but also on International levels. That is why the U.N. Secretary General has given following view regarding violence against children across the world. \textsuperscript{35} (a) According to WHO in 2002, 530 children died due to child homicide. In the Global School Based Health Survey carried out in wide range of developing countries between 20\% and 65\% of school going children reported having been verbally or physically bullied in school in the previous 3 days. Similar rates of bullying have been found in industrialized countries also.

(b) An estimated 15million girls and 73 million boys under 18 year of age have been undergoing forced sexual intercourse or other forms of sexual violence involving physical contact.

(c) ILO estimates that 218 million children are involved in child labour in 2004 of whom 126 million were involved in hazardous

\textsuperscript{34} Supra note 172 p. 4

work. Estimates from 2000 suggest that, 5.7 million were in forced or bonded labour, 1.8 million in prostitution and pornography and 1.2 million were victim of trafficking.

(d) Only 2.4 of the world’s children are legally protected from corporal punishment.

Another matter regarding child abuse is, to understand the scope of the misuse of childhood and why no response come from the side of the children. This is because of they are unable to understand the different dimension of child abuse. The present National Policy on Child, 1974 needs revision. Every State should establish State Commission for the protection of children to enhance the care and protection of children in country. There is need to develop standards, protocols on child protection at district levels, village levels. Adequate financial and human resources should be allocated and there is need of strong machinery to create a protective environment for children. Apart from this, gender equality should be maintained. Discrimination of girls resulted in their lower enrollment in the schools, higher levels of malnutrition, trafficking of girls for sexual exploitation child marriage and their non-participation in decision making in the family should be avoided. These imbalance need to be addressed by bringing about attitudinal change in people regarding the value of girl child. Media may be used to spread awareness on human rights of children. The schools are safest for children and therefore efforts should be made to increase the enrollment of children in the school by adopting innovative child friendly methods of teaching.
Adequate infrastructure including sanitation facilities with special facilities to the girls will encourage the enrollment of girl children in school. There is also need for a central legislation banning corporal punishment.

Besides forgoing there should be better co-ordination at National, State, District and Block levels for the -

(i) rescuing children from banned occupation and their repatriation and mainstreaming in to appropriate education streams,

(ii) the reason must be considered, why the children are nagging in child labour and hazardous activates,

(iii) the guidelines should be formulated not only on national levels but on state levels for the rescue, repatriation and rehabilitation of child domestic workers.

Apart from the above the children in institutions need high care. Some other suggestions may be incorporated like Juvenile Justice Board, Child Welfare Committee and Special Juvenile Police Unit should be setup. In existing institutions standards of care should be established and maintained. The behavior of caregivers of institution some time destroys the faith and trust because they often abuse the children. It should be prevented. Besides these there should be uniform definition of child for all legislations relating to employment of children and a child should be construed as a person below 15 years of age. An other thing which is important is to set up night schools, so that poor workers and children get opportunity to have at least primary education
during their recess period. To come out of “poverty begets child labor begets lack of education begets poverty”, a forceful attempt must be made to stem out poverty and illiteracy. Apart from these some other things can be incorporated to protect the human rights of children. These are like there should be consolidate existing law into single comprehensive one which should cover all aspects as enumerated in the Convention in tune with the realities of the Indian situations. There should be uniformity in the definition of child and special provisions for girl child and illegitimate child which should be legally enforced with sanctions\textsuperscript{36}.

E. Human Rights and Environment

Since in Vedic times the main motto of social life was to live in harmony with nature. If we see Rigveda following hymn is found:

\begin{quote}
The sky is like Father
The Earth is like Mother and
The space as their Son
The Universe consisting the Three
is like a Family and
Any kind of damage to any one of the Three
Throws universe out of Balance\textsuperscript{37}
\end{quote}

\textsuperscript{36} Supra note 173, p.71.
\textsuperscript{37} Rigveda 160.2 6.51.5 K Rama Joga Roa, Use of Criminal Law Machinery for Environment Protection in (2001) 7SCC (J).

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Our ancient literature is an example, that the people of such period regarded that it is sacred duty of every person to protect the nature. Charka Sanhita considered that the destruction of the forest is the most dangerous activities against humanity.

All human being have the fundamental rights to an environment adequate for their health and well being. Nothing can be more fundamental than the issue of public safety and right to life. The right to life means not only to alive but to live with dignity, which also includes pollution free environment. Environment as defined, includes water, air, land and their interrelationship with human beings and other living organism. The environment is very much affected with the development. Right to environment and right to development both are the human rights of third generation. Justice Lila Seth stated that an all-round effort to find and means of using development without destroying the resources and polluting the atmosphere has to be the first priority.\textsuperscript{38} The expansive interpretation of rights compatible with people's welfare, societal needs and interest is the by product of a legal sensitivity contributing to the evolution of modern jurisprudential trends. These trends which form parts of wide spectrum of protection mechanism and community orientation of

rights promotes, maintain and sustain rule of law.\textsuperscript{39} Rule of Law essentially means creating and maintaining conditions for protection of human dignity and development of ones personality.\textsuperscript{40} The Government must create conditions where people can develop capacity to exercise their rights properly and meaningfully.\textsuperscript{41} Protection of environment, can ensure life consistent with dignity and development of potential, because of an integral component of the rule of law.\textsuperscript{42} Under the Indian constitution there are provisions for the protection of environment. Under Article 47\textsuperscript{43}, 48 A\textsuperscript{44}, 51 A (g).\textsuperscript{45} They comprehend right to hygienic environment protection, it also casts an obligation on the states as well as individuals to maintain and protect environment both man made as well as natural. Post-Maneka period witnessed an era of constitutional activism resulting into expanded interpretation of fundamental rights. As a result of highly creative interpretation right to healthy environment like so many other

\textsuperscript{40} I.P. Massey, Administrative Law, 2005, Lucknow, Eastern Book Company, p. 30
\textsuperscript{41} ibid
\textsuperscript{42} Supra note 226
\textsuperscript{43} Article 47 provides, “the state shall regard the raising of 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 endeavor to bring about prohibition of consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health”.
\textsuperscript{44} Article 48 A provides, “the state shall endeavor to protect and improve the environment and to safe guard the forest and wild life of the country.”
\textsuperscript{45} Article 51 A (g) provides, “it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, river and wild life and to have compassion of all living creatures”.

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rights has been included in the right to life guaranteed under Article 21 of the Constitution of India. Clean and wholesome environment is necessary for healthy living, hence clean and wholesome environment is an essential ingredient of right to life. Right to life together with environment becomes most important basic human right, because environment provides life to everyone including mankind.

**Environmental Rights and Human Rights:**

Before understanding the nature and scope of environmental rights it is essential to know the difference between human rights and environmental rights. Human rights are, individual rights in the sense that beneficiaries are individual and are concerned with the protection of liberty, equality and freedoms while environmental rights are collective rights. Whenever equality, liberty or freedom of an individual is violated it is violation of human rights. Environmental rights on the other hand relate to community entitlement or access to entitlement of community. These rights (environmental rights) are concerned with resources, conservation and long term sustainability. Consideration of socio-economic justice are more predominant than in the case of human rights where ‘individualistic’ facets of socio-economic justice are relevant. Apart from these differences environmental rights are part of human rights in sense that they fulfill basic needs for

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46 Supra note 226 p. 23
47 Supra note 226 p. 30
48 ibid
49 ibid
50 ibid
survival of human being and healthy environment enable people to enjoy qualify life which is guaranteed under Article 21 of the Constitution of India. Water a facet of environment signifies an important basic need for human being. So violation of environment is violation of human rights. Environmental protection leads to promotion of human rights. Both are mutually exclusive but intimately they are inter dependent and inter connected.\textsuperscript{51}

\section*{Problems regarding Environment:}

Deforestation, over exploitation of natural source growing population, competition of development pollution are causing adverse effect on environment. According to Paul Harrison;

‘The final principle is respect for nature growth that does not respect the natural limits itself. Resources are exhausted, ecosystem collapse, species disappear and our own physical and mental health and even our survivals are threatened’.\textsuperscript{52} There is great need to tackle problems like environmental degradation, pollution, deforestation climate change. Nature and its resources have their adequate capacity to feed and beer the burden of requirement of mankind.\textsuperscript{53} Once these resources are overburdened due to the undue pressure of human activities, it disturb the equilibrium relationship between nature and mankind, which are


\textsuperscript{52} Paul Harrison, Third World Tomorrow 1991 at 345 in G.S. Tiwari, ‘Developing Jurisprudence of Principle Environmental Protection and Environmental Rights’ \textit{NationalCapital Law Journal} 2004 IX p.27

\textsuperscript{53} Dr. K.C. Jena ‘Environmental Pollution and its Legal Control in India’ in \textit{AIR200 0(J)} p. 178.
essential for the existence of human beings.\textsuperscript{54} Consequently it gives rise to the problem of environmental pollution. Now we are facing serious problem of polluted Air, polluted Water acid rains, global warming. The depletion of ozone layer cases skin cancer, cataract, and damage the body immunity.

**Cause of Environment Pollution.**

The main cause of environmental pollution are (i) Population explosion (ii) Over industrialization (iii) Unplanned urbanization (iv) Coal burnt thermal power generation (v) Poverty (vi) Deforestation (vii) An expansion in the use of efficient new technology with its associated demands on space food and natural resources.

**(i) Population Growth.**

The problem of population growth has become a global phenomenon which has got its alarming proportion in India. India have 2-4 percent of global land but have second largest population in the world. Because of more population it puts heavy demand on natural resources like water, air, soil and forest. According to the study the tropical forest is shrinking by eleven million hectares a year.\textsuperscript{55} top soil is being lost at the rate of 26 billions tones a year. \textsuperscript{56} The problem of deforestation is also causing harm to the nature. The problem of population has long been a very emotional issue. Because more people require more food, land, housing more water. For more food they use chemical fertilizers. Which causes side

\textsuperscript{54} ibid  
\textsuperscript{55} ibid  
\textsuperscript{56} ibid
effect to the people. The people also use insecticides, pesticides which resulted desert to the land and pollution causing harm to general people. Due to rapid growth of population people move from villages to cities. India is facing problem of urbanization. The problem of fast growth of mega cities is putting undue pressure on the basic necessities like sanitary, pure water, pollution free air etc. Number of vehicles are increasing due to which air pollution and noise pollution is increasing.

(ii) Over Industrialization.

At present India is one of the most polluted countries because of over growth of industry. These Industries are increasing without proper regulation. Hazardous things and materials like oil, grease, petrochemicals are released from the industries and are coming in rivers. These materials make water unsightly and black. Delhi, Agra, Kanpur are the burning example of it. River Yamuna has lost its existence in Delhi, the water of the river is black and dirty. Same condition is in Agra. River Ganga is polluted in Kanpur. Chemicals present in industrial wastes making ground water acidic. Though many essential needs of human being are satisfied by the Industries, Industries extract raw materials from the nature and produce the products but at same time they pollute the environment.

(iii) Unplanned Urbanisation.

The cities in India are facing problems like shortage of sanitary lack of ventilated houses, lack of open spaces. The

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57 ibid
domestic waste disposal is serious problem in every city. These are the basic requirements of every human being. Most of the area in cities have no sewer system. A study by the Central Pollution Control Board, pointed out that discharge of community wastage and industrial effluents are the major factor of water pollution.\(^{58}\)

(iv) **Deforestation.**

Forests protects land and water resources and produce oxygen for human being. They produce energy and wood products, medicine also. Because of extra use of woods, jungles are being cut. Due to which ecosystem is being disturbed. Deforestation has caused carbon dioxides concentrating on earth leading to global warming. Because of global warming climate is being changed. According to the draft report of Inter Governmental Panel on Climate Change, given on February 16, 2007, sea levels will rise by at least 4cm by 2100, inundating vast areas on the coast line, including some of the most densely populated cities whose population will be forced to migrate inland or build dykes.\(^{59}\)

*Ganga, Bramhaputra* and *Indus* will be seasonal rivers. Water tables will continue to fall and gross per capita water availability in India be one third by 2050, as rivers dry up.\(^{60}\) Water scarcity will in turn affect the health of vast populations with rise in water born disease. The temperature will rise up to 5.4 degree centigrate at the end of the century.\(^{61}\) To avoid these problems there are many

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\(^{58}\) ibid

\(^{59}\) Daphne Wysham and Smitu Kothari, ‘Climate change will devastate India’, The Hindu 9th April 2007 p. 11

\(^{60}\) ibid

\(^{61}\) ibid
initiatives which the country can adopt to reduce carbon emissions without sacrificing its priority of economic development. Oil and Gas are the fastest growing segments of our energy basket and we should maximize their availability to run our economy. If the railway system is fully electrified and railway offers satisfactory service a big reduction in oil use will take place. All metro cities must have metro system then there will be reduction of carbon emission. Magnetic levitation would greatly increase the efficiency in electric traction.

(v) Coal Burnt Thermal Power Plants.

In India generally power plants use coal to generate electricity. This process results in the accumulation of various byproducts such as bottom ash, boiler slag and fly ash. Disposal of these ash is difficult and sensitive. The presence of ash particulars in the atmosphere is a major concern to the people living in close to the plant site. The finer fraction of fly ash are potentially harmful as they got deposited in lungs, pulmonary tissues of respiratory tracts when inhaled.

(vi) Use of New Technology.

Man who is in quest for better quality of life and materialistic comfort have been exploiting and consuming resources at their command. Excessive exploitation of natural

63 ibid
64 ibid
65 Supra note 240 p. 180
66 ibid
resources led to serious ecological crisis. That is why we need to search and develop environment friendly technology.

Above are the problems related to environment which somehow cause adverse effect to human rights.

Following are the issues that have been discussed.

(i) Right to Development v Right to Environment.

Right to development is the human rights of third generation. In recent years environmental concerns have become economic concerns. Neglect of environment in development policies and strategies of both the developed and and developing countries has given rise to the serious global environment problem like ozone depletion, global warming, forest degradation and acid rain which not only threaten the very survival of earth and all those who live on it but also the fear about the sustainability of economic growth based on the present unsustainable patterns of production and consumption.\textsuperscript{67} Awareness of the increasing vulnerability of the environment and the recognition and rapid and unabated degradation of the natural resources based on which economic activity and life itself may constitute the most serious threat to human well being \textsuperscript{68}. Two issues have been particularly acute in recent negotiations: (i) Developing countries have sought to make their acceptance of environmental publications depending upon the provision of financial assistance and (ii) some developing countries


\textsuperscript{68} ibid
in order to prevent competitive economic disadvantages (which might flow from non compliance) have striven to ensure that environmental treaties establishes effective institution which can verify and ensure that the contracting parties comply with their environmental obligations. Article 1 of the United Nation Declaration on Right to Development defines right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate, contribute and enjoy economic social cultural and political development in which all human rights and fundamental freedoms can be fully realized. ECSOC established fifteen members working group of governmental experts. This working group was working on draft declaration on Right to Development submitted a text of preamble to the United Nation Commission on Human Rights on which general agreement reached, which stated; ‘the human person is the central subject of the development policy which should have the human beings as the main participant and beneficiary of the development’. It is further stated that the creation of condition favorable to the development of people and individual is the prime responsibility of the states. Development being basically a systematic positive phenomenon signifying not only the material welfare of people but also human value based on co-operation and

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70 U.N.G.A. Resolution 4/128 of 4 December 1986
non-exploitation requires a positive societal change. However the negative infraction between the development and natural resources has affected the environment adversely.\textsuperscript{72} This puts a question before the basic relationship between the resource, people and the state.\textsuperscript{73} Since development denotes a positive change in living conditions of the people but development should be scientific and systematic and not a hazard one.\textsuperscript{74} The Stockholm declaration in linking environment with economic and social development acknowledges the fact that poverty forms the base for environmental problem in developing countries. The declaration enjoying the states to apply planning for developing human settlement and urbanization. Economic growth is \textit{sin qna non} of any development model because this enables the community equal opportunity to fulfill its basic needs.\textsuperscript{75} But as the economic model of growth has to be tempered with constitutional goal of socio economic justice and ideals of egalitarian society, any development capable of meeting the needs of present and future generations must be governed by the regulatory norm of conservation of natural resources.\textsuperscript{76} Achieving harmony between the two can be the only way to attain meaningful development in India in presents situation of classic dilemma in this regard.\textsuperscript{77} The

\textsuperscript{72} Vijay Kumar ‘Environmental Poverty Development and the State in Perspective of less Developed Countries’ in \textit{Delhi Law Review}, Vol. XXVI, 2004, p. 56
\textsuperscript{73} ibid
\textsuperscript{74} ibid
\textsuperscript{75} ibid
\textsuperscript{76} Supra note 226 p. 25
\textsuperscript{77} ibid
governing norms as proclaimed by agenda 21, should be integration of imperative with development aspirations which in terms of natural resources implies that country’s demand for its sustenance should not exceed its carrying capacity. Thus industrial and technological advancements are necessary for the development, but modernization reduces the capacity of nature. Devastation are taking place in the forest, agricultural land, grazing land because of construction of dam, and urbanization. Though there is no alternative of development but balancing process has to be patronized between development and environmental concern. Sustainable development becomes the norm and new paradigm of future development process.


78 ibid
79 U.N. Conference on the Human Environment was held at Stockholm from 5-16 June 1972 to tackle the global problem of protection and improvement of the human environment by International Consensus. About 114 nations participated there. The principle decisions, resolutions and recommendations of the conference were as follows:
1. A resolution in plenary session condemning nuclear weapons test, especially those carried out in the atmosphere and calling on the states intending to carry out such test to refrain from doing so, as these might lead to further contamination of the environment.
2. A unanimous recommendation that world environment day be observed on 5 June each year.
3. An Action Plan for protection and enhancement of the environment was enforced, which had three parts:
   (i) earth watch programme to identify problems of International significance so as to warn against environmental crisis.
   (ii) recommendation concerning environmental management i.e. what was necessary to manage the environment and
   (iii) supporting measures such as education, training public information and finance.
Sustainable Development is a term which is subject to considerable interpretation depending upon the context of discussion and the audience of the debate. The World Commission on Environment and Development was created on the basis of Stockholm Conference. Mrs. Gro Harlem Burntland Chairman of the World Commission on Environment submitted a report, ‘Our Common Future’ in 1987 forwarded by Sri Rajiv Gandhi, the then Prime Minister of India. The report showed that politician industrialist and environmental groups around the world had endorsed sustainable development meeting the needs of present without compromising the ability of future generations to meet their own needs. According to Laxman D. Guruswami, the concept of sustainable development involves at least two sets of contradiction. First, embedded in much of the sustainability thinking is an important difference of emphasis. Some view sustainability as a

4. The adoption of the Declaration of the Human Environment, which may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human rights of 1948 accomplished for the protection of fundamental freedoms and human rights.
5. Recommendation were made to the United Nation General Assembly for the creation of new International machinery.
6. Recommendation for establishing voluntary environmental fund.
7. It was recommended that the General Assembly should decide to convene a second United Nation conference on Human Environment.
   In Principle 21 and 22 of the Declaration on Human Environment three principles of International Law were proclaimed.
   (i) States have a sovereign rights to exploit policies.
   (ii) States are responsible for ensuring that the activities within their jurisdiction control do not cause damage to the environment of other states or areas beyond the limits of national Jurisdiction.
   (iii) State are under a duty to co-operate to develop further the International Laws as liability and compensation for the victims of pollution.
80 See also World Commission on Environment and Development “Our Common Future” (1990)

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serious issue because nature is a major constraint on further human progress. They are concerned basically with the price paid by conventional growth model, if the warnings we receive from the environment are ignored, the ‘biosphere imperatives’. The solution, then, is to develop technologies, which avoid the most dire environmental consequences of development or to take measures to assess environmental losses in a more realistic way, thus, reducing the danger that they will be overlooked by policy makers. Second, considering development within a North-South framework requires attention to the contradictions imposed by the structural inequalities of the global system. Green concerns of the North can often be inverted in the South where the environment is contested not because it is valued in itself but because its destruction creates a value in the South. (When we refer to the South we are referring to the majority of the population of the planer). Struggles over the environment are usually about basic needs, strategies to survive rather than ‘life styles’. There is no point on appealing under these circumstances to idealism or altruism to protect the environment when the individual and household are forced to behave ‘selfishly in their struggle to survive’. W. Sach observes: The Brundland Report incorporated concern for the environment into the concept of development by erecting ‘sustainable development’ as the conceptual roof for both violating and healing the environment\(^{81}\). Indian Government has recognized the principle of sustainable development as basis for

\(^{81}\) Supra note 258, pp.53, 54.
balancing ecological imperative with developmental goals.\textsuperscript{82} Sustainable development demotes a balance between physical (ecological) aspect of environment and its socio economic dimension. The human rights to healthy environment and sustainable development must be balanced as there is a need to take right to healthy environment along with right to sustainable development and balance them.

\textbf{b. Public Trust Doctrine:} Public trust doctrine permits use of natural resources only for valid, legitimate and public, purposes. This doctrine emphasizes that the person will use natural resource as a trustee so that people of future generation can utilize the same natural resource. It cannot be converted into private ownership. It can be said that the constitutional obligation under Article 48 A\textsuperscript{83} of the Constitution of India to protect and improve the environment bears close resemblance with this doctrine. Apart from this two other principles are there to protect the environment. They are polluter pays principles and precautionary principles.

\textbf{c. Polluter Pays Principle:} This means polluter should internationalize the cost of their pollution control it and its sources and pay for its effects Polluter pays principle means that absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring

\textsuperscript{82} Divan, Rosencrenz, \textit{Environmental Law and Policy in India} 2003, Delhi Universal Law Publishing Co. Ltd p. 585

\textsuperscript{83} Article 48 A, Provides that the State shall endeavor to protect and improve the environment and to safeguard the forest and wild life of the country.

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the environmental degradation. Polluter is liable to pay to the cost to the individual suffers as well as the cost of restoring the damaged ecology. This principle is adopted in India also.

d. Precautionary Principles: Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious irreversible damage, lack of scientific certainty should be used for postponing measures to prevent environmental degradation. In 1991 the *caring for earth* document emphasized that precautionary principle be made the basis of decision on development and environment. It is also internationally accepted norm. This is basically of foresees and assess environmental risk to worm potential victims of such risks and to behave in ways that prevent or mitigate such risks.

Apart from this environmental impact assessment is internationally accepted norms. Such assessment balances economic benefits with environmental costs. After the Stockholm the Reo conference in 1992 took place in which 80 page document “Agenda 21” was adopted. It was an action plan to deal all the aspect of environment.

After the Reo conference in September 1994 the International Conference on Population and Development took place in Cairo. The Cairo conference changed the frame work of

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85 Ibid
86 Supra note 276, p. 136
87 Ibid
debate from conventional issue of family planning to broader question of reproductive health empowerment of women and integration of population policy with environmental policy and development strategies.

(ii) **Right to Environment v Right to Livelihood.**

Poverty is an important factor to damage the environment. Due to poverty the people exploit exclusively the natural resources of the country for their basic needs like food, fuel, employment etc. Marx shows that "the important factors behind violations of Law in Prussia on thefts of wood and censorship was due to the prevailing social circumstances especially due to inequitable fact that poor class was deprived of their basic rights to livelihood".

Human Development Report 2000 indicates that 1.2 billion people are living below poverty, more than 2.4 billion people are without basic sanitation and about 100 million people are homeless. India appears to be at the forefront of economic growth but it remains unchanged at a low 127 among 177 countries and the disparity between the rich and the poor is widening day by day.

Although United Nation Declaration, 1948 makes provision for that. International Convention on Economic, Social and

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88 N.K. Chakraborty, "Right to livelihood and right to environmental protection" in *AIR(J)* 1996 p. 72
90 ibid
91 Article 25, provides that a every one has the right to a standard of living adequate for the health and well being of himself and his family including food, clothing, housing, medical care and necessary social services and the
Cultural Rights, 1966 has published a comment that root of the problem of hunger and malnutrition are not the lack of food but lack of access to available food.\textsuperscript{92} It was also stated in the committee that it is the obligation of the states parties to respect and fulfill the right to food for immediate and long term measures to achieve its progressive realization.\textsuperscript{93}

Prof. Upendra Baxi substituted the word poverty with impoverishment and poor with impoverished.\textsuperscript{94} He said that poor are not naturally poor but are made poor by the person who are not poor. According to him it is because of bad governance of unconsciousness of the government.\textsuperscript{95}

In 2002-2003 about 60 millions tons of grains were in stock of the government yet in many part of the country people were dying of hunger and starvation not because of the lack of food but because of bad governance. In India the government is not very sensible about right to means of livelihood and work. Because it is not guaranteed in Part III of the Constitution of India. It has been placed in the chapter of Directive Principle of State Policy.\textsuperscript{96} The

right to security in the event of unemployment, sickness, disability widowhood, old age, or other lack of livelihood in circumstances beyond its control.


\textsuperscript{93} Supra note 268

\textsuperscript{94} Upendra Baxi ‘Introduction’ in Law and Poverty; A Critical Essay, vi (1988)

\textsuperscript{95} Ibid

\textsuperscript{96} Article 41 of the Constitution of India, provides that “the state shall with in 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 ages, sickness and disablement and in other case of
Court cannot ask the government to open more hospital, schools and distribution of grains, and to provide adequate means of livelihood and work.

It is true that people are migrating from rural areas to villages and are mostly living in slums where there is no proper facilities of sanitary. They are running their shops and other businesses. Some time they cause pollution in that area in different ways. According to the government these slums constitute hindrance to the development project for modernizing the cities. That is why forced eviction of slums and people of there takes place. Although United Nation Commission on Human Rights, prohibits forced eviction. 97 Forced eviction according to Committee on Economic and Social Cultural Rights affects directly to the privacy of a person. 98 The Committee is of the view that eviction should not result in individual’s rendered homeless or vulnerable to the violation of other human rights and the state party must provide adequate alternative housing, resettlement or access to productive land. 99

Despite that Indian position is quiet different. For the sake of development people are forcibly evicted. Current examples of it is increasing the height of Sardar Saravor Dam, the incident of Harsood of Madhy Pradesh and Tata project of Nandigram district

98 Committee on Economic social and Cultural rights, General Comment 7 Forced Evection and Rights to Adequate Housing (sixteenth session, 1997) U.N. Doc./ 1998, para 1
99 ibid at para 16
of West Bengal. In the above examples people are evicted from their own place, to other places. This is gross violation of their human rights. Not only the violation of human rights of the people of the area where these projects are established but some how it is going to affect the environment also. Unless proper rehabilitation and resettlement option is provided these people should not be evicted from their own places.

(iii) Right to Environment v Rights of Tribes.

Tribal people in India used to have traditional rights over the forests. Though in few area of India these rights are recognized,¹⁰⁰ but such types of provisions are not found in Forest Act, 1980. State Legislature cannot enact any law for the welfare of the tribes and central has no such type of law which can protect traditional rights of tribes. It is need of the society that tribal welfare should be incorporated as an entry in the concurrent list enabling both Central and State to take up legislative measures to save the tribal people and protect their habitat.¹⁰¹ In 1988 National Forest Policy declared that due attention to be paid to wards the problem of tribes and intended to associate them in forest conservation and development. They develop friendly relationship between forest and the people living near or around the forest. One of the major depredations of forest is cutting the forest by contractors. In place of contractors, local tribal society or


governmental society should be called to take care of the forest. Forest village may also be a better factor for the development and protection of the forest. Integrated area development programme is required to be undertaken to improve the status, meets and needs of the tribal economy recognized, and tribal people’s customary rights and concession and to declare to protect and maintain their traditional rights.\textsuperscript{102} But in practice the forest department’s philosophy varied from time to time from absolute protectionism to a callous attitude to wards the tribal settlement.\textsuperscript{103}

Similarly, Government is launching mega dam project without considering environmental impact and migration of tribal people and those who are residing in that area. Measures to anticipate and migrate environmental impact were not properly considered in the design of the project because of lack of basic data and consultation with the affected people. Thus we can say that right to livelihood of forest peoples \textit{vis-a-vis} environmental protection is always in the hand of greedy persons like owner of forests or contractors.\textsuperscript{104} Although we say that the global environment is our common home but not everyone lives in the same room.\textsuperscript{105}

The right of indigenous people may area cross over issue in that they may be protected under both in human rights law and

\textsuperscript{102} Supra note 267
\textsuperscript{103} T. Madhav Menon ‘Law and Tribal Society in Kerla’ (1985) \textit{Cochin University Law Review} p. 163.
\textsuperscript{104} Supra note 267, p. 109
\textsuperscript{105} Jean Marie Baland, Pranab Bardhan and Samuel Bowels, \textit{Inequality, Cooperation and environmental Sustainability} (ed.)in ‘The Hindu’, 6th November, 2007 p. 15.
environmental law both on national and international levels. The right of indigenous people may be seen in two basic lights:

1. The right to protect and manage natural resource located on traditional indigenous land.
2. The right of citizens to live to healthy environment.

Therefore these rights provide tool to fight against mega project. To protect the rights of indigenous people, international environmental law can play vital role. By this it is revealed that combination of human rights and environmental obligation can make indigenous people more powerful to protect the land and ecosystem of that area where indigenous people resides.

Therefore from the above it is found that right to life with dignity is recognized in fundamental right under Article 21 of the Constitution of India. It is inherent right not a gift of law. A healthy environment conducive to the health of human beings forms essential components of life. The environmental problems are of two categories. Those which are the negative effects of the development and those which result from poverty and under development. Proper planning for the development is necessary.

106 Supra note 274 p. 267
107 Principle 22of Reo Declaration on Environment and Development 1992, states that indigenous people, their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity culture and interest and enable their effect on participation in the achievement of sustainable development.
108 Supra note 285 p. 592
110 ibid
Improper planning of development deprives those who are directly affected by the development. Large scale of displacement and pollution are the example of it. Though National Human Right Commission recommended that suitable legislation should be made for the rehabilitation to the people who are going to be displaced,\textsuperscript{111} because by the displacement their privacy as well as livelihood are affected. There is need to set up independent national agency to act as watching dog to prevent abuse and over exploitation of natural resource particularly in forest areas. Tribes who have traditional rights on forest and dependent upon them, must be protected from commercial exploitation by outsiders. Apart from this sustainable development must be clearly defined so that it can be enforced by law.

F. Human Rights and Problems of Enforcement

Human rights are those rights which inherits in every human being by virtue of being a member of human family. In India these rights are guaranteed under the Part III and Part IV of the Constitution of India. These are known as fundamental rights and Directive Principle of State Policy. Fundamental rights guarantees certain rights to the individuals while Directive Principle of State Policy gives direction to the state to provide some other rights to its people in specified manner and are not enforceable before the

\textsuperscript{111} ibid

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Court of law.\textsuperscript{112} This part covers from Article 37 to Article 51. Article 51 of the Constitution of India provides general obligation towards the world.\textsuperscript{113} But this article is too general and no conclusion can be drawn from the Article itself as to how far rules of International law shall be applied by the Courts.\textsuperscript{114} It is simply a pledge that India will work for the promotion of International peace and security, enforcement of International law and treaty obligations and settlement of International dispute. India has ratified both International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights on 27 March 1979. These covenants deal with human rights. After the ratification India has become bound by them and has an obligation to provide to the individuals the rights contained in two covenants. But the question is that how far the rights enshrined in covenants are consistent with the Constitution of India and how far they are enforceable.

I. International Covenant on Civil and Political Rights and Indian Constitution

\textsuperscript{112} Article 37 of the Constitution of India Provides that the provisions contained in this part shall not be enforceable by any Court but the principle laid down are nevertheless fundamental in the government of the country and it shall be the duty of the states to apply these principles in making Laws

\textsuperscript{113} Article 51 says, “The state shall endeavor to;
(a) promote international peace and security,
(b) maintain just and honorable relation between nations,
(c) foster respect for international law and treaty obligation in the dealing of organized people with one another and
(d) encourage settlement of industrial dispute by arbitration.”

\textsuperscript{114} Dr. H.O. Agarwal \textit{Human Rights}, 2005, Allahabad, Central Law Publication, p. 218
Part III of the Constitution of India contains fundamental rights. These rights inherit in all human beings. These fundamental rights can be divided in two categories, first is specified fundamental rights and second is other fundamental rights. Rights which may be called specified fundamental rights are specified because of being mentioned in the constitution by name. Same rights are also recognized in International Covenant on Civil and Political Rights. These are, rights against forced labour,\(^{115}\) equality before law,\(^{116}\) prohibition of discrimination,\(^{117}\) freedom of speech and expression,\(^{118}\) right of peaceful assembly,\(^{119}\) right of freedom of association,\(^{120}\) protection in respect of conviction,\(^{121}\) protection from prosecution and punishment,\(^{122}\) not to be compelled to testify against himself,\(^{123}\) right to life and liberty,\(^{124}\) Protection against

\(^{115}\) Article 23 of the Constitution of India and Article 8 (3) of Covenant on Civil and Political Rights.
\(^{116}\) Article 14 of the Constitution of India and Article 14 (1) of Covenant on Civil and Political Rights.
\(^{117}\) Article 15 of the Constitution of India and Article 26 of Covenant on Civil and Political Rights.
\(^{118}\) Article 19(1)a of the Constitution of India and Article 1(1) and (2) of Covenant on Civil and Political Rights.
\(^{119}\) Article 19(1)b of the Constitution of India and Article 21 of Covenant on Civil and Political Rights.
\(^{120}\) Article 19(1)c of the Constitution of India and Article 22(1) of Covenant on Civil and Political Rights.
\(^{121}\) Article 20(1) of the Constitution of India and Article 15(1) of Covenant on Civil and Political Rights.
\(^{122}\) Article 20(2) of The Constitution of India and Article 14(7) of the Covenant on Civil and Political Rights.
\(^{123}\) Article 20(3) of the Constitution of India and Article 14(3) of Covenant on Civil and Political Rights.
\(^{124}\) Article 21 of the Constitution of India and Article 6(1) and 9(1) of Covenant on Civil and Political Rights.
arrest and detention,\textsuperscript{125} freedom of consciousness and religion.\textsuperscript{126} The covenant being international treaty is applicable to the states not individuals. Unless states incorporate it in their own municipal laws it has no effect for that country. This power is given to the Parliament under the Constitution of India.\textsuperscript{127} If Parliament does not enact any law for implementing the obligations under the treaty, Court cannot compel Parliaments to make such law. So far as customary principle of International law is concerned the Indian Courts follow doctrine of incorporation and apply customary rule of international law if they are not over ride in by clear rule of domestic laws.\textsuperscript{128} Though some fundamental rights (other fundamental rights) are originated by the Court through Judicial decisions but problem regarding the rights given in Covenant on Civil and Political Rights which are not incorporated in municipal law is still same.

Another problem is that the fundamental rights which are given in Part III of the Constitution of India and inherits in all human beings are not available to every individual. Some of them are available to citizens\textsuperscript{129} and some are to persons (citizen and non

\textsuperscript{125} Article 22 of the Constitution of India and Article9(2)(3) & (4) of Covenant on Civil and Political Rights.
\textsuperscript{126} Article25 of the Constitution of India and Article 18 (1)of Covenant on Civil and Political Rights.
\textsuperscript{127} Article 253 of the Constitution of India provides “Notwithstanding anything in foregoing provisions of this chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference or other body.
\textsuperscript{128} Supra note 293 p. 223
\textsuperscript{129} Article 15, 16, 19, 29, 30are available to citizens of India.
citizen both). The rights which are available to citizens only are also enshrined in Covenant on Civil and Political Rights as human rights. So there is conflict between human rights as provided in Covenant on Civil and Political rights and fundamental rights as provided in the Constitution of India.

II. International Covenant on Economic Social and Cultural Rights and Indian Constitution

Rights stipulated to International Covenant on Economic Social and Cultural Rights are, equal pay for equal work, safe and human condition of work, maternity relief, right to work, opportunities to children, compulsory education to the children, living wages, condition of work, adequate standard of living, and right to child education. Article 2 para 1 of the Covenant on Economic Social and Cultural Rights provides that state parties undertake to provide the rights to the individuals. But the states parties to the covenant are not

130 Article 14, 20, 21, 22, 25 are available to the persons.
131 Article 7 (a) (1)
132 Article 7 (b)
133 Article 10(2)
134 Article 6 (1)
135 Article 10(3)
136 Article 13 (2)(a)
137 Article 7 (a) (i)
138 Article 7 (d)
139 Article 11
140 Article 13 (1)
141 Article 2 para 1, provides, that each State party to the present Covenant undertakes to take step individually and through international assistance and co-operation especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means inclosing particularly the adopting legislative measures
required to provide the rights to the individuals from the time of ratification. However they shall take such steps so that these rights may be provided to them in future.\textsuperscript{142} However, the Government of India even after ratification is not very serious about that, because rights stipulated in the Covenant on Economic Social and Cultural Rights do not find place in Part III of the Constitution of India. Such rights are enshrined in Part IV of the Constitution of India i.e. is Directive Principle of State Policy. These are, equal pay for equal work\textsuperscript{143}, safe and human condition for work\textsuperscript{144}, maternity relief\textsuperscript{145}, right to work\textsuperscript{146}, opportunities to the children\textsuperscript{147}, compulsory education to the children\textsuperscript{148}, living wages\textsuperscript{149}, condition to work\textsuperscript{150}, adequate standard of living.\textsuperscript{151} This part IV deals with the positive duties cast upon the states to achieve social justice of the citizens. But the problem is that, this part is not justifiable and therefore are likely to remain unenforceable or ineffective and no legal action can be taken against the government in Court of law, if it fails to follow any of these principle. Another problem is that there are some other rights which did not get place in the constitution. These should be included in the Directive Principle of State Policy by making amendment keeping in view that India is a

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\textsuperscript{142} Supra note293 p. 248  \\
\textsuperscript{143} Article 39(d)  \\
\textsuperscript{144} Article 42  \\
\textsuperscript{145} Article 42  \\
\textsuperscript{146} Article 41  \\
\textsuperscript{147} Article 39(f)  \\
\textsuperscript{148} Article 45 (though it get place in Article 45 of the Constitution of India)  \\
\textsuperscript{149} Article 43  \\
\textsuperscript{150} Article 42  \\
\textsuperscript{151} Article 47
\end{flushright}
party to the Covenant. Although Court has tried to include these rights in right to life, but other than judicial activity the legislatures should perform their role to achieve social and economic justice through law.

III. Human Rights Conventions and Indian Position

A number of conventions have been concluded under the auspices of the United Nation and other International organization to protect human rights. But the problem is that these treaties shall be binding only on the parties to the treaties not on third parties. This customary rule is based on the maxim pacta tertis nec nocent nec prosunt. This rule has been incorporated in Vienna Convention 1969. India has become party of same by ratification. Apart from above, Convention against Torture and other Cruel Inhuman Degradation Treatment or Punishment was signed by India on 14th October 1997, however it has not been

152 Supra note 293 p. 254
153 Article 34 of Vienna Convention 1969
154 (a) International Convention on Elimination of All Forms of Racial Discrimination 1965 was ratified on 3rd December 1968.
(b) International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 was ratified on 22nd September 1977.
(c) International Convention against Apartheid in Sports 1985 ratified on September 12, 1990.
(d) Convention on Prevention and Punishment of Genocide (1951) ratified by India 27 August 1959.
(f) Convention on the Elimination of All Forms of Discrimination Against Women (1979) was ratified on July 1993.
(g) Convention on the Political Rights of Women 1952 was ratified on November 2, 1961.
(h) Convention for the Suppression of the Traffic in Person and of the exploitation of the Prostitutions of others 1949 was ratified on January 9, 1953
ratified till now, despite that National Human Rights Commission recommended it to be ratified. India wants to show the world community that it had faith to protect human rights, but is not prompt for that. In India treaty making power is the executive power of Union Government while the law making power for implementing the treaty or convention is vested in parliament. This distinction makes discrimination and treaties unable to acquire the same status and force as enacted laws have. Simply ratification is not sufficient for the Courts to enforce the provisions of international treaties and conventions. They are required to be transformed in municipal laws. India has enacted a few legislation to give effect to the conventions. For example Immoral Traffic Prevention Act 1987 was enacted to give effect to the Convention for the Suppression of the Traffic in Person and Exploitation of Prostitution of Others of 1949. Juvenile Justice (Care and Protection of children) Act 2000, has been enacted to give effect to

155 India is signatory to the convention on the Elimination on All Forms of Discrimination Against Women. It is the first country whose report had become due for submission to the committee in 1994, but report was submitted in 2000, similarly India was to place its first report before the committee of Convention on Rights of Child in 1995, but that report was filed in July 7, 1997.

156 Article 73 of the Constitution of India Provides (1) Subject to the provision of this constitution to executive power of the Union shall extend;
(a) to the matters with respect to which Parliament has power to make law, (b) to the exercise of such rights authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.
Provided, that the executive power referred to in subsection (a) shall not save as expressly provided in this constitution or the law made by the parliament extend in any state to matter with respect to which the legislature of the state has also power to make laws.

157 Supra note 306.
Convention on Rights of Child, 1989 etc. Though Courts had tried to incorporate the International treaties without incorporation in domestic laws but the International provisions should not be inconsistent with domestic laws.

The attitude of the Indian Government towards the enforcement of rights originated through the international treaties, conventions or covenants is indeed lethargic.\textsuperscript{158} The result is that continuous violation of human rights is going on despite the ratification of international treaties. India is a party of the Convention on the Rights of Child but child labour is continued on mass levels. Similarly India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women but position of women is not up to the mark.

\textbf{IV. Enforcement Problem & Human Rights Commission}

In spite of the legal and constitutional safeguards, regarding human rights of the people no satisfactory result is coming out. Human rights of people are still being violated. Complaints of deprivation and in fraction of human rights continue to be voiced. A large number of cases of human rights violation are pending in the Courts.\textsuperscript{159} Hence for the better protection of human rights of people government through the Protection of Human Rights Act, 1993 created National Human Rights Commission and State Human Rights Commissions. There is also provision for the

\textsuperscript{158} Supra note293 p. 259
\textsuperscript{159} Case analysis of 50 Cases relating to health which came before Punjab State Human Rights Commission in file 11 A // 15/9/2006.
construction of Human Rights Courts. Article 30 of the Protection of Human Rights Act, 1993, talks about establishment of Human Rights Court for the speedy adjudication of human rights cases but has not been properly adhered.

Though National and State Human Rights Commission play very important role in the function assigned to them. But the powers of the Commissions are very less under the Act. The Commission is only fact finding body with powers to conduct inquiry to complaints of violation of human rights.\textsuperscript{160} There are provisions in Protection of Human Rights Act which have prevented the Commission in effective protection of human rights of people. Firstly the Commission has no power of punishing the persons who have violated the human rights of other person but can give only recommendation to the government on finding that the person was reality fault.\textsuperscript{161}

Secondly. It can take action on a complaint if complaint is against public servant.\textsuperscript{162} This limitation ties the hand of the

\textsuperscript{160} ibid
\textsuperscript{161} Section 18 of the Protection of Human Rights Act, 1993 provides that, the Commission may take any of the following steps upon completion of enquiry held under this Act namely,
(1) where the enquiry discloses the Commission of violation of human rights by a public servant, it may recommended to the concerned government or authority the initiation of proceeding or such other action as the commission may deem fit against the concerned person or persons.
(2) approach the Supreme Court or the High Court concerned for such direction, orders, or writ as that Court may deem necessary.
(3) recommended to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary
\textsuperscript{162} Section 12 of the Protection of Human Rights Act, 1993, provides that the Commission shall perform all or any of the following functions namely
Commission in handling complaints of human rights violation of private individuals as commission cannot give recommendation against private person or persons.\textsuperscript{163}

Thirdly under the Protection of Human Rights Act, 1993 a limitation of one year has been placed for the entertainment of the complaints.\textsuperscript{164} This limitation as one year is very short because complainant will first sort refuges to the law and after facing disappointment he will come to any other forum for the protection of his human rights and it may be that he comes to know about this commission later and thinks of filing the complaint then, but this will not be fruitful as his complaint will not be entertained owing to this technicality.

Lastly, it is not mandatory on the State Government to establish respective State Human Right Commission.\textsuperscript{165} However it is compulsory to establish National Human rights Commission.\textsuperscript{166}

That is why till now only thirteen states have State Human Rights Commission.

\textit{inquire \textit{suo moto} or on a petition presented to it by victim or any person on his behalf in to complaint of;}  
(i) violation of human rights or abatement thereof, or  
(ii) negligence in the prevention of such violation by a public servant.

\textsuperscript{163} Supra note 338 p. 5

\textsuperscript{164} Section 36 (2) of Protection of Human Rights Act, 1993 provides that the National Human Rights Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human right is alleged to have been committed.

\textsuperscript{165} Section 21 of the Protection of Human Rights Act, 1993 provides that the State Government may constitute a body to be known power conferred upon and to perform the functions assigned to a state Commission

\textsuperscript{166} Section 3 of the Protection of Human Rights Act 1993 provides that the Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the power conferred upon and to perform the functions assigned to under this Act.
Now the time has come that the Government should make the provision to establish State Human Rights Commission compulsory by amending section 21 of the Protection of Human Rights Act, 1993. Substantial change is required to be made in legal as well as in the administrative system. Enactment of laws alone cannot make reforms in the social and economic conditions. They are required to be backed by the administrative machinery which should be effective and enforce them. Illiteracy, poverty and ignorance makes provisions of conventions and the Acts meaningless. So the gulf between slogans and the reality has to be bridged through realization of the rights of human being. A fair, just and durable political solution can lead to resolving the festering peripheral secessionism and while doing so accepted human rights standard have to honor to the fullest extent. Draconian laws like the infamous AFPSA (Armed Force Special Power Act) have to be repealed in the same way as the infamous POTA has been scrapped.\textsuperscript{167} The National Human Rights Commission of India had long back in 1997 had recommended the repeal of the AFPSA even then it is in existence\textsuperscript{168}. One more point which is to be considered is that limitation to entertain the case under section 36 (a) of the Protection of Human Rights Act, 1993 should be three years in place of one year. Efforts with full determination and courage have to be made by those govern the country for the upliftment of the economic and social conditions of


\textsuperscript{168} Ibid.
repeal of the AFPSA even then it is in existence. One more point which is to be considered is that limitation to entertain the case under section 36 (a) of the Protection of Human Rights Act, 1993 should be three years in place of one year. Efforts with full determination and courage have to be made by those govern the country for the upliftment of the economic and social conditions of the people. It is necessary for the government to make such an act a strong one as it will be instrumental in protecting more effectively the human rights of the people. They also should implement the recommendations of the Commission more often. People should start respecting and honoring the human rights of others because there is no better religion than protection of human rights of a human being by a human being. There is no better service to mankind that respecting of the human rights of a human being.

365 ibid.