CHAPTER - V
HUMAN RIGHTS AND THE INDIAN CONSTITUTION

5.1 Introduction

Today human rights permeate national and international spheres. It is said, in national system, the concept was present but in international system, it is of recent origin and roughly goes back to four hundred years. Indian society being one of the oldest civilisations has all along recognised certain basic rights of the individuals. The modern normative protection to human rights in India has evolved from the time of freedom struggle and developed subsequently. This Chapter deals with the development of the idea of human rights under the Constitution, nature and contents of Fundamental Rights and the Directive Principles of State Policy, extent of human rights incorporated in the Constitution of India, distinction between the constitutional recognition of human rights and the International Bill of Human Rights, constitutionally not specifically incorporated human rights standards and a conclusion.

5.2 Development of the Idea of Human Rights under the Constitution of India

It is said, “…Along with some other states, it (India) is committed to human rights by its constitutional instruments, has a strong and independent judiciary, and despite problems and setbacks tries hard to maintain human rights. Nor is their adherence to traditional values and rules absolute; the Indian Constitution prohibits many traditional and religious practices such as the discriminatory and degrading treatment of lower castes and provides for an equal treatment of women with men…”

History of human civilisation reveals that human rights existed throughout the ages, in one name or the other. The idea of human rights was not new to the political thinkers and philosophers in India and as pointed out in the Chapter III under ‘Evolution of Rights in India’, the visions to secure human rights and fundamental freedoms for all and everywhere existed even in Vedic times. Rig Veda cites three civil rights that of Tana

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2 Yash Ghai, Asian Perspectives on Human Rights, 23 Hong Kong L.J. 1993, p.344.
(Body), Skridhi (Dwelling Place) and Jibhasi (Life). Mahabharata tells about the importance of the freedom of the individual or civil liberties in a State.\(^4\) Concept of Dharma, rights and duties of individuals, communities and castes have been described in our Scriptures. In fact, Arthashastra elaborates on civil and legal rights first formulated by Manu, which also included economic rights.\(^5\) It is opined, “Ancient civilisations such as the Indian have had a world view of human welfare”.\(^6\) Ancient Indian philosophy spoke of the entire world to be one single family.\(^7\)

Since the world was divided into political and geographical units for administration purposes such units known as States held powers to govern themselves and their subjects. Sovereignty of the States and individuals were part of State entity. Initially, for the purpose of recognition and security of their own, the individuals surrendered to the supreme organisation called States, Leviathan as Thomas Hobbes called it.\(^8\) As time passed by, the despotism set-in in the nature of State operations and democratic movements started emerging. The principles of democracy, State accountability welfare and development of people gained attention.

The modern form of human rights jurisprudence originated in India at the time of British rule.\(^9\) It is said, “The British looked down upon Indian values, myths mores and lores as a lamp of loath some and demeaning thought”.\(^10\) Indians were discriminated in the enjoyment of civil and political liberties.\(^11\) This was criticised by the enlightened freedom fighters and individuals of that time such as Gandhi and others in their own ways. Indeed, Gandhi had believed that his service to India was his service to humanity.\(^12\) Collective movements too were organised to demand for the basic rights. This was

\(^7\) ‘Vasudhaiva Kutumbakam.’
\(^8\) V.S. Mani, *supra* note 6.
\(^10\) Ibid.
\(^11\) Ibid.
concretised for the first time in the Charter of 1813, which aimed at promoting the interest and happiness of the native inhabitants in India.\textsuperscript{13}

Similarly, the Charter Act of 1833 conferred upon Indians to enjoy few political rights by allowing them to participate in governance subject to certain limitations.\textsuperscript{14} Further, the declaration to recognise respect for religion by being a secular State made by Queen Victoria in 1833 ensured that there will be no interference with religious belief and worship of any of the subjects by further declaring that no one would be favoured, and molested by reasons of one’s religious faith and observances.\textsuperscript{15} Additionally, it also provided that “all shall enjoy the equal and impartial admittance to public offices and assignment to duties of which any subject by his education, ability and integrity was qualified to discharge”.\textsuperscript{16} Subsequently, the Swaraj Bill of India, 1895 spoke about freedom of speech, right to privacy and equality, right to Franchise and punishment for specific offence only.\textsuperscript{17}

Next important development is traceable to the Government of India Act 1915, which in pursuance of the demands for Fundamental Rights initiated through the Home Rule Bill, prepared by the National Congress provided for equality of opportunity in public services. It was also provided that such opportunity in public services must exclude the considerations of religion. Other resolutions of the National Congress made between 1917 and 1919 reiterated the demand for conferment of civil rights and equality of status with English persons.\textsuperscript{18} At the time of Montague-Chelmsford report, which led to the enactment of the Government of India Act of 1919, the Indian National Congress became very intense as they pressed for reforms.\textsuperscript{19} Inspired by the Irish Constitution, in 1925, the Indian National Congress prepared a ‘Commonwealth of India Bill,’ that provided for the much-needed declaration of bill of rights.\textsuperscript{20} This in itself was not

\textsuperscript{13} Rathin Bandyopadhyay, \textit{supra} note 9, at p. 180.

\textsuperscript{14} \textit{Ibid}.

\textsuperscript{15} \textit{Ibid}.

\textsuperscript{16} \textit{Ibid}.


\textsuperscript{18} Rathin Bandyopadhyay, \textit{supra} note 9, at p. 180.

\textsuperscript{19} N. Jayapalan, \textit{Indian Political Thinkers: Modern Indian Political Thought}, (Delhi: Atlantic Publishers & Distributors, 2000), p.102.

\textsuperscript{20} Rathin Bandyopadhyay. \textit{supra} note 9, at p. 180.
sufficient, so the Indian National Congress in 1927 demanded incorporation of a Declaration of Fundamental Rights in any future constitutional Acts.

Accordingly, the first formal document came into existence in 1928 with the report made by Jawaharlal Nehru.\(^\text{21}\) The report mentioned list of aspired rights such as free elementary education, living wage, protection of motherhood, welfare of children.\(^\text{22}\) This way, the report is seen as a forerunner to Fundamental Rights and Directive Principles of State Policy which were later incorporated into the Constitution of India. However, the Simon Commission rejected this proposal which consequently led to the next important Session at Karachi held by the National Congress to adopt a detailed programme of ‘Fundamental Rights and Duties and Economic and Social Change.’\(^\text{23}\) At the same time, the Government of India Act, 1935 was being prepared, which was planned to be a substitute for the Government of India Act, 1919.

However, the Government of India Act, 1935, which the British thought, was a great step in the direction of India’s advancement towards constitutionalism made no provision for civil liberties and Fundamental Right.\(^\text{24}\) Thus, it was recommended to the British government that Fundamental Rights be included in it. Again, citing a reason different to the earlier one, that is, that the Statutory Commission of the British had found that princely States in India as against the formulation of such rights, the British Government straight away rejected the demand for rights.\(^\text{25}\)

In 1939, when the Second World War broke out, in which Europe and Great Britain were involved, the constitutional machinery in India was suspended and the nationalist aspirations of the Indian people were suppressed. When the war ended in 1945, the issue of India’s Independence was reconsidered, and after negotiations and discussions, a Constituent Assembly was set up in 1946 for the purpose of framing the Constitution to an independent India.\(^\text{26}\) Meanwhile, the Sapru Committee founded in 1945 recognised the importance of incorporating Fundamental Rights into the Constitution of India. For the first time, the said Committee Report distinguished between


\(^{22}\) Ibid.

\(^{23}\) Rathin Bandyopadhyay, *supra* note 9, at p. 181.


\(^{25}\) Rathin Bandyopadhyay, *supra* note 9, at p. 181.

justiciable and non-justiciable rights, an approach that exercised great influence over the Constituent Assembly. Thus, it is said that the Constituent Assembly had a continuous lineage of "individual rights" claims before it.27

In order to provide justice to the expectations surrounding the Constituent Assembly it was thoughtfully designed to comprise of men of vast learning and varied experience of life. The Constituent Assembly, which was responsible for framing the Constitution to the budding independent India, spent three long years to frame it. Indeed, the impact of World War II, the framing of Universal Declaration of Human Rights 1948 and the Nuremberg Trials of 1945-46 that highlighted crimes against humanity and drafts of the European Convention on Human Rights 1950 left their impact on the formation of the Constitution.28 Guarantees of Fundamental Rights by the Constitution were an expected product of India’s long struggle for political freedom.29 The leaders of the Indian independence movement attached great significance to the nation-building capacities of the State, and its duties to establish within India ‘the economic and social conditions’ necessary for the meaningful exercise of civil and political rights.30

It is said, the tension between “individual rights” and “individual responsibilities or collective rights” led the Fundamental Rights Sub-Committee to find some refuge in the Irish Constitution and led to the ultimate adoption of the justiciable-non-justiciable dichotomy of Parts III and IV of the constitution.31 Secularism and federalism that acts as the two pillars of the Indian Constitutional scheme32 became the backdrop for the exercise of individual rights. Although secularism and federalism operate at a macro level, they do have direct impact on realisation of individual rights.33 In fact, these two

33 Abhishek Singhvi, *supra* note 27, at p. 332.
constitute a part of the ‘Basic Structure’ of the Indian Constitution.\textsuperscript{34} Subsequently, it is observed that “One of the greatest achievements of civilisation in the 20\textsuperscript{th} century was the accomplishment of human rights as an integral part of governance of the State”.\textsuperscript{35}

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights, 1948 (UDHR) by its Resolution\textsuperscript{36} and proclaimed that human rights are a common standard of achievement for all persons and nations. Since, the UDHR was only a Declaration and not a treaty, the States had to take steps to commit themselves to human rights in accordance with the obligations of the Charter of the United Nations. This movement led to giving recognition to human rights in the domestic spheres, including the written constitutions of States. The idea of Fundamental Rights was to confer individuals certain rights that in turn would act as a limitation on the powers of the Governments.

The Constitution of India was drafted when the deliberations for the UDHR were in progress, so that framers of the Constitution were influenced by the concept of human rights.\textsuperscript{37} The UDHR did not contain in it enforcement machineries and as a result the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966 came into existence. Much before that, the Indian Constitution had developed implementation mechanism for the rights conferred by Part III of the Constitution. The obligation to care was imposed through the fundamental law of the country and is supplemented and complemented by subsequent ordinary laws. Rights will have greater value if they are made enforceable. Accordingly, in the matters of enforcement of the Fundamental Rights, the Constitution has provided concurrent writ jurisdiction upon the Supreme Court and the High Courts.\textsuperscript{38} The Courts’ power is not limited to issue writs alone, it can pass any order including a declaratory order or direction as it may appear to it as essential for providing adequate relief to the aggrieved

\textsuperscript{35} Benoy Jose, supra note 3, at p.181.
\textsuperscript{36} General Assembly Res. 217 A (III) of 10 December 1948.
\textsuperscript{37} Benoy Jose, supra note 3, at p.183.
\textsuperscript{38} Constitution of India, Articles 32 and 226.
persons.\textsuperscript{39} Further, the Supreme Court of India in particular is empowered to pass any order, decree, direction or any suitable order to render complete justice in litigation.\textsuperscript{40}

The Constitution of India was adopted on 26 November 1949, some provisions came into force immediately and the remaining provisions of it came into force on 26 January 1950. India has a written Constitution and it is the fundamental law of the land. This would suggest that all its creations such as Governments, its legislative, judicial and executive organs and other institutions of the Government derive their powers from the Constitution and they must adhere to the \textit{suprema lex}. The Constitution has purposive existence and it is not ephemeral in nature as it serves as a social, legal and moral document having legal sanctity. The Preamble of the Constitution sets out the important resolutions, promises and declarations that the people have made for themselves. The important promises includes securing to all citizens justice: social, economic and political, liberty of thought, expression, belief, faith and worship, fraternity to be promoted among all while assuring the dignity of the individual, unity and integrity of the nation, most of which are the broad concepts under the Declaration.

The principles laid out in Preamble have been realised through the provisions, especially those contained in Parts III and IV of the Constitution. Dr. B.R. Ambedkar has outlined the importance of Fundamental Rights in the following terms. “The object of Fundamental Rights is twofold. First, every citizen must be in a position to claim those rights, and secondly, they must be binding upon every authority”.\textsuperscript{41} This means that the rights conferred by Part III lays obligation upon every authority such as Governments, district boards, panchayats, municipalities and any other instrumentalities of the State to care for Fundamental Rights.

The Constitution of India is a ‘transformative’ document.\textsuperscript{42} Provisions of it provide for principles of administration, rights and limitation of State power.\textsuperscript{43} “They aim ‘to spark and shape social and economic revolutions within India,’”\textsuperscript{44} especially the Parts III and IV of the Constitution, namely, the Fundamental Rights and the Directive

\textsuperscript{40} The Constitution of India, Article 142.
\textsuperscript{41} CAD Vol. VII, 1948-49, p.610.
\textsuperscript{43} Granville Austin, \textit{supra} note 30, at p. xiv.
\textsuperscript{44} Nick Robinson, \textit{supra} note 42.
Principles of State Policy, comprise ‘the conscience of the Constitution.’\(^{45}\) They allow for the simultaneous achievement of ‘massive social and economic transformation’ and the preservation of individual liberties,\(^{46}\) including the international human rights standards. The foundation for human rights protection in India is its Constitution. With an intention to provide better protection to human rights, the Government enacted a special legislation called the Protection of Human Rights Act, 1993.\(^{47}\) Both of these are considered as national level protection-mechanisms for human rights in India.

5.3 Nature and Contents of Fundamental Rights and Directive Principles of State Policy

The rights contained in Part III have been considered by the judiciary, which is a guardian of Fundamental Rights, as paramount,\(^{48}\) sacrosanct,\(^{49}\) transcendental,\(^{50}\) inalienable and inviolable.\(^{51}\) Fundamental Rights ensure that the “individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exist”.\(^{52}\) The remedy guaranteed under Article 32, by being in Part III, is itself a Fundamental Right. It is not a mere power of the Court but a constitutional obligation to protect the Fundamental Rights, prevent the infringement of Fundamental Rights.\(^{53}\)

Fundamental rights are not absolute by nature as they are subjected to reasonable restrictions, which are imposed by the laws.\(^{54}\) All legislations must be in conformity with the Fundamental Rights.\(^{55}\) In *ADM Jabalpur v. Shukla*, Justice Beg had stated that the object of making certain general aspects of rights fundamental is to guarantee them against illegal invasion of these rights by executive, legislative, or judicial organ of the

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\(^{45}\) Granville Austin, *supra* note 30, at p. 50.

\(^{46}\) Nick Robinson, *supra* note 42.

\(^{47}\) This Act seeks to provide better protection and promotion of the human rights by establishing human rights commissions at the central and State level and by establishing the human rights courts.


\(^{50}\) *Govind v. State of M.P.*, AIR 1975 SC 1378.


\(^{52}\) *Supra* note 50.

\(^{53}\) *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

\(^{54}\) See The Constitution of India, Articles 19 (2) to (6), and 25 (1).

\(^{55}\) The Constitution of India, Article 13 (2) holds that State shall not make laws inconsistent with Fundamental Rights and any law repugnant shall be void to the extent of its inconsistency with Fundamental Rights.
Fundamental Rights can be suspended during proclamation of a national emergency under Article 352, in accordance with the Constitution. Fundamental Rights are said to be those great and basic rights, which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. The rights contained in Part III are predominantly the civil and political rights and hence they are phrased in negative terms to prohibit the State from denying or restricting individual liberty, while the directive principles are the aspirations, framed to be positive obligation.

The Constitution guarantees a comprehensive array of Fundamental Rights that are subject to certain explicit exceptions. The purpose of enumerating these basic rights in the Constitution “is to safeguard the basic human rights from the vicissitude of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the Centre or in the State.” The range of human rights covered under Part III (Articles 14 to 32) is quite decent. Some of these rights are available to both citizens and aliens alike. Generally, the rights conferred by Articles 14, 20, 21, 22, and 25 to 28 are available to both citizens and non-citizens. Safeguards conferred by Article 20 against arrest and detention are not available to enemy aliens. This apart all other rights conferred by the Constitution are exclusively available to citizens.

Articles 14 to 18 deal with the right to equality. Article 19 confers upon citizens the six fundamental freedoms of, “speech and expression”, “peaceful assembly”, “formation of associations or unions or cooperative societies”, “movement,” “residence,” and freedom to “practice any profession, occupation, trade or business”. These rights are subject to "reasonable restrictions" on specific grounds mentioned in Clauses (2) to (6) of Article 19. Article 20 safeguards in respect of conviction for offenses from retrospective
laws, enhanced punishments than that prevailed in law at the time of commission of
offence, double jeopardy and self-incrimination. Article 21 protects life and liberty,
however it can be deprived in accordance with the procedure established by law. The
Supreme Court in *Maneka Gandhi v. Union of India* case has held that it must be just, fair
and reasonable procedure established by law and not any procedure by law.\(^{61}\) Article 21
is also a Charter of un-enumerated rights.

Article 22 provides safeguards to persons against arbitrary arrest and detention.
Article 23 prohibits traffic in human beings and *begar* and other similar forms of forced
labour. Article 24 prohibits the exploitation of children and employment of children in
factories, mines, and other hazardous work situations. Article 25 guarantees to all
people’s freedom of conscience and the right freely to profess, practice, and propagate
any religion of their choice subject to other Fundamental Rights, public health and
morality. Article 26 guarantees the freedom to manage religious affairs including
establishing and maintaining institutions for religious and charitable purposes to every
religious denomination. Article 27 prohibits compelling any person to pay taxes for the
promotion or maintenance of a particular religion or denomination. Article 28 prohibits
religious instruction in educational institutions wholly maintained by State funds in India.

Articles 29 and 30 guarantees the protection to religious and linguistic minorities
to preserve and cherish their traditional practices, language and culture and to establish
and administer the educational institutions of their choice. State cannot discriminate in
granting aid to institutions established by the minorities. “All the above rights would be
otiose in the absence of a right to move the court for their enforcement”.\(^ {62}\) Therefore,
Article 32 guarantees all people the right to move the Supreme Court of India for
enforcement of Fundamental Rights.

It is said, the Fundamental Rights contain those basic rights “sans which societal
survival would eventually be a mirage”\(^ {63}\) and which ordinary laws cannot take away.\(^ {64}\)
They prevent the State from acting, while directive principles provide a framework

\(^{61}\) 1978 SCR (2) 621.
\(^{62}\) Vijayashri Sripathi, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking
\(^{64}\) MP Jain, *Indian Constitutional Law*, 5th edn. (New Delhi: Lexis Nexis Butterworths Wadhwa
within which the State is required to act. The Directive Principles of State Policy are non-justiciable by themselves but ‘fundamental in the governance of the country’. In the initial years of the Supreme Court of India, the Part IV of the Constitution was interpreted as secondary to the Fundamental Rights contained in Part III. However, this interpretation underwent a change since the mid-1970s. Since then, the Supreme Court has recognised that for the complete enjoyment of the fundamental liberties guaranteed by Part III, the enforcement of social and economic rights is required as an antecedent. This change of view made the Court to read the Directive Principles of State Policy along with or in the ambit of Fundamental Rights, consequently, making it enforceable. For instance, the right to life guaranteed by Article 21 of the Constitution of India has been given the expansive interpretation and consequently right live with ‘human dignity, right to education, right to healthcare, and a right to a healthy and sustainable environment have been read into right to life guaranteed by Article 21 of the Constitution.

In Minerva Mills case, the Supreme Court has clarified that Fundamental Rights and the Directive Principles of State Policy are supplementary and complementary to each other, and as such, they need harmonious construction. The Directive Principles of State Policy, together with the Fundamental Rights state the essential features of constitutionally desired social order. The difference between Fundamental Rights and Directive Principles of State Policy does not derive from the first-generation versus second-generation human rights debate. Several economic, educational and cultural rights are included in the Chapter on Fundamental Rights, and are therefore justiciable.

The Directive Principles of State Policy have two important characteristics. First, they are unenforceable, which results in no legal remedy to compel positive State action.

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66 Constitution of India, Article 37.
67 Nick Robinson, *supra* note 42.
69 Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.
Secondly, the principles are fundamental to the governance of the country and oblige the legislature to act in accordance with them. Therefore, the Directive Principles of State Policy are in essence constitutional 'letters of instruction' to all Governmental institutions by the ultimate sovereign authority, the Indian people. All legislations must be consistent with these principles, as they are fundamental to the governance of the country.\textsuperscript{72} "Structural problems, financial constraints, unwillingness of political parties and the limited resources to address backlogs, are but a few reasons why the ideals contained in the Preamble and the directive principles have not yet fully been attained".\textsuperscript{73}

The Directive Principles of State Policy may be classified into five categories.\textsuperscript{74} First category comprises of socialist principles which emphasise on approaches to address socio-economic problems by holding the States to direct its policies towards ensuring that its citizens, men and woman equally, have an adequate means of livelihood; the ownership and control of the material resources of the community should be so distributed as best to serve the common good; the operation of the economic system should not result in the concentration of wealth and means of production to the detriment of the common good; there will be equal pay for equal work for both men and woman; the health and strength of workers, men and woman, and the tender age of children should not be abused, and that citizens should not be forced by economic necessity to enter occupations unsuited to their age and strength; childhood and youth should be protected against exploitation and against moral and material abandonment.\textsuperscript{75}

Further, the State should, within the limits of its economic capacity and development, make effective provision for securing the right to work, right to education and right to public assistance in cases of unemployment, old age, sickness, disablement, etc.\textsuperscript{76} State must strive to secure just and humane conditions of work and for maternal relief.\textsuperscript{77} The State should endeavour to secure for all workers, agricultural or industrial,

\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid. at p. 38.
\textsuperscript{75} The Constitution of India, Article 39.
\textsuperscript{76} Ibid. Article 41.
\textsuperscript{77} Ibid. Article 42.
work and a living wage, conditions of work ensuring a decent standard of living and full employment and leisure and social and cultural opportunities. 78

Second category comprises of the Gandhian principles. Based on these, the State should take steps to organise village Panchayats with such powers and authority as may be necessary to enable them to function as units of self-government; 79 promote with special care the educational and economic interests of the weaker sections of the people, particularly of the scheduled castes and the scheduled tribes, and should protect them from social injustice and all forms of exploitation; 80 endeavour to promote cottage industries on an individual or co-operative basis in the rural areas; 81 endeavour to preserve the breeds of milch and draught cattle, including cows and calves, and prohibit their slaughter; 82 endeavour to raise the level of nutrition and the standard of living and in particular, bring about the prohibition of the consumption, except for medicinal purpose, of intoxicating drugs and of drugs that are injurious to health; 83 and take steps to separate the judiciary from the executive in the public service. 84

Third category consists of General Welfare principles that emphasize the welfare of all citizens. Accordingly, the State is required to endeavour to provide early childhood care and education for all children until they complete the age of six years; 85 organize agricultural and animal husbandry on modern and scientific lines; 86 secure for its citizens a uniform civil code throughout the territory of India; 87 and to ensure equal access to the courts and provide free legal assistance to those in need. 88

The fourth category consists of international principles, according to which the State must promote international peace and security, maintain just and honourable relations between nations, foster respect for international law and treaty obligations, and

78 Ibid. Article 43.
79 Ibid. Article 40.
80 Ibid. Article 46.
81 Supra note 78.
82 The Constitution of India, Article 48.
83 Ibid. Article 47.
84 Ibid. Article 50.
85 Ibid. Article 45.
86 Ibid. Article 48.
87 Ibid. Article 44.
88 Ibid. Article 39-A.
encourage settlement of international disputes by arbitration.\textsuperscript{89} The last category comprise of principles relating to conservation of nature. State must protect and improve the environment, and safeguard the forests and wild life.\textsuperscript{90} Protection of monuments or places of historic importance from spoilation, disfigurement, destruction, removal, and disposal are an obligation for the States under Article 49 of the Constitution. The Directive Principles of State Policy is the basis for the Parliament and the State Legislatures to order their laws and policies.

5.4 Extent of Human Rights Standards Incorporated under the Constitution of India

The Constitution of India (hereinafter referred to as the Constitution) guarantees Fundamental Rights, which can be classified into the following categories. Right to Equality (Articles 14-18), Right to Freedom (Articles 19-22), Right against Exploitation (Articles 23-24), Right to Freedom of Religion (Articles 25-28), Cultural and Educational Rights (Articles 29-30), and Right to Constitutional Remedies (Article 32).

The just understanding and appreciation of the extent of human rights standards incorporated in the Constitution needs consideration of the International Bill of Human Rights. For this purpose, the Optional Protocols 1 to the ICCPR and the ICESCR have been excluded as they deal with specific procedures relating to individual communications. Optional Protocol 2 to the ICCPR is also excluded because it deals with abolition of death penalty, which India has not ratified. The discussion on the extent of human rights standards incorporated under the Constitution of India starts with the examination of civil and political rights followed by the economic, social and cultural rights enumerated in the UDHR, ICCPR, ICESCR and the Constitution of India.

5.4.1 Civil and Political Rights

The UDHR, among others, guarantees the right to life, and liberty.\textsuperscript{91} The ICCPR, as an improvisation to the said right guaranteed by the UDHR provides for inherent right to life that cannot be arbitrarily deprived. According to the ICCPR, right to life is to be protected by law and any penalty affecting life can only be carried out pursuant to a final

\textsuperscript{89} Ibid. Article 51.
\textsuperscript{90} Ibid. Article 48 A.
\textsuperscript{91} The Universal Declaration of Human Rights 1948, Article 3.
A right against slavery or servitude, slavery and the slave trade is guaranteed by the UDHR including its prohibition in all forms. Similarly, Article 8 of the ICCPR provides rights against slavery and the slave trade in any of its forms. In addition, the ICCPR holds that no one shall be held in servitude and no one shall be required to perform forced or compulsory labour. In India, Article 23 of the Constitution states that traffic in human beings and begar and other similar forms of forced labour is prohibited. However, this provision in the Constitution does not make use of the expression ‘slavery’ or ‘servitude’, as mentioned in the International Bill of Human Rights. Forced labour and begar in a wider sense may be seen as specie of slavery.

92 The International Covenant on Civil and Political Rights 1966, Article 6.
93 The Code of Criminal Procedure 1973, Section 416 states that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.
94 The Juvenile Justice (Care and Protection of Children) Act, 2000, Section 16.
95 The Universal Declaration of Human Rights 1948, Article 4.
The UDHR provides for equality before the law and equal protection of the law, without any discrimination.\(^{96}\) This right is protected by Article 26 of the ICCPR, which in addition states that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In India, Articles 14 and 15 of the Constitution recognise the right to equality before law, equal protection of laws and right against discrimination.

The UDHR provides for a right to an effective remedy by the competent national tribunals for acts violating the Fundamental Rights granted to him by the constitution or by law.\(^{97}\) Article 3 (a) of the ICCPR recognises this right in the form of an obligation of all States Parties. In India, Articles 32 and 226 of the Constitution guarantee a right to move the Supreme Court or the High Court, respectively, for the purpose of enforcement of Fundamental Rights.

The right against arbitrary arrest and detention is recognised by the UDHR.\(^{98}\) Similarly, but in addition to the UDHR, Article 9 of the ICCPR states that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention, and that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 of the ICCPR also confers a right to the arrested to be informed, at the time of arrest, of the reasons for his arrest or charges levied against him. Additional safeguard to arrested or detained persons on a criminal charge is provided by the Covenant in the following manner. It provides that a detained or arrested person shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial. The Article further provides for a right to take proceedings before a court on the lawfulness of his detention and the victim of unlawful arrest or detention shall have an enforceable right to compensation. In India, joint reading of Articles 21 and 22 would suggest that most of the rights provided against arrest and detention is also recognised.

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\(^{96}\) Ibid. Article 7.
\(^{97}\) Ibid. Article 8.
\(^{98}\) Ibid. Article 9.
under the Constitution. Besides, Sections 50\textsuperscript{99}, 50-A\textsuperscript{100}, 56\textsuperscript{101} and 57\textsuperscript{102} of the Code of Criminal Procedure 1973 supplements the conferrals found in the Constitution. These Sections deal with the abovementioned protections against arbitrary arrest. However, it must be noted that a right to compensation in cases of arbitrary arrest and detention is not explicitly found in the Constitution.

The UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any penal offence because of any act or omission that did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.\textsuperscript{103} Similarly, Paras 2 and 3 of Article 14 of the ICCPR states that any person charged with a criminal offence has the right to be presumed innocent until proved guilty in accordance with law and in the determination of any criminal charge, everyone shall

\textsuperscript{99} Person arrested to be informed of grounds of arrest and of right to bail.
(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.
(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.
\textsuperscript{100} Obligation of person making arrest to inform about the arrest to inform about the arrest, etc., to a nominated person
(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.
(2) The police officer shall inform the arrested person of his rights under subsection (1) as soon as he is brought to the police station.
(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.
(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of Sub-Section (2) and Sub-Section (3) have been complied with in respect of such arrested person
\textsuperscript{101} Person arrested to be taken before Magistrate or officer in charge of police station.
A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.
\textsuperscript{102} Person arrested not to be detained more than twenty-four hours.
No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s court.
\textsuperscript{103} The Universal Declaration of Human Rights 1948, Article 11.
be entitled to the following minimum guarantees, in full equality: (a) “To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; and (g) Not to be compelled to testify against himself or to confess guilt.” In addition, this provision also provides recognition to the tender age of the accused, which obligates the States to provide for different treatment to such persons with intent to promote their rehabilitation. This apart, without discrimination, every convicted person has the right to get his conviction reviewed by a higher tribunal in accordance with law. Upon such review, when a conviction has been reversed or the convict has been pardoned on the ground that there has been an injustice, the victim of punishment shall be compensated according to law. Lastly, Article 14 of the ICCPR holds that no one shall be liable to be tried or punished again for the same offence for which he has already been finally convicted or acquitted in accordance with the law. Article 15 of the Covenant on Civil and Political Rights confers a right to be tried and punished in accordance with law and right against higher penalty. According to the latter part of the provision, no higher punishment can be inflicted upon any person than what was prescribed by law, which was in force at the time of commission of the offence, however, a change in law that reduces sentence, it can benefit the offender. Under the Constitution, there is no express provision to consider a person as innocent until his guilt is proven. Nevertheless, the Courts in India have been referring to the international human rights instruments and giving effect to this rule.104 Article 22 (1)

104 “The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and
to (4) safeguards the rights of the arrested persons and Articles 20 (1) and (2) of the Constitution protects convicts against higher penalty and double jeopardy.

Article 13 of the UDHR states that everyone has the right to freedom of movement and residence within the borders of each State. Article 12 of the ICCPR states that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. Article 12 of the ICCPR also provides that the rights guaranteed by it shall not be subject to any restrictions except those that are provided by law or as are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the ICCPR and no one shall be arbitrarily deprived of the right to enter his own country. In India, Article 19 (1) (d) and (e) of the Constitution recognises the freedom of movement and residence, which may be restricted in the interests of the general public and for the protection of the interests of any Scheduled Tribes. (Article 19 (5)). Right to leave the country is not expressly recognised under the Constitution.

Article 17 of the UDHR provides for a right to own property alone as well as in association with others. This right cannot be arbitrarily deprived. Interestingly, right of

once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for…” held in State of Rajasthan v. Shera Ram alias Vishnu Dutta (2012) 1 SCC 602.

105 Protection against arrest and detention in certain cases
(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate
(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention
(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

106 Protection in respect of conviction for offences
(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence
(2) No person shall be prosecuted and punished for the same offence more than once
property is not recognised under the ICCPR except as grounds specified for prohibition of discrimination. Whereas, Article 300-A of the Constitution guarantees the right of property to every person which cannot to be deprived save by authority of law. This recognition is in the form of constitutional right, which earlier was a Fundamental Right under Article 19 (1) (f) that was omitted by the Constitution (Forty Fourth) Amendment Act, 1978.

According to Article 18 of the UDHR, everyone has the right to freedom of thought, conscience and religion, which includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. According to Article 18 of the ICCPR, everyone have the right to freedom of thought, conscience and religion, which includes freedom to have or to adopt a religion or belief of his choice, and freedom, to manifest his religion or belief in worship, observance, practice and teaching. This freedom would ensure that no one is subject to coercion to adopt a religion or belief that is against his choice. Further, the limitations are clearly laid down in the same provision, according to which, the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals. In addition, Article 27 of the ICCPR guarantees ethnic, religious or linguistic minorities the right to enjoy their own culture, to profess and practise their own religion, or to use their own language. In India, Articles 25-28 of the Constitution recognise the freedom of religion which is subjected to public order,

108 Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law,
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
Explanation II: In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
Article 26 of the Constitution deals with Freedom to manage religious affairs subject to public order, morality and health. It states “Every religious denomination or any section thereof shall have the right
morality, health and other provisions of Part III of the Constitution. Indeed, Articles 29 and 30 of the Constitution\textsuperscript{109} are the corresponding provisions for Article 27 of the ICCPR.

Articles 19 of the UDHR and that of the ICCPR confer the right to freedom of opinion and expression, where the latter adds right to hold opinions without interference. Under the Constitution of India, Article 19 (1) (a), the freedom of speech and expression is guaranteed to all citizens. This freedom is not absolute as it is subjected to reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence as specified under Article 19 (2).

\begin{itemize}
\item[(a)] to establish and maintain institutions for religious and charitable purposes;
\item[(b)] to manage its own affairs in matters of religion;
\item[(c)] to own and acquire movable and immovable property; and
\item[(d)] to administer such property in accordance with law."
\end{itemize}

Article 27 deals with Freedom as to payment of taxes for promotion of any particular religion. It states “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

Article 28 deals with Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

\textsuperscript{109} Article 29-Protection of interests of minorities-

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30- Right of minorities to establish and administer educational institutions-

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.
Article 20 (1) of the UDHR provides for the freedom of peaceful assembly and association. Article 21 of the Covenant on Civil and Political Rights recognises the right of peaceful assembly. Besides, Article 22 of the ICCPR provides for the right to freedom of association with others, including the right to form and join trade unions for the protection of interests. Like Article 21, the freedom guaranteed by Article 22 of the ICCPR is subjected to restrictions that are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In the context of India, Article 19 (1) (C) of the Constitution guarantees to all citizens the freedom to form or join association, trade unions or co-operative society, which may be restricted only on the grounds of interests of the sovereignty and integrity of India or public order or morality.

The UDHR proclaims that everyone has the right to take part in the governance of his country, directly or through freely chosen representatives, and that everyone has the right of equal access to public service in his country. The will of the people shall be the basis of the authority of the Government that shall be expressed in periodic and genuine elections, which shall be conducted by universal, equal suffrage and by secret vote or by equivalent free voting procedures. The ICCPR not only recognises the right to take part in governance of the country but also states that every citizen shall have the right and the opportunity, without any distinctions to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and to have access, on general terms of equality, to public service in his country. In India, Articles 325 and 326 of the Constitution deal with elections in a manner that is consistent with the principles of the

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110 Freedom to form or Join Cooperative Society is added by the Constitution (Ninety-Seventh) Amendment Act, 2011.
111 The Declaration of Human Rights 1948, Article 21.
112 The International Covenant on Civil and Political Rights 1966, Article 25.
113 Article 325 of the Constitution states that “No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.”
UDHR and the ICCPR. Besides, Article 16, which provides for equality of opportunity in matters of public employment, read with Articles 311 and 312 of the Constitution deals with All India Services. Right to vote is not explicitly recognised in the Constitution.

5.4.2 Economic, Social and Cultural Rights

Article 1 of the UDHR holds that all human beings are born free and equal in dignity and rights. According to Article 1 of the UDHR human beings are endowed with reason and conscience with which they should act towards one another in a spirit of brotherhood. The latter part of this provision is dealt by the Constitution under Article 51A (e), in the form of a Fundamental Duty.

Article 2 of the ICESCR obliges the States to ensure that all measures to realise the rights recognised in the Covenant must be taken progressively and they are based on the principle of non-discrimination. Among them, the first happens to be a right guaranteed by Article 3 of the ICESCR. It provides that States must ensure equal right to men and women in the enjoyment of all economic, social and cultural rights set forth in the Covenant. Similarly, in India Article 38 (2) of the Constitution holds that the State must strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. This would suggest that the underpinning on which Article 38 is standing is on the principle of non-discrimination.

Article 6 of the ICESCR recognizes the right to work. In India, Article 41 of the Constitution provides that the State, within the limits of its economic capacity and development, make effective provision for securing the right to work. Article 41 proceeds to address education and public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

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Article 326 of the Constitution provides that “Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.”
Under Article 7 of the ICESCR, everyone has the right to the enjoyment of just and favourable conditions of work. This right ensures remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; a decent living for themselves and their families in accordance with the provisions of the Covenant; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. In India, most of these standards are recognised under Article 39 of the Constitution.\textsuperscript{114}

Article 8 of the ICESCR recognises the right to form trade unions and join the trade union of one’s choice. This right would help the individuals in promoting and protecting their economic and social interests, which is also recognised under Article 19 (1) (C) of the Constitution.

Article 9 of the ICESCR guarantees the right of everyone to social security. The Indian Government in accordance with the directives contained in Article 38\textsuperscript{115} and Article 39 of the Constitution\textsuperscript{116} bears the primary responsibility for developing appropriate system by which it could provide protection and assistance to its workforce. Since the workforce in India is increasing, its protection is aimed by various legislations.

\textsuperscript{114} Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means to livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

\textsuperscript{115} State to secure a social order for the promotion of welfare of the people

(1) 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 inform all the institutions of the national life

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations

\textsuperscript{116} Supra note 114.

Article 10 of the ICESCR holds that special protection should be accorded to mothers before and after childbirth. Article 10 of the ICESCR further provides that during such period, working mothers should be accorded paid leave or leave with adequate social security benefits. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law. Further Article 11 of the ICESCR deals with the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, which is recognised under Article 43 of the Constitution.117

Article 12 of the ICESCR provides for a right of everyone to the enjoyment of the highest attainable standard of physical and mental health. States must take steps for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases. In addition, States must create necessary conditions which would assure to all, medical service and medical attention in the event of sickness. In India, Articles 47 and 48-A of the Constitution118 holds the State responsible for promoting public health and for

117 This Article deals with the right to living wage of workers.
The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas

118 Duty of the State to raise the level of nutrition and the standard of living and to improve public health
The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Article 48-A- Protection and improvement of environment and safeguarding of forests and wild life-
providing and maintaining cleanly environment for the people. On recall, it would be clear that Article 12 of the ICESCR in comparison to Articles 47 and 48-A of the Constitution is specific. This would imply that provisions of the Constitution are either abstract or general in nature, and alternatively Articles 47 and 48-A of the Constitution may be seen as provisions having wider amplitude.

Article 13 of the ICESCR provides that right to education; primary education shall be compulsory and available free to all. In addition, Article 26 (1) of the ICESCR states that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all based on merit. In India, right to education is recognised in Articles 41, 45 and 21-A of the Constitution.

Article 15 of the ICESCR states that everyone has the right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Further, it provides that the States must strive to achieve the full realization of this right and it shall include those necessary for the conservation, the development and the diffusion of science and culture. Under the Constitution of India, clauses (e), (f), (h) and (j) of Article 51 A deals with the protections addressed by Article 15 of the ICESCR.

As to the extent of recognition given to economic, social and cultural rights under the Constitution, it is said, “The catalogue of economic and social rights in the Indian Constitution is extensive as that of the international instruments, though rights are not enforceable through judicial process. Efforts have been made to achieve some of these rights through legislation.”\(^\text{119}\) The economic social and cultural rights require legislative and executive initiatives.

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5.5 Distinction between Fundamental Rights and Human Rights Standards

The fundamental distinction between Human rights standards and the Fundamental Rights lies in the addresses, that is to whom those rights are available. Since the “Fundamental Rights” relates to a system, they imply affiliation. This would suggest that affiliation by means of ‘citizenship’ to a system of governance might be required. The Fundamental Rights are limited to what is prescribed by the Constitution.120 On the other hand, human rights are universal in nature and they are more to do with natural rights and natural duties. Human rights are for all human beings with no requirement as to citizenship or nationality. In the case of Fundamental Rights, certain Fundamental Rights are exclusively available to citizens, whereas some other rights are extended to aliens as well.121

It is generally observed that the Civil and Political Rights (CPR) are protected under Part-III, whereas, the Economic, Social and Cultural Rights (ESCR) have been incorporated under Part-IV of the Constitution. However, the fact that Part III is made enforceable while Part IV is non-enforceable, it highlights the deviation from international standards where such distinction in enforceability of CPR and ESCR is not found under Covenants on human rights, except that ESCR is said to be programmable in nature. Non-enforceability of Part-IV does not stand for malafide intention of the government.

Both human rights and the Fundamental Rights can be suspended during the times of national emergency. However, the important distinction between the two is found in the way the IHRL and the Constitution classifies rights as ‘derogable’ and ‘non-derogable’. That is, Article 4 (2) of the ICCPR proclaims the right to life, prohibition of torture and cruel, inhuman or degrading treatment or punishment, prohibition of slavery, slave trade and servitude, right against imprisonment on ground of inability to fulfil a contractual obligation, non-retroactivity of criminal law, right to recognition as a person before law, freedom of thought, conscience and religion, and right against discrimination based on race, colour, sex, language, religion or social origin, cannot be derogated even

121 Different dimensions of Fundamental Rights guaranteed by Articles 15, 16, 19, 29 and 21 (discussed under rights incorporated, infra) are available only to citizens. Fundamental Rights guaranteed by Articles 14, 20, 21, 22, and 25 to 28 are available to both Citizens and aliens.
during a serious emergency situation. Whereas, in India, Article 359 of the Constitution provides that except Articles 20 and 21, namely protection in respect of conviction for offences and right to life and liberty, any other Fundamental Right can be suspended during national emergency. If the national emergency is proclaimed on the grounds of ‘war’ or ‘external aggression,’ then all six fundamental freedoms guaranteed by Article 19 gets suspended automatically, without a proclamation by the President of India in this regard (Article 358). This apart, Article 4 of the ICCPR is not applicable to all types of public emergencies. Only the threat to life of the nation or to its very existence may be the ground for derogation. In India, Article 352 of the Constitution deals with national emergency and according to it, war, external aggression or armed rebellion are the grounds for proclamation of a national emergency. It is said, “The question whether there exists a real threat to the security of India or not is to be decided by the executive. The ICCPR apparently permits this, but if there is no real threat to the life of the nation as such and if an attempt is made by the executive to misuse the powers, the right of derogation recognised by the Covenant will not be available. In case of India, the satisfaction of the executive that there is a threat to the security of India is not beyond judicial review”.122

Under the International Human Rights Law, the States can resort to preventive detention only during emergency. On the contrary, in India, the State can resort to preventive detention both in emergency and in peacetimes. This establishes the distinction in circumstances in which deprivation of certain essential rights like right to liberty of a person can be affected. The Indian Government has passed a number of enactments which authorises preventive detention (further discussion on the same is held in Chapter VII under ‘Constitutionally Specifically Incorporated Rights and the Supreme Court’), though the safeguards are made available against arbitrary detention.123

Furthermore, a theory of human rights, in itself, “concludes by bringing a deontological claim, concerning that which we owe to human beings, and which is linked at least to a moral theory and probably also to an anthropology. A theory of “fundamental rights” by contrast obliges us to focus also on that which is capable of contributing to the

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123 The Constitution of India, Article 22 (4) to (7).
existence of a society (or also to recommend them as that which could or should do so): this involves analysis or prescriptions, which are not expressed in deontological terms, but in ethical, institutional, political or teleological terms. Fundamental Rights must be concretised just as human rights must be considered in the abstract".\textsuperscript{124}

Next distinction lies in the fact that human rights are protected globally and this involves many human rights implementation mechanisms, such as, reporting procedure by States, inter-State communications, Conciliation, individual communication, UPR, and other procedures. Fundamental Rights are enforceable by the Supreme Court or the High Court in accordance with the constitutional provisions.

It is pertinent to note that human rights are relatively new concept, and has emerged post-World War II, while Fundamental Rights are protected by constitutions of various countries is much of age. Also, there is no consensus on universal human rights' content and theories but Fundamental Rights are specific and have the status of basic feature of the Constitution as recognised by the Supreme Court of India.\textsuperscript{125}

One more distinction is that human rights like, right to legal aid, right to work, equal pay for equal work are recognised under Part IV and not under Part III of the Indian Constitution. Few other human rights like- right to privacy, right to cleanly environment, right to shelter, right to found a family, and speedy trial, \textit{inter alia}, are enumerated neither under Part-III nor under Part-IV of the Constitution of India. Therefore, it is observed, all Fundamental Rights are human rights but not vice-versa.

5.6 Constitutionally not Specifically Incorporated Human Rights Standards and its Consequences

This part of the Chapter deals with two aspects. The first aspect deals with the list of rights that are not-specifically enumerated in the Constitution, and the second aspect

\textsuperscript{124} Generally, human rights are also “fundamental” rights: this should mean that a given society considers the protection of human rights essential. It would appear that, if this is not a tautology, human rights are also fundamental, (if and) because they posit at the basis of our life in common, and they are concretely implemented through the fabric of an organised social system. Any change in Fundamental Rights’ model would result in a change of the societal model. Therefore, human rights are “abstract”, while Fundamental Rights cannot be so.


\textsuperscript{125} Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461
deals with the consequences arising out of such non-incorporation of certain international human rights standards.

The framers of the Indian Constitution have not given explicit recognition to certain international human rights standards. They are known as ‘constitutionally not specifically incorporated human rights’, ‘unspecified rights’, or ‘un-enumerated rights’. They are as follows:

First, the UDHR states that everyone has the right to life, liberty and security of person. The Indian Constitution does not recognise ‘security of person’ directly and as a result, it is left to one’s interpretation to read it as implied in any of the provisions of either Part III or Part IV.

Second, right against slavery or servitude, slavery and the slave trade in all their forms is guaranteed by the UDHR. The Indian Constitution does not recognise protection against slavery, slavery trade or servitude.

Third, Article 5 of the UDHR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Right against torture or cruel, inhuman or degrading punishment or treatment is not expressly provided by the Constitution.

Fourth, Article 7 of the UDHR guarantees a right against discrimination and any incitement to such discrimination. The later part of this provision, namely, incitement to discrimination is not expressly provided by any of the provisions of the Indian Constitution.

Fifth, Article 9 of the UDHR protects persons from arbitrary arrest, detention or exile. It is observed that ‘right against exile’ is not recognised by the Constitution.

Sixth, right to a fair and public hearing before the independent and impartial tribunal in the determination of one’s rights and obligations and of any criminal charge is guaranteed by the UDHR. The Constitution has not expressly conferred such a right.

Seventh, Article 12 of the UDHR guarantees a right against arbitrary interference with one’s privacy, family, home or correspondence, and attacks upon one’s honour and reputation. Further, it provides that everyone have the right to the protection of the law

126 The Universal Declaration of Human Rights 1948, Article 3.
127 Ibid. Article 4.
128 Ibid. Article 10.
against such interference or attacks. Right against arbitrary interference with one’s privacy, family, home or correspondence, and attacks upon one’s honour and reputation is unspecified in the Constitution.

Eighth, Article 13 (2) of the UDHR guarantees the right to leave any country, including his own, and to return to his country. This is not expressly recognised by the Constitution.

Ninth, Article 16 of the UDHR states that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. These important standards are unenumerated in the Constitution.

Tenth, Article 19 of the UDHR holds that everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers. The right to seek, receive information and ideas is not recognised in the Constitution.

Eleventh, Article 20 (2) of the UDHR provides that no one may be compelled to belong to an association, which is not recognised by the Constitution. Besides, Article 25 (2) of the UDHR holds that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. The last aspect of this provision, that is, all children, whether born in or out of wedlock, shall enjoy the same social protection is not expressly recognised by the Constitution.

Twelfth, Article 26 (2) of the UDHR holds that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It further provides that the right to education shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. In matters of education, parents have a prior right to choose the kind of education
that shall be given to their children. In India, though the Constitution was amended in 2002 to include the right to education as a Fundamental Right in Article 21-A, but it has not stated the purpose of the revered right in the aforementioned manner, which perhaps was the ideal way for the Government of India.

Thirteenth, Article 1 of the ICCPR guarantees the right of self-determination. However, the same is not recognised under the Constitution.

Fourteenth, Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Humane treatment of prisoners with respect to their inherent dignity is not expressly mentioned under the Constitution.

Fifteenth, Article 11 of the ICCPR provides protection from imprisonment in the case of inability to fulfil a contractual obligation, which is not addressed by the Constitution.

Sixteenth, Article 14 of the ICCPR declares that the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. This is not specifically addressed by the Constitution, though in the matrimonial cases, or cases involving the juveniles or in offences against women such as rape, the court in its discretion may decide to hold in-camera proceedings.

Seventeenth, Article 14 of the ICCPR also recognises when a conviction has been reversed or the convict has been pardoned by the appellate tribunal shows that there has been an injustice to the convict, such person shall be compensated according to law. No Fundamental Right in the Constitution explicitly deals with right to compensation for such injustice.

Eighteenth, Article 9 of the ICESCR guarantees the right of everyone to social security, including social insurance. Social insurance is not addressed by the Constitution.
Nineteenth, right of protection and assistance to the family for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. Para 3 of this provision provides that “special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.” The Constitution has not given recognition to these standards.

Twentieth, Article 11 of the ICESCR obligates the States to recognise the right of everyone to be free from hunger, and to take, individually and through international co-operation, the measures, including specific programmes, which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources. The same is not guaranteed by the Constitution.

Twenty-First, right to travel abroad, right to privacy, right against solitary confinement, right to human dignity, right to speedy trial, right against custodial violence, right against death penalty, right to health care and medical assistance, right to shelter, right against handcuffing, and right to pollution free environment, are not recognised by the Constitution in the guise of specified rights.

From this list, it is clear that certain international human rights standards are not recognised by the Constitution. This is a serious deficit in giving recognition to human rights and thus it has produced some disturbing consequences.

Firstly, the non-recognition to these rights would imply that there would be no binding obligation for the State or its authorities to protect the constitutionally not specifically incorporated human rights, which would undoubtedly cause hardship to the people.

Secondly, it is pertinent to note that in addition to non-enumeration of certain human rights standards, India has not ratified the Convention Against Torture, and it is also not a Party to the Conventions on the Rights of Migrant Workers and their Families.

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on Refugees and Stateless Persons, the ILO Conventions on the abolition of Child Labour, on the rights of Indigenous and Tribal People, and Optional Protocol to CEDAW and Optional Protocols 1 and 2 to the ICCPR. Also, the Government’s persistent refusal to cooperate with the Human Rights Council’s special procedures\textsuperscript{130} concerning torture, the treatment of human rights defenders, contemporary forms of discrimination, extrajudicial, summary and arbitrary executions, sale of children, child prostitution and child pornography, and arbitrary detentions\textsuperscript{131} have resulted in routine atrocities against children, women, instances of human trafficking, deaths in police custody, atrocities against Dalits, fake encounter killings and disappearances of persons.\textsuperscript{132} These are also recorded in reports, submitted by the Indian Government, certain civil societies (mentioned below) and the National Human Rights Commission, to the Human Rights Council. These reports highlight the following issues relating to the enjoyment of human rights and patterns of violations that exist in India.

The National Human Rights Commission (NHRC) has reported that thirty-five percent of the complaints that it receives annually are against the police.\textsuperscript{133} This shows that police frequently violate the human rights of the people and the custodial justice remains a problem. Non-mention of a right against torture, cruel or inhuman and degrading treatment in the Constitution and non-ratification of the Convention Against Torture has made the armed forces including police a powerful authority to decide on the nature and the extent to which a particular nature of treatment to be accorded to individuals who are in their custody. The report of the NHRC further indicates that jails

\textsuperscript{130} The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advice on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. In the context of the 2011 review of its work and functioning, the Human Rights Council reaffirmed the obligation of States to cooperate with the Special Procedures, and the integrity and independence of Special Procedures. It also reaffirmed the principles of cooperation, transparency and accountability and the role of the system of Special Procedures in enhancing the capacity of the Human Rights Council to address human rights situations. See http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx


\textsuperscript{132} \textit{Ibid.}

are overcrowded and remain unhygienic. Almost sixty-seven percent of prisoners are under-trial, who are unable to raise bail, or confined far longer than they should be because of the delay in disposal of cases and backlog of cases. This would suggest that the right to speedy trial is given lesser importance in India. The Food First Information and Action Network, a human rights organisation in India, in its report has stated that “difficulties remain in enforcing existing legislation and in ensuring the implementation of court decisions and access to justice for the poor”. This certainly indicates that right to good governance is not effectuated in India.

Further, it is important to note that the delay in implementation of all of the Directive Principles of State Policy has led to denial and deprivation of certain economic, social and cultural rights which in turn has resulted in violations of the right to life through instances of suicide, hunger and starvation. In fact, a staggering 89,362 farmers have committed suicide between 1997 and 2005. Ten years later, the Government has successfully continued to fail in bringing down the number of farmer suicides. On the contrary, there is increase in feminisation of poverty especially with males committing suicide.

The Food First Information and Action Network indicated through its report that the necessary shift from Public Distribution System to Targeted Public Distribution System in 1997 has not contributed to addressing the problem of hunger and starvation of millions of Indians. Poverty itself is not plainly defined by the Government and the criterion to decide which people are below the poverty line is unclear. Similarly, the Asian Legal Resource Centre, an NGO having General Consultative status with the Economic and Social Council of the United Nations, observed that the management of distribution system suffers from corruption, particularly black-marketing, as well as caste
prejudices. It also reported that starvation and malnourishment affects about fifty-three percent of India’s entire population.\textsuperscript{141} This would imply that right to food and right against hunger are not fully respected by the Government of India. The Food First Information and Action Network has observed that lack of access to clean drinking water and water for irrigation due to pollution of natural resources including water and diversion of water for industrial purposes and steps towards privatisation of water are some of the threats to the right to water of the people in India.\textsuperscript{142}

The Human Rights Council Working Group in its report has highlighted that some parts of the country like Jammu and Kashmir and North East regions are constantly exposed to the menace of militancy and terrorism. The Armed forces of the Union including para-military forces have been deployed in some disturbed areas to aid and assist the State Government authorities to handle the internal security situation. However, there are allegations of human rights violations by the forces who conduct operations against terrorists.\textsuperscript{143} The Kashmir Institute of International Relations, an NGO, holds that eighty percent of the schools in Kashmir, the Indian army occupy buildings. Due to the fear of the armed forces, the people are scared to send their children to schools.\textsuperscript{144}

According to the report of the Norwegian Refugee Council (Internal Displacement Monitoring Centre), (it is part of the Norwegian Refugee Council and an independent, non-governmental humanitarian organisation), at least 600,000 people are displaced in India for reasons related to conflict and localized violence.\textsuperscript{145} According to the Ministry of Home Affairs, quoted by Asian Indigenous and Tribal Peoples Network and International Working Group on Indigenous Affairs, (an independent international membership organisation staffed by specialists and advisers on indigenous affairs) 21 out of 28 States are afflicted by armed conflict and the majority of these States are afflicted

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\item[142] Supra note 136, at p. 5.
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by Naxalite (Maoist) conflicts. The areas afflicted by internal armed conflicts, except Jammu and Kashmir are pre-dominantly inhabited by indigenous and tribal peoples, who constitute over forty percent of conflict-induced internally displaced persons in India and suffer serious human rights violations from both the security forces and the armed opposition groups. Norwegian Refugee Council (Internal Displacement Monitoring Centre) noted that India’s largest situation of internal displacement stems from conflict in Jammu and Kashmir and the Indian Government frequently denies international humanitarian organisations access to internally displaced people, arguing that local governments take full care of the affected people. It has also submitted that the government’s response to displaced people is often ad-hoc and largely insufficient, and the Internally Displaced Person frequently find themselves in an extremely vulnerable situation.

The NHRC has stated “…the Armed Forces Special Powers Act (AFSPA) remained in force in Jammu & Kashmir and the North-Eastern States, conferring impunity that often led to the violation of human rights, despite India reporting in 2011 that it did not face international or non-international armed conflict situations.” The Society for Threatened People, a non-profit and human rights organisation, in its report has noted that most of the Adivasi tribes live in the forests of remote and mountainous regions in central India, what is known as “Tribal Belt”, and that their land contains large deposits of natural resources like bauxite, iron ore and coal. However, these lands have been increasingly targeted for industrial development by the fast-growing Indian economy. Mining operations, industrial complexes (frequently clustered in Special Economic Zones and the building of infrastructure (particularly dams) have already taken a serious toll on Adivasi land and threaten to drive their distinct culture into extinction. Lack of transparency, inclusiveness and consultation with those who own the land in the

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147 Ibid. at p. 3.
148 Ibid. at pp.1 & 3.
149 Ibid. at p. 1.
150 Supra note 133, at p. 5.
acquisition modalities of land for industrial projects has sparked protests from local socially and economically marginalized communities fearing displacement from their land and homes.\textsuperscript{152}

According to the Action Aid India, Indian security forces and police have been engaged in rape and killing to suppress the people’s genuine protest against the acquisition of their farmland for Special Economic Zones and unjust industrialisation.\textsuperscript{153} Various State Governments in India acquired land mostly from tribal communities, Dalits and farmers under the Land Acquisition Act 1894.\textsuperscript{154}

Thirdly, the fact that India has not given recognition to the aforementioned international human rights standards imply that it makes it a country that has inadequately recognised human rights, which in turn produces important consequence that is it results in deprivation of the individuals’ right to have all round development. This is because every human right provides a dimensional growth to individuals, if individuals enjoy all international human rights, as they are interdependent, then only one can be a well-rounded human being. If certain of the human rights are not made available to the individuals then they are deprived of having such all-round development.

Fourthly, the declaration of controversial 1975 national emergency by the then ruling Government has set no parallel to the use of preventive detention laws depriving the rights of many in an arbitrary manner. The South Asia Forum for Human Rights has added that the chronic use of anti-terrorist laws, preventive detention laws and the Armed Forces Special Powers Act, 1958 have created a situation where the normal methods of 'investigation' have been replaced by disappearances, illegal detention, custodial torture, sexual violence against women and summary executions disguised as armed encounters.\textsuperscript{155}

Lastly, the distinction between Article 4 of the ICCPR and Articles 358 and 359 of the Constitution, which deals with derogation of rights in emergency, lead to lesser protection of the Fundamental Rights enshrined by the Constitution. The consequences that have emerged from not giving recognition to all international human rights standards needs to be effectively tackled by the State at the earliest.

5.7 Conclusion

The Constitution is inspired by the UDHR and accordingly it has incorporated certain civil and political rights as Fundamental Rights, and economic, social and cultural rights as Directive Principles of State Policy. The Fundamental Rights cast negative obligations on the State and the Directive Principles of State Policy imposes affirmative obligations. The Protection of Human Rights Act, 1993 is a special legislation in India that aims at better protection and promotion of human rights by establishing human rights institutions and the court. However, the Constitution and the aforementioned Act if taken together, still they account for not giving recognition to certain important international human rights standards such as right to privacy, right to compensation, right to fair trial, right to dignity, right to livelihood, right to decent environment, right to found a family, right against inhuman and degrading treatment. Consequently, poverty, torture, disappearance of persons, fake encounters, and other important sufferings of humanity as discussed in this Chapter have continued to exist. To reduce the sufferings of people and to give recognition to some of the international human rights standards, the Indian Judiciary has been developing few techniques like the judicial incorporation of rights, which is studied in the next Chapter.