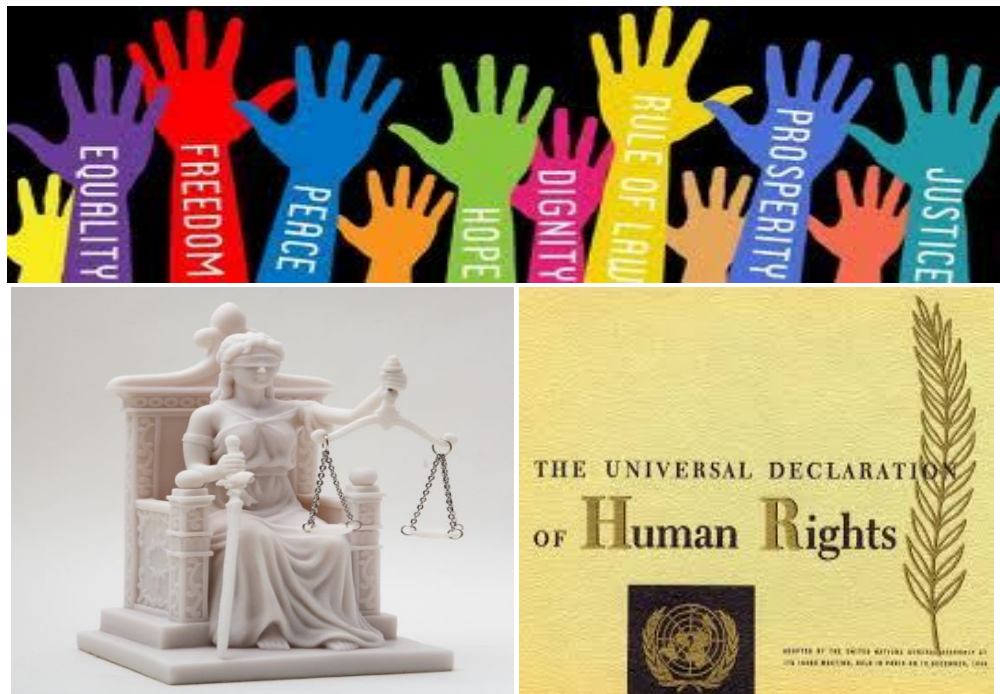




Vardhaman Mahaveer Open University, Kota



Human Rights Emerging Issues and Judicial Approaches

Course: HR - 03



**Vardhaman Mahaveer Open University,
Kota**

**Human Rights
Emerging Issues and Judicial
Approaches**

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Human Rights in International Scenario

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Introduction

This Course is conceived and produced for the students of Certificate Program in Human Rights who need to study different basic aspects of Human Rights. It will provide understanding, skill and elementary knowledge of Human Rights. It will train learner for career as Human rights volunteers or professionals. Course will inculcate the understanding of national and International dimensions in human Rights field.

This Block contains Ten Units. First Unit will introduce students with the meaning of judicial Activism. Unit will also explain the development of Judicial Activism in India and about the writs by which one can achieve justice. In Second Unit students will be able to appreciate how basic human rights are protected through Supreme Court of India? Unit will also explain various types of human rights violations and the Role of Supreme Court as harbinger of human rights protection. Third Unit will explain students about the Human Rights of women and different kinds of Human Rights of violation against women. Unit will also explain legal protection available for the Human Rights of women and also the various judgements given by Supreme Court of India in protection of Human Right of women. Unit Four will introduce students with Definition and Meaning of Child in Law. Unit will also explain what are child Rights and how human rights of child are violated? Unit will also explain the legal protection available to child for their Human Rights violation. Unit Five help students in knowing that who are the weaker sections of society and how their Human Rights are violated. Unit will also explain the constitutional and legal provisions available for protection of their Human Rights.

Unit Six will explain about how development affects Human Rights and how urbanization and Human Rights violations are going on? Unit will also explain what measures or guidelines are given by Supreme Court of India in relation to development and the Human Rights violation?

Unit seventh will introduce students with the advancement of science and technology in the society and how science and technology is affecting the human rights. Unit will also explain various national and international instruments in protection of human rights against abuse of science and technology. Unit Eight will explain students what is cyber world? Unit will also explain you that how use of cyber system is affecting human rights of common person and the measures taken by Government of India to stop Human Right violation in cyber crimes.

Unit Nine will explain you about the role of Public Authorities in Society and the functions of Public Authorities. Unit will also explain the procedure of working of Public Authorities and how Human Rights are protected by Public Authorities. Unit Ten will apprise you about the role of Supreme Court of India in protection of fundamental Rights and the compensatory relief given by Supreme Court and other courts.

UNIT 1

JUDICIAL ACTIVISM AND ROLE OF PIL IN PROTECTION OF HUMAN RIGHTS

STRUCTURE:

- 1.1 Introduction and Meaning of Judicial Activism
- 1.2 Nature and Scope of Judicial Activism
- 1.3 Development of Judicial Activism in India
- 1.4 Public Interest Litigation
- 1.5 Development of P.I.L
- 1.6 Nature of writs
 - 1.6.1 Writ of Habeas corpus
 - 1.6.2 Writ of Prohibition
 - 1.6.3 Writ of Mandamus
 - 1.6.4 Writ of Quo-Warranto
- 1.7 Nature and Scope of PIL
- 1.8 Basic Features of PIL
- 1.9 PIL in protection of Human Rights
 - 1.9.1 Protection against Inhuman Treatment
 - 1.9.2 Protection of Ecology and Environment
 - 1.9.3 Protection given to Disabled persons
 - 1.9.4 Protection of Women from Prostitution and their Rehabilitation
- 1.10 Misuse of Public Interest Litigation
- 1.11 Summary
- 1.12 Some Useful Books
- 1.13 Check your Progress
- 1.14 Answers to check your progress
- 1.15 Terminal questions

OBJECTIVES

After going through this unit you should be able to:

- understand the meaning of Judicial Activism
- understand the development of Judicial Activism in India
- understand the nature of writs and their kinds.

1.1 Introduction and Meaning of Judicial Activism

“Black Law Dictionary” defines “Judicial Activism as a philosophy of Judicial decision-making whereby Judges allow their Personal views about Public Policy, among other factors, to guide their decisions”.

A Government is usually constituted of three wings – Executive, Legislature and Judiciary. When Executive or/and Legislature do not act properly, judiciary interfere in their action and decide about their action on the basis of law prevalent at that time. This action taken by the judiciary can be called judicial activism.

Justice Krishna Iyer, Judge Supreme Court of India express his opinion in the following words, “Law and Justice can no longer remain distant neighbors in case of the increasing deficiencies and distortions of the legal system and the challenge to the credibility of the Judicature are to be adequately met”.

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. It is sometimes used as an antonym of judicial restraint.¹ The judicial activism, and for which specific decisions are activist, is a controversial political issue. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.²

1.2 Nature and Scope of Judicial Activism

As understood, judicial activism is neither a casual occurrence nor a reaction. It is gaining prominence in the present days. Its basic source can be gathered from the concept of “Public Interest Litigation”; citizens are getting access to Justice. Judiciary has become the centre of controversy, in the recent past, on account of the sudden increase of judicial intervention. The area of judicial intervention has been steadily expanding through the device of Public interest Litigation. Justice P.N. Bhagwati while interpreting the principles of “Locus Standi” Under Article 32

¹ Christopher Wolfe, *Judicial activism*, Rowman & Littlefield, ISBN 0-8476-8531-4.

² http://en.wikipedia.org/wiki/Judicial_activism

of the constitution of India, first of all declared the concept of Public Interest Litigation and Judicial activism. Insertion of Article 39-H in the Constitution developed the process of Public interest Litigation , Lok Adalat, Legal Literary and Legal aid etc. It developed a belief in the hearts of Public at large that they will not be deprived of their rights and Social Justice. Even if a person is financially very weak and not even in a position to knock the doors of the court, then also he will be administered Justice. Judicial activism refers to interference of the Judiciary in the Legislative and executive fields. It mainly occurs due to the over or non-activity of the other organs of the government.

Judicial activism is a way through which relief is provided to the disadvantaged and aggrieved citizens. It protects human rights of citizens. Judicial activism is providing a base for policy making in competition with the legislature and executive. Judicial activism is the rendering of decisions, which are in tune with the temper and tempo of the times. In short, judicial activism means that instead of judicial restraint the Supreme Court and other lower courts become activists and compel the authority in policies and also in matters of administration. It has arisen mainly due to the failure of executive and legislatures to act. Secondly, it has arisen due to the fact that there is a doubt that the legislature and executive have failed to deliver the goods. Thirdly it occurs when the entire system has been played off by ineffectiveness and inactiveness.

The violation of basic human rights has also led to the judicial activism. Due to misuse and abuse of the some of the provisions of the constitution, judicial activism has gained significance. Besides the above mention factors, there are some other situations that lead to Judicial activism. These are:-

1. When the Legislature fails to discharge its responsibility.
2. In case of a hung parliament where the government is very weak and instable.
3. When the governments fail to protect the basic human rights of the citizens or provide an honest, efficient and just system of law and administration.
4. When the party in power misuses the courts of law for ulterior motives as was during the Emergency period and
5. Finally, the court may on its own try to expand its jurisdiction and confer on themselves more functions and powers.

1.3 Development of Judicial Activism in India

The constitution of India gives power to Supreme Court and High Courts under Article 32 and 226 respectively to protect and enforce the fundamental rights of the citizens of India by issuing and directing the writ or order. Writ may be defined as an order of court to do or abstain to do from certain act, the power of the supreme court for the protection of constitutional rights of the citizens are of the widest amplitude and there is no reason why the court should not adopt activist approach similar to courts in other countries of the world and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right.

In December 1979 a lady advocate, Pushpa Kapila Hingorani of Supreme Court of India filed a petition. That petition was related with the condition of the prisoners whose suits were pending in the courts and were detained in the jails of Bihar. The special thing about this petition was that this petition was not filed by any single prisoner; this petition was filed by various prisoners from the jails of Bihar. The case was filed in the Honorable Supreme Court before the bench headed by Justice P.N. Bhagwati. This petition was filed in the name of prisoner Hussainara Khatoon; that is why the petition comes to be known as Hussainara Khatoon Vs State of Bihar. In this petition Supreme Court upheld that the prisoners should get benefit of free legal aid and fast hearing. Due to this case, 40,000 prisoners whose suits were pending in the court were released from the Jail. Thereafter many cases like this have been registered in the Supreme Court. Thereafter the area in which judiciary has become active are health, child labour, political corruption, environment education, etc. Through various cases like Bandhu Mukti Morcha, Bihar under trials, Punjab police, Bombay pavement Dwellers, Bihar Care home cases, the judiciary has shown its firm commitment to participatory justice, just Standards of procedures, immediate access to justice and prevention of arbitrary state action.

1.4 Public Interest Litigation

Public-Interest Litigation (PIL, or जनहित याचिका) is litigation for the protection of the public interest. In Indian law, Article 32 of the Indian constitution contains a tool which directly joins the public with judiciary. A PIL may be introduced in a court of law by the court itself (*suo moto*), rather than the aggrieved party or a

third party. For the exercise of the court's jurisdiction, it is not necessary for the victim of the violation of his or her rights to personally approach the court. In a PIL, the right to file suit is given to a member of the public by the courts through judicial activism. The member of the public may be a non-governmental organization (NGO), an institution or an individual. The Supreme Court of India, rejecting the criticism of judicial activism, has stated that the judiciary has stepped in to give direction because due to executive inaction, the laws enacted by Parliament and the state legislatures for the poor since independence have not been properly implemented.

Public Interest Litigation means a suit filed in a court of Law for the Protection of Public interest, such as Pollution, terrorism, road safety etc. Judicial activism in India acquired importance due to public interest litigation. It is not defined in any Statute or Act. It has been interpreted by judges to consider the intent of public at large. The court has to be satisfied that the person who has resorted to PIL has sufficient interest in the matter. In India, PIL initially was resorted to towards improving the lot of the disadvantaged Sections of society who, due to poverty and ignorance were not in a position to seek justice from the courts. After the constitution (Twenty Fifth Amendment Act, 1971), primacy was given to Directive Principles of State Policy by making them enforceable. The Courts, to improve administration has taken up PIL cases. PIL ensured the compliance of constitutional provisions. PIL has increased the faith of public in this judicial action.

PIL is filed for a variety of cases such as maintenance of ecological balance, making municipal authorities comply with statutory obligations of provision of civic amenities, and violation of fundamental rights etc. It has provided an opportunity to citizens, social groups, consumer rights activists etc, and easier access to law and it introduced a public interest perspective. Justice P.N. Bhagwati and V.R. Krishna Ayer have played a key role in promoting this avenue of approaching the apex court of the country, seeking legal remedies in areas, where Public interests are on stake.

PIL has been considered a boon, as it is an in-expansive Legal remedy due to nominal costs involved in filing the litigation. But there are some problems also in the PIL cases. There has been an increase in the number of frivolous cases being filed due to low court fees. Genuine cases got receded to the background and

privately motivated interest started gaining predominance in PIL cases. In view of this, the Supreme Court has framed certain guidelines governing the PIL.

Presently the Court entertains only writ petition filed by an aggrieved person or public spirited individual or a social action group for enforcement of the constitutional or the legal rights of a person or a class of persons who due to reasons of poverty, disability, socially or economically disadvantaged position are finding it difficult to approach the court for redressal of their grievances.

PIL is an extraordinary remedy available at a cheaper cost. As justice Bhagwati observed in the case of *Asiad workers case*, for the first time the portals of the court are being thrown open to the poor and the downtrodden. The courts must shed their character as upholders of the established order and the status quo. The time has now come when the courts must become the courts for the poor and struggling masses of this country.

1.5 Development of PIL

The origin of concept of Human Rights has been developed from the English American and French revolutions of the 17th and 18th centuries. Centuries ago in England, the favorite Magna Carta (1215), the Petition of Rights (1688) and the US declaration of Independence (1776) followed by Bill of Rights are directed towards the protection of individual rights. Later, the French declaration of the Rights of man and the citizen (1789), there was in no part of the world till then any declaration of universal appellation.

When we compare provisions of the constitution of India to that of Universal Declaration of Human Rights, we find many Articles have the same spirit to the point of being identical. Part III of the constitution of India deals with the fundamental Rights of citizens. To enable those rights, Supreme Court of India, through Judicial interpretation, has widened the horizon of Human Rights. Mere declaration of Fundamental Rights is meaningless unless there is effective machinery for enforcement of the rights exists. If there is no remedy there is no utility of that right. (*Ubi Jus ibi remedium*). As such the makers of the constitution have provided a machinery and procedure under Article 32 and 226 of constitution for safeguarding the fundamental rights. It empowered the Supreme Court and all High Courts of India to issue writs in the nature of *Habeas Corpus*, *Mandamus*, *Prohibition*, *Quo-warrantor* and *Certiorari* etc. Art 32 (1) guarantees the right to move the Supreme Court for appropriate proceedings for realization of remedies

for the fundamental Rights conferred by Part III of the constitution. Clause 2 of Article 32 confers powers on the Supreme Court to issue appropriate directions or orders or writs. Article 226 is substantially of the same effect as Article 32(2).

1.6 Kinds and Nature of Writs

A brief explanation of the meaning and purpose of each writ can be understood for their significance as under:

1.6.1 *Writ of Habeas corpus:*

A writ of *habeas corpus* is a writ (court order) that requires a person under arrest to be brought before a judge or into court. The principle of *habeas corpus* ensures that a prisoner can be released from unlawful detention—that is, detention lacking sufficient cause or evidence. The remedy can be sought by the prisoner or by another person coming to the prisoner's aid. This right originated in the English legal system, and is now available in many nations. It has historically been an important legal instrument safeguarding individual freedom against arbitrary state action.³

An aggrieved person can move the Supreme Court or High Court and request to issue an appropriate writ or direction. When a person is arrested or detained, he may, in a petition of habeas corpus, challenge the constitutionality of the Law under which he has been arrested or detained on the ground of contravention of fundamental right of personal Liberty (Art.21)

1.6.2 *Writ of Prohibition:*

A *writ of prohibition* is a writ directing a subordinate to stop doing something the law prohibits. In practice, the Court directs the Clerk to issue the Writ, and directs the Sheriff to serve it on the subordinate, and the Clerk prepares the Writ and gives it to the Sheriff, who serves it. This writ is normally issued by a superior court to the lower court asking it not to proceed with a case which does not fall under its jurisdiction.⁴

Where an inferior court or a quasi- Judicial tribunal proceeds to act Under a Law which is alleged to be unconstitutional, the aggrieved party may apply writ of prohibition to prohibit the tribunal from proceeding further, or if the tribunal has already given its decision the party may move for a writ of *certiorari* to quash that decision. The writ of prohibition has much common with *certiorari*. Both the writs

³ http://en.wikipedia.org/wiki/Habeas_corpus

⁴ http://en.wikipedia.org/wiki/Writ_of_prohibition

are issued with the object of restraining the inferior courts from exceeding their jurisdiction. The only difference is that the prohibition will stop the proceeding while the writ of *certiorari* will be sought to quash the order of the lower court by the High court or Supreme Court.

1.6.3 Writ of Mandamus:

Mandamus is a judicial remedy in the form of an order from a superior court, to any government subordinate court, corporation, or public authority—to do (or forbear from doing) some specific act which that body is obliged under law to do (or refrain from doing)—and which is in the nature of public duty, and in certain cases one of a statutory duty. It cannot be issued to compel an authority to do something against statutory provision. For example, it cannot be used to force a lower court to reject or authorize applications that have been made, but if the court refuses to rule one way or the other then a mandamus can be used to order the court to rule on the applications.

Mandamus may be a command to do an administrative action or not to take a particular action, and it is supplemented by legal rights. In the American legal system it must be a judicially enforceable and legally protected right before one suffering a grievance can ask for a mandamus. A person can be said to be aggrieved only when he is denied a legal right by someone who has a legal duty to do something and abstains from doing it.⁵

Where the executive seeks to enforce a law against an individual, say affecting his fundamental right, he may move for a writ of mandamus to restrain the Government or other executive authority meant to discharge a public duty, from enforcing the Law, upon finding that it is unconstitutional.

1.6.4 Writ of Quo-Warranto:

Quo warranto is a prerogative writ requiring the person to whom it is directed to show what authority they have for exercising some right or power (or "franchise") they claim to hold.⁶ The word *Quo-warranto* means, what is your authority. By this writ a holder of an office is called upon to show to the court under what authority he holds the office. The object of the writ of *Quo-warranto* is to prevent a person from holding an office for which he is not legally entitled.

⁵ <http://en.wikipedia.org/wiki/Mandamus>

⁶ http://en.wikipedia.org/wiki/Quo_warranto

The writ of Habeas corpus and mandamus are the effective Instruments to prevent the abuse of power and protect the Human Rights from violation. In case of the violation of article 15(2), 17,21 and 23 of the constitution, the writs can be issued against a private person in case of untouchability, social discrimination and employment of bonded labour. The aggrieved person can move the court on the above grounds in case of violation of his fundamental rights.

1.7 Nature and Scope of PIL

The constitution of India has given very important and also very wide powers to the supreme court of India under Article 32. This includes the "Social Action Litigation" or popularly called the Public Interest Litigation. The right to constitutional remedies as provided by Article 32 is itself a fundamental Right. The Supreme Court is constituted as the protector and guarantor of fundamental Rights and it is the duty of the Supreme Court to grant relief under Article 32 where the existence of a fundamental Rights and its breach is found, actual or threatened. An application under Article 32 cannot be thrown out simply because the proper direction or writ has not been prayed for nothing debars the court from granting it in a different form.

Article 32 gives the court a very wide direction in the matter of framing the writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that proper writ has not been prayed for, as decided in *Chiranjilal V/S Union of India*.⁷

The Supreme Court making a special use of Public Interest Litigation was pleased to accept the letters sent by citizens as writ petitions and expanded the meaning of "Life". In *Oleum Gas leak case* a letter addressed to Supreme Court was entertained as Social Action Litigation to consider even claims for compensation arising from violations of fundamental Rights in *M. C. Mehta V/S Union of India*.⁸

In the case of *Mohini Jain V/S State of Karnataka*⁹, while deciding the matter on Capitation fee the court said that "the right to education flows directly from right to Life." The right to life under Article 21 and the dignity of an individual cannot be assumed unless it is accompanied by the right to education. The right to education therefore is concomitant to the fundamental right to the enshrined under a

⁷ AIR 1951 SC 41.

⁸ AIR 1987 SC 1086.

⁹ AIR 1992 SC 1858

constitutional mandate to provide educational institutions at all levels for the benefits of the citizens. Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme. This is wholly adherent to the Indian culture and heritage. It further condemns the policy of capitation fees. This commercialization of medical education endangers the lowering of standards of medical education. Article 226 Subsequent to the forty third and forty fourth amendment now provides that every High Court shall have power throughout the territories in relation to which it exercise jurisdiction to issue to any person, authority or Government any directions, orders or writs ,where any fundamental Right is infringed. An application under Article 226 should not be thrown out simply on the ground that the proper writ has not been prayed for. The court should give suitable protection to fundamental Rights. Decisions of High Court are binding on all subordinate courts within the state.

1.8 Basic Features of PIL

The basic features of Public Interest Litigation are that once the court is satisfied as to the public mischief to be remedied, it would not insist on the locus standi of the petitioners, who may not have any personal interest in the matter. Even a person who was benefited by the act of a public body is entitled to urge that body was not lawfully constituted, said by reason of bias.

1. In a Public Interest Litigation the court has to strike a balance between two conflicting interests.
 - (a) Nobody should be allowed to indulge in wild and reckless allegations, and
 - (b) Avoidance of public mischief, end to prevent public to mischievous executive actions, where public mischief is predominant the court may not only restrain executive action, but may also give appropriate affirmative action.
2. The court may direct inquiry, without determining the respondent's preliminary objection that no fundamental right have been affected.
3. The court may not be bound by the technicalities of an adversarial procedure in such litigation.
4. The court may award costs to the petitioner even where the petition fails.
5. A private litigant may abandon his claim. But in public interest litigation the court may refuse the petitioner to withdraw his petition where such withdrawal may be prejudicial to the public weal.

1.9 PIL in Protection of Human Rights

The public interest litigation is more in nature of collective litigation dealing essentially in the protection of basic Human Rights and enforcement of rights of a large number of disadvantaged and exploited person in an area where it the responsibility of the state is to end such exploitation. Public Interest litigation is a co-operative effort on the part of petitioner, the state and the courts to secure economic, social and cultural justice to the poor and the disadvantaged. The traditional rule of locus standi that a person under article 32 can only be filed by a person whose fundamental right is infringed has now been considerably relaxed which resulted to supreme court and high court to more actively act in protection of Human Rights. The fundamental rights enshrined in the constitution and Human Rights are the same thing. The court now permits public interest litigations or social interest litigations at the instance of Public Spirited citizens for the enforcement of constitutional and other rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. The Supreme Court through its various decisions tried to protect the basic Human Rights of citizens. Some of the major actions for protection of Human Rights are as under:

1.9.1 Protection against inhuman treatment:

In the case Sunil Batra V/S Delhi Administration,¹⁰ it was held by supreme Court that writ of Habeas Corpus can be issued not only for a person from illegal detention but also for protecting prisoners from inhuman and barbarous treatment. The dynamic role of judicial remedies imports to the habeas corpus writ a versatile vitality and operational utility as bastion of liberty even within jails wherever the rights of prisoners either under the constitution or under other laws are violated, the writ power of the court can run and should run to rescue, declared Krishna Iyer J. In Veena Sethi V/S State of Bihar, AIR 1983 SC 339, the court was informed through a letter that some prisoners, who were insane at the time of trial but subsequently declared sane were not released due to inaction of state authorities and had to remain in jail for 20 to 30 years. The court directed that they be released forth with. In D.S. Nakara V/S Union of India (1983) I SCC 304, it has been held that a registered Society, non- political, nonprofit making and voluntary organization is entitled to file a writ petition under Art 32 for espousing the cause

¹⁰ AIR 1980 SC 1759

for the large number of old infirm pensioners who are unable to approach the court individually.

In Maneka Gandhi case AIR 1981 SC 746, the court gave a new dimension to Article 21. It held that the right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Elaborating the same view the court in Francis Coralie V/S Union Territory of Delhi, AIR 1978 SC 597, said that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The Right to Live is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes "the right to live with human dignity", and all that goes along with it namely, the bare necessities of life such as, adequate nutrition clothing and shelter and facilities for reading writing and expressing ourselves in diverse forms freely moving about and mixing and mingling with fellow human beings.

1.9.2 Protection of Ecology and Environment:

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

1.9.3 Protection given to Disabled Persons:

In an important Judgment in National federation of Blind V/S U.P. SC (1993) 2 SCC 411, the Supreme Court has held that the visually handicapped (blind and partially blind) are eligible to compete and write civil services examination in the

categories of group 'A' and 'B' posts which are suitable for the handicapped in Braille script or with the help of a scribe. The court gave this direction on the representative petition filed by the National federation of Blind. The visually handicapped constitute a significant section of our society and as such it is necessary to encourage their participation in every walk of life, the court declared.

1.9.4 Protection of Women from Prostitution and their rehabilitation:

In a significant judgment in *Gaurav Jain V/S Union of India*, AIR 1997 SC 3021, the petitioner, a public spirited advocate "Gaurav Jain," filed a public interest petition seeking appropriate directions to the Government for the improvement of the plight of prostitute's fallen women and their children. He was inspired by reading an Article entitled "A red light trap" "Society gives no chance to prostitutes offspring", published in India today dated July 11, 1988. The Supreme Court has issued a number of directions to the government and all social organizations to take upon appropriate measures for prevention of women in various forms of prostitution and to rescue them from falling them again into the trap of red light areas and to rehabilitate their children through various welfare measures so as to provide them with dignity of person means of livelihood and socio-economic improvement. The court has issued the following directions:-

- (1) The court held that it is the duty of Government and all voluntary non-governmental organization to take necessary measures for protecting them from prostitution and rehabilitate them so that they may lead a life with dignity of person.
- (2) The Court directed that they should be provided opportunity for education. Financial support developed marketing facilities for goods produced by them. If possible their marriages may be arranged so that the problem of child prostitution can be eradicated and marriage would give them real status in society. They should be given housing facilities, legal aid free counseling assistance and all similar aids and services so that they do not fall into the trap of red light area again.
- (3) The Court held that economic empowerment is one of the major factors that prevent the practice of dedication of the young girls to the prostitution as Devadasis Jogins or Venkatasing. Referring to the various measures taken up by different states, the court directed that the social welfare Department should undertake similar rehabilitation programmes for the fallen victims so

that the foul practice is totally eradicated and they are not again trapped into prostitution. The court gave example of state of Andhra Pradesh where the state Government is providing housing facilities, free treatment in hospitals and pension to Devadasis women of 60 years or above and adult literacy programme such measures are being taken by non-Governmental organizations (NGOS) in the states of Maharashtra, Karnataka and Andhra Pradesh.

(4) The court directed that the rescue and rehabilitation of the child prostitutes and children should be kept under nodal department, namely, Department of women and child Development under the ministry of welfare and Human resources, Government of India, which will, devise suitable schemes for proper and effective implementation. The court directed the ministry of welfare, Government of India for the establishment of Juvenile homes.

(5) The Court directed to constitute a committee within a month from the judgment which would make an in depth study into these problem and evolve suitable schemes as are appropriate and consistent with the directions given above. It shall submit its report within three months on the basis of its report direction would be given to the State Government for effective implementations of the scheme. The Nodal Department would enforce and regularly be supervised by the minister of welfare. A Permanent committee of Secretaries should be constituted to review the progress of the implementation on annual basis and to take such other steps as may be expedient in the effective implementation of the schemes. Periodical progress as to funding and enforcement of the scheme should be submitted with Registry of the Supreme Court. "It is hoped", the court said, the above law and direction would relieve the human problem by rehabilitation of the unfortunates fallen women caught in the trap of prostitution their children would be brought into the mainstream of the social order. These directions would enable them to avail the equality of opportunity and of status with dignity of person which are the arch of the constitution.

1.10 Misuse of Public Interest Litigation

Public Interest litigation or social Interest Litigation in the Indian Law is Litigation for the Public interest. PIL may be introduced in a court of law by the court (Suo-moto), rather than the aggrieved party or another third party for the exercise of the court's jurisdiction, it is unnecessary for the victim of the violation of his or her

rights to personally approach the court. In PIL, the right to file suit is given to a member of the public by the courts through judicial activism. The member of the public may be a non-governmental organization (NGO), an institution or an individual. The supreme court of India, rejecting the criticism of judicial activism has stated that the judiciary has stepped to give direction due to executive inaction, laws enacted by parliament and the state legislatures for the poor since independence have not been properly implemented. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the constitutional jurisprudence that has no parallel in world and has acquired a big significance for the concerned with the protection of the interest of a class or group of persons who are either the victims of government lawlessness or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redressal of their grievance due to lack of resources or their disadvantaged social and economic position.

1.11 Summary

As a result of Judicial activism the court decisions under Public Interest Litigation on the rights relating to life, free and fresh environment and air, right to education, rehabilitation of Prostitute's child etc, are indicative of the fact that our judiciary is alert and active to the rights of not only the present generation but to the future generations also . Denial of the basic rights will amounts to denial of right to live and move. It would be perhaps the worst that can go to any next generation. "No State or Society should do it. These are the basic elements which sustain life itself."

1.12 Some Useful Books

1. Constitutional Law of India by Dr. J.N. Pandey, central law Agency
2. The constitutional of India by P.M. Bakshi, Universal Law publishing co.
3. Administrative Law by Dr. U.P.D. Kesari, Central Law Publications.
4. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004

5. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005 Edition:
6. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
7. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
8. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
9. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
10. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

1.13 Check your Progress

- A. Which of the following statements are true or false:
1. 1. A Government usually consists of three wings-Executive, Legislature and Judiciary.
 2. Public Interest litigation is also called Social Interest Litigation.
 3. Judicial Activism is a way through which relief is provided only to the rich.
 4. Executive works actively when Judiciary fails to discharge its responsibility.
 5. Judiciary works actively when executive fails to discharge its responsibility.
 6. The constitution of India gives power to High Court to issue writs under article 32.
 7. Hussainara Khatoon V/S State of Bihar case is related to Human rights of Prisoners.
 8. Public interest litigations are filed only by aggrieved party.
 9. There are only three types of writs.
 10. Writ of Quo-Warranto is issued to release an arrested person.
 11. Writ of Mandamus is issued against Government or other executive authority.
 12. Sunil Batra's case is related to protection of Human Rights of Children.

B. Fill in the blanks.

1. Full form of PIL is _____.

2. The violation of _____ has led to development of Judicial Activism.
3. The Supreme Court issues writ under Article _____ of Constitution of India.
4. The High Court may issue writ on violation _____.
5. The Directive principles of State Policy are _____ enforceable by High Court.
6. _____ of the constitution of India deals with the Fundamental rights.
7. If there is _____ there are no rights.
8. The word Quo-warranto means _____.
9. In _____ case it was decided that the right to education flows directly _____ from right to life.
10. The court may award _____ to the petitioner even where the petitions fail.

1.14 Answer to check your progress

(A)

- | | | |
|----------|-----------|----------|
| 1. True | 2. True | 3. False |
| 4. False | 5. True | 6. False |
| 7. True | 8. False | |
| 9. False | 10. False | |
| 11. True | 12. True | |

(B)

- | | |
|--------------------------------------|--|
| 1. Public Interest Litigation | 2. Fundamental Rights |
| 3. Article 32 | 4. Fundamental Rights and other rights |
| 5. Not | 6. Part III |
| 7. No Remedy | 8. What is your Authority? |
| 9. Mohini Jain Vs State of Karnataka | 10. Costs |

1.15 Terminal Questions

1. Discuss Judicial Activism, its nature and scope.
2. Discuss the development of Judicial Activism in India.
3. Discuss Public Interest Litigation and its nature and scope.
4. Discuss different types of writ.
5. Discuss the Basic features of PIL.

Unit – 2

Supreme Court as Harbinger of Human Rights Protection

STRUCTURE:

- 2.1 Introduction
- 2.2 Writ Jurisdiction of the Supreme Court and the High Court
- 2.3 Prisoners and Human Rights
- 2.4 Hand cuffing and Human Rights
- 2.5 Custodial death and Human Rights
- 2.6 Solitary confinement and Human Rights
- 2.7 Legal Aid and Human Rights
- 2.8 Environment Protection and Human Rights
- 2.9 Summary
- 2.10 Some Useful Books
- 2.11 Check your Progress
- 2.12 Answers to check your Progress
- 2.13 Terminal questions

OBJECTIVES

After going through this unit you should be able to understand:

- various types of violations of human rights.
- how basic human rights are protected through Supreme Court of India.
- role of Supreme Court as harbinger of human rights protection.

2.1 Introduction

The role of the Judiciary is to provide mechanisms for conflict resolutions. This branch of government doesn't make or enforce laws rather it interprets and applies it in dispute resolution. The term judiciary also refers to law personnel such as judges, magistrates and other adjudicators. Judiciary some time construct the law also.

Judiciary in every country plays role of harbinger and has an obligation to protect Human Rights of citizens. The constitution of India assigned this function to the Supreme Court and the High Courts of states. The Supreme Court of India is the most active court in protection of Human Rights. It has great reputation of independence and credibility. The preamble of India gives social, economic and political Justice for everyone and equality of status and opportunity for all. This basic objective of the constitution mandates every organ of the state, the executive the legislature and the judiciary working harmoniously to strive to realize the objectives concretized in the fundamental Rights and Directive principles of the state policy. The judiciary must therefore adopt a creative and purposive approach in the interpretation of fundamental Rights and Directive principles of state policy embodied in the constitution with a view to advancing Human Rights jurisprudence. The promotion and protection of Human Rights depends upon the strong and independent judiciary. The major contributions of the judiciary to the Human Rights jurisprudence have been two fold:

1. The Substantive expansion of the concept of Human Rights under Article 21 of the constitution, and
2. The Procedural innovation of Public Interest litigation.

2.2 Write Jurisdiction of the Supreme Court and the High Court and the High Court

Article 32 and 226 of the constitution of India is the most significant constitutional remedy in protection of Human rights of citizens. Those persons whose rights have been violated have right to directly approach the High Court and Supreme Court for judicial ratification, redressed of grievances and enforcement of fundamental rights. The Supreme Court and High courts are empowered to issue appropriate directions, orders or writs including writs in the nature of *Habeas corpus, mandamus, prohibition, Quo-warranto and certiorari*. Under Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the fundamental Rights or are violative of the Basic Structure of the constitution. The power of Judicial Review exercised by the Supreme Court is intended to keep every organ of the state within. Its limits lay down by the constitution and the laws. It is in exercise of the power of Judicial Review that, the Supreme Court has developed the strategy of Public Interest Litigation.

The right to move the Supreme Court to enforce fundamental Rights is itself a fundamental Right under Article 32 of the constitution of India. This remedial Fundamental Right has been described as “the cornerstone of the Democratic Edifice” as the protector and guarantor of the fundamentals Rights”. It has been described as an integral part of the Basic structure of the constitution. Whenever, the legislative or the executive decision results in a breach of fundamental Right, the jurisdiction of the Supreme Court can be invoked; hence the validity of a law can be challenged under Article 32 if it involves a question of enforcement of any fundamental Right. The Right to constitutional remedy under Article 32 can be suspended as provided under Articles 32(4), 358 and 359 during the period of promulgation of emergency. Accordingly in case of violation of Fundamental Rights, the petitioner under Article 32 for enforcement of such right cannot be moved during the period of emergency. However, as soon as the order ceases to be operative, the infringement of rights made either by the legislative enactment or by executive action can be challenged by a citizen in a court of Law and the same may have to be tried on merits, on the basis that the rights alleged to have been infringed were in operation even during the pendency of the presidential proclamation of emergency. If, at the expiration of the presidential order, the parliament passes any legislation to protect the executive action taken during the pendency of the presidential order and afford indemnity to the execution in that behalf, the validity and effect of such legislation may have to be carefully scrutinized.

Under Article 226 of the constitution of India, the High Court have concurrent jurisdiction with the Supreme Court in the matter granting relief in cases of violation of fundamental Rights, though the High Court’s exercise jurisdiction in case of any other rights too. The Supreme Court observed that where the High Court dismissed a writ petition under Article 32 on the same facts and for the same relief filed by the same parties will be barred by the rule of Res-judicata. The binding character of the judgment of the court of competent jurisdiction is in essence, a part of the rule of Law on which, the administration of Justice is founded. Thus the judgment of the High Court under Article 226 passed after hearing the parties on merit must bind the parties till set aside in the appeal as provided by the constitution and cannot be permitted to be avoided by a petition under Article 32.

Article 226 contemplates that notwithstanding anything in Article 32, every High Court shall have power, throughout the territorial limits in relation to which to exercises jurisdiction to issue to any person or authority including the appropriate cases, any government within those territories, direction, orders or writs in the nature of habeas corpus, mandamus, Prohibitions Quo-warranto and certiorari or any of them for the enforcement of fundamental Rights conferred by part III and for "any other purpose". Hence, the jurisdiction of a High Court is not limited to the protection of the fundamental Rights but also of the other legal rights as is clear from the words "any other purpose". The concurrent jurisdiction conferred on High Courts under Article 226 does not imply that a person who alleges the violation of fundamental Rights must first approach the High Court, and he can approach the Supreme Court directly. This was held in the very first case Romesh Thapper V/S State of madras AIR 1950 SC 124. But in P.N. Kumar V/S Municipal corporation of Delhi, AIR 1989 SC 1285, the Supreme Court expressed the view that a citizen should first go to the High Court and if not satisfied he should approach the Supreme Court. Innumerable instances of Human Rights violation were brought before the Supreme Court as well as the High Courts. Supreme Court as the Apex Court devised new tools and innovative methods to give effective redressed.

2.3 Prisoners and the Human Rights

The Supreme Court of India in the recent past has been very vigilant against encroachments upon the Human Rights of the prisoners. In this area an attempt is made to explain some of the provisions of the rights of prisoners under the International and National arenas and also as interpreted by the Supreme Court of India by invoking the fundamental Rights. Article 21 of the constitution of India provides that "No person shall be deprived of his life and personal liberty except according to the procedure established by Law". The rights to life and personal liberty is the back bone of the Human Rights in India. Through its positives approach and activism the Indian judiciary has served as an institution for providing effective remedy against the violations of Human Rights.

By giving a liberal and comprehensive meaning to "Life and personal liberty," the courts have formulated and have established plethora of rights. The court gave a very narrow and concrete meaning to the fundamental Rights meaning to the fundamental Rights enshrined in Article 21. In A.K. Gopalan's case, the court had

taken the view that each Article dealt with separate rights and there was no relation with each other i.e. they were mutually exclusive. But this view has been held to be wrong in *Maneka Gandhi V/S Union of India*, AIR 1978 SC p. 597, and held that they are not mutually exclusive but form a single scheme in the constitution that they are all parts of integrated scheme in the constitution. In the instant case the court stated that “the ambit of personal liberty by Article 21 of the constitution is wide and comprehensive, it embrace both substantive rights to personal liberty and the procedure prescribed for their deprivation” and also opined that the procedures prescribed by Law must be fair, just and reasonable.

In the following cases namely *Maneka Gandhi*, *Sunil Batra (1)*, *M.H. Hoskot* and *Hussainara Khatoon*, the Supreme Court has taken the view that the provisions of part III should be given widest possible interpretation. Every activity which facilitates the exercise of the named fundamental right may be considered integrated part of the Article 21 of the constitution. It has been held that right to legal aid, speedy trial, right to have interview with friend, relative and lawyer, protection to prisoners in jail from degrading inhuman, and barbarous treatment, right to travel abroad, right to live with human dignity right to livelihood, etc. through specifically not mentioned are fundamental Rights under Article 21 of the constitution. One of the most powerful dimensions through Public Interest litigation is the Human Rights of the prisoners.

The Supreme Court of India has considerably widened the scope of Article 21 and has held that its protection will be available for safeguarding the fundamental rights of the prisoners and for effecting prison reforms. The supreme court by its progressive interpretation made Article 21, which guarantees the Right to Life and personal Liberty, the reservoir of prisoner’s rights under the Seventh schedule of the constitution of India, the prison administration police and Law and order are to be administered by the respective states. The States have generally given Law priority to prison administration. In fact, some of the decisions of the Supreme Court on Prison administration have served as eye – openers for the administrators and directed the states to modernize prison administration.

The Human Rights savior Supreme Court has protected the prisoners from all types of tortures. Judiciary has taken a lead to widen the ambit of Right of Life and personal Liberty. The host of decision of the Supreme Court on Article 21 of the

constitution after Maneka Gandhi case, through Public Interest Litigation have unfolded the true nature and scope of Article 21.

The Supreme Court of India has developed Human Rights jurisprudence for the preservation and protection of Prisoner's Right to Human Dignity. The concern of the apex judiciary is evident from the various cardinal judicial decisions. The decisions of the supreme court in Sunil Batra was a watershed in the development of prison jurisprudence in India. It has been held that the writ of habeas corpus can be issued not only for relating a person from illegal detention but also for protecting prisoners from inhuman and barbarous treatment.

2.4 Hand Cuffing and Human Rights

In Prem Shanker V/S Delhi Administration AIR 1980 SC 1535, the supreme court added yet another projectile in its armory to be used against the war of prison reform and prisoners rights in the instant case the question raised was whether hand cuffing is constitutionally valid or not. The Supreme Court discussed in depth the hand cuffing jurisprudence. It is the case placed before the court by way of Public Interest Litigation urging the court to pronounce upon the constitution validity of the "hand cuffing culture" in the light of Article 21 of the constitution. In the instant case, the court banned the routine hand cuffing of a prisoner as obsolete. The court also opined that "hand cuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first flush arbitrary.

While deciding the constitutional validity of hand cuffing the Supreme Court specifically referred to Article 5 of the Universal Declaration of Human Right, 1948 and Article 10 of the International covenant on civil and Political Rights and held that hand cuffing is impermissible torture and is violation of Article 21. In the instant case Justice Krishna Iyer rightly emphasized hand cuffs should not be used in routine and they were to be used in extreme circumstances only when the prisoner is a security risk, desperate, rowdy or involved in non-bailable offence. But in even such circumstances, the escorting authority must record the reason for doing so otherwise, the court pointed out, under Article 21 of the constitution the procedure will be unfair and bad in Law.

In spite of such clear ruling of the supreme court against hand cuffing the high handedness of the police personnel come to the light in Delhi Judicial Service Association V/S State of Gujarat (1991) 4 SCC 406, where in the Supreme Court held that an extraordinary and the unusual behavior of police was not proper and

the court laid down detailed guidelines which should be followed in case of arrest and detention of judicial officer. The Supreme Court took a serious note of the whole incident and it amounts to interference with the administration of justice lowering of its judicial authority and it amounts to criminal contempt.

It is submitted that wherever any police official acts contrary to the clear directions against hand cuffing as laid down by the Supreme Court and thus violates the basic Human Right to human dignity, he should be made personally liable to pay the compensation and this fact is clearly established in State of Maharashtra V/S Ravikanth S. Patil, (1991) 2 SCC 373. Apart from the above the Supreme Court had delivered many cases against hand cuffing and called that it is violation of Article 21 of the constitution. In citizen for Democracy V/S State of Assam, 1995 (1) SCC 743, the Supreme Court said that it lays down as a rule that hand cuffs or other fetters shall not be forced on prisoner convicted or under trial while lodged in a jail anywhere in the country or while transporting or in transit from jail to another or from jail to court and back. The police and jail authorities, on their own, shall have no authority to direct transport from one jail to another or from jail to court and back. The court declared that if it is absolutely necessary for the jail or police authorities to hand cuff, permission of magistrate is to be attained. The magistrate may grant the permission to hand cuff the prisoner in rare cases. Violation of the directions given by the supreme court by the authorities shall be punishable under the contempt of court Act, 1971.

The Supreme Court directed the union of India to frame rules or guidelines regarding the circumstances in which hand cuffing of the accused should be resorted to, in conformity with the judgment of the court in Prem Shanker case; and to circulate them among all the Governments of the states and Union Territories for strict observance. It is important to mention that so as to put an end to hand-cuffing it is suggested that the parliament may make a suitable amendment to the Indian penal code, 1860 and the code of criminal procedure, 1973 wherein hand cuffing should be made a cognizable offence so as to give effect to the ruling of the Apex court of the land and also to preserve the right to live with human dignity, which is a important facet of personal liability of the individuals.

2.5 Custodial Death and Human Rights

In Nilabati Behera V/S State of Orissa, (1993) 2 SCC 746, the Supreme Court has laid down the principle on which compensation is to be awarded by the court under

Article 32 and 226 to the victim of State action. The object to award compensation in public Law proceeding under Art. 32 and 226 is different from compensation in private tort law proceeding. Award of compensation in proceeding under Articles 32 and 226 is a remedy available in Public law based on strict Liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply even though it may be available as a defense in private law in an action based on tort. The purpose of public law is not only to civilize power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. The payment of compensation in such cases to provide relief by way of "monetary amends" for wrong done due to breach of public duty of not protecting the fundamental rights of the citizen.

In this case the deceased aged about 22 years was taken into police custody at about 8 a. m. on December 1, 1987, by Assistant Sub-Inspector of Police in connection with the investigation of an offence of theft in a village and detained at the police outpost. He was hand cuffed, tied and kept in custody in the police station. His mother went to the police station at about 8 p. m. with food for him which he ate. The accused police constable and some other persons were present at the police outpost that night. At about 2 p. m. on Dec 2 the petitioner came to know that dead body of her son with a hand cuff and multiple injuries was found laying on the railway track. The police reached the spot much later in the day to take charge of the dead body. The mother of the deceased sent a letter to the Supreme Court alleging custodial death of her son and claimed compensation on the ground of violation of Article 21. The court treated the letter as a writ petition under Article 32 and impleaded the state of Orissa, the police ASI and the concerned constable as respondents in the petition. The defiance of the respondents was that the deceased managed to escape from police custody at about 3 a. m. by chewing off the rope with which he was tied and thereafter his dead body was found on the railway track which indicated that he was run over by a passing train. On the basis of evidence of the doctor who conducted post mortem examination and the report of forensic science laboratory the court held that the deceased had died in the police custody. On the basis of the age of the deceased and his monthly income between Rs. 1200 to Rs 1500 the state was directed to pay Rs. 1, 5,000 as compensation to the deceased's mother and a further sum of Rs. 10,000 as costs to the Supreme Court legal Aid committee. The court however, clarified that this will not affect the petitioner's right to claim compensation in

other proceedings in which case the amount awarded by the court would be adjusted.

2.6 Solitary Confinement and Human Rights

The courts have strong view against Solitary confinement and held that imposition of Solitary confinement has a highly degrading and dehumanizing effect on the prisoners. The courts have taken the view that it could be imposed only in exceptional cases where the convict was of such a dangerous character that he must be segregated from the other prisoners. The Supreme Court in Sunil Batra V/S Delhi administration AIR 1978 SC 1675, considered the validity of solitary confinement. The constitutional validity of Solitary confinement when prisoner is under sentence of death, while section 56 of the said Act permits the use of bar fetters for the safe custody of the prisoners. The supreme court while approving section 30 (2) of the prisons Act, 1894 declared that the imposition of Solitary confinement on Sunil Batra was illegal on the ground under reference to a finally exactable death sentence which means that the sentence of death has become final and conclusive and cannot be annulled by any judicial or constitutional authority. Sunil Batra was not considered a prisoner under sentence of death, since his appeal against the death penalty was pending before the Supreme Court and in the event of its dismissal he retained the right to appeal for presidential clemency. The court held that Batra was put in statutory confinement and not solitary confinement.

The Supreme Court has also reacted strongly against putting bar fetters to the prisoners. The court observed that continuously keeping a prisoner in fetters day and night reduced the prisoner from human being to an animal and such treatment was so cruel and unusual that the use of bar fetters under the constitution of India.

On the question of the validity of the use of bar fetters, the court in Sunil Batra observed that subjecting a prisoner to bar fetters for an unusually long period, without due regards to the safety and security of the prisoner would violate basics human dignity and is hence impermissible under while approving section 56 of the prisons Act and declared that bar fetters can be used subject to the following procedural safeguards:

- (a) It must be absolutely necessary to use fetters;
- (b) The reasons for doing so must be recorded;

- (c) The basic condition of dangerousness must be well grounded;
- (d) Principles of natural justice must be observed;
- (e) The fetters must be removed at the earliest opportunity;
- (f) There must a daily review of the absolute need for bar fetters;
- (g) Continuance of bar fetters beyond a day is subject to direction of district magistrate or session Judge.

The Supreme Court in Sunil Batra diluted the rigor of solitary confinement and bar fetters to a considerable extent by specifying the procedural norms to be followed when resorting to sections 30(2) and 56 of the prisons Act, 1894.

2.7 Legal Aid and Human Rights

The main object of the free legal Aid Scheme is to provide means by which the principle of equality before law on which the edifice of our legal system is based. It also means financial Aid provided to a person in matter of legal disputes. In the absence of free legal Aid to the poor and needy, fundamental Rights and Human freedoms guaranteed by the respective constitution and International Human Rights covenants have no value. Though the constitution of India does not expressly provide the Right to legal aid, yet the judiciary has shown its favor towards poor prisoners because of their poverty and who are not in a position to engage the lawyers of their own choice. The 42nd Amendment Act, 1976 has included free Legal Aid as one of the Directive principles of state policy under Article 39A in the constitution. This is the most important and direct Article of the constitution which speaks of free Legal Aid. Though this Article finds place in part- IV of the constitution as one of the Directive principle of state policy and though this Article is not enforceable by courts, the principle laid down there in are fundamental in the governance of the country. Article 37 of the constitution casts a duty on the State to apply these principles in making laws. While Article 38 imposes a duty on the state to promote the welfare of the people by securing and protecting as effectively as it may in a social order in which justice, social economic and political, shall confirm all the institutions for just and dignified life. The parliament has enacted legal services Authorities Act, 1987 under which Legal Aid is guaranteed and various state governments also established legal Aid and Advisory Board and framed them for Legal Aid to give effect to the constitutional mandate of Article 39-A under the Indian Human Right jurisprudence, Legal Aid is

of wider amplitude and it is not only available in criminal cases but also in civil, revenue and administrative cases.

Maneka Gandhi V/S Union of India AIR 1978 SC p 597, case was a catalyst which laid down a foundation for interpreting Articles 39-A and 21 widely to cover the whole panorama of free legal Aid, in the instant case the Supreme Court held that procedure established by law in Article 21 means fair Justice and reasonable procedure. In Madhav Hayawadan Rao Hosket V/S State of Maharashtra, AIR 1978 SC 1548, a three judge bench (V.R. Krishna Tyea D.A. Desai and O. Chinnappa Reddy, JJ) of the Supreme Court reading Article 21 and 39-A along with Article 142 and Section 304 of cr. P.C. together declared that the Government was under duty to provide legal services to the accused persons. Justice Krishna Iyer observed that Indian societal milieu makes free legal services at trial and higher levels, an imperative procedural piece of criminal Justice. The Supreme Court decided the point of Legal Aid in appeal cases as follows "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, in cuisine of special Leave to appeal, for want of legal assistance, there is implicit in the court under Article 142 reads with Article 21 and 39A of the constitution, power to assign counsel for such imprisoned individual for doing complete justice. The court further added that Legal Aid in such cases is state's duty and not Government's charity. In words of Justice Krishna Iyer, "where the prisoner is disabled from engaging a lawyer, on resonance grounds such as indigence of incommunicado situation, the court shall, if the circumstances of the case, the gratuity of sentence and ends of Justice so require, assign competent counsel for the prisoners defense provided the party does not object to that lawyer. The state which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum of as the court may equitably fix".

In Hussainara Khatoon and others V/S Home Secretary, State of Bihar, AIR 1979 SC 1360, the main observations of the Supreme Court are on Speedy trial. Bhagwati and Koshal, JJ observed that the speedy trial which means reasonably expeditious trial is an integral and essential part of the fundamental Right to Life and Liberty enshrined in Article 21. However the Apex Court declared the speedy trial as a constituent of Legal Aid and directed the Government to provide free

Legal Aid Service in deserving cases. The case reinforces the principles laid down in M.H. Hoskot's case.

Justice Bhagwati bestowed that Article 39-A of the constitution also emphasizes that free Legal Service is an unalienable component of reasonable, fair and just procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free Legal Services is, therefore clearly an essential ingredient of "reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in Article 21 of the constitution. In the instant case justice Bhagwati emphasized upon the necessity of introducing by the control and state Governments, a dynamic and comprehensive Legal Services programmer with a view to reaching justice to the common man. His lordship thought this cause as a mandate of equal justice implied in Article 14, 21 and also the compulsion of constitutional directive embedded in Article 39-A. The concern of his lordship was that such programmes of Legal Aid are intended to reach the justice to the common man. In Sunil Batra V/S Delhi administration (II) AIR 1980 SC 1579; Justice Krishna Iyer observed that the free Legal Services to the prison programmer shall be promoted by professional organization recognized by the court. His Lordship further added that the District Bar Association should keep all free prisoner relief. In Kedar Pahadiya and others V/S State Bihar, (1981) 3 SCC 671, the Supreme Court once again reiterated the principle laid down in Hussainara Khatoons and Sunil Batra cases, and observed that the court directed that the petitioners must be provided legal representation by a fairly competent lawyer at the cost of the State, since Legal Aid in a criminal case is fundamental Right implicit in Article 21, and the fundamental Right has merely remained a paper promise and has been grossly violated. In the instant case, the Supreme Court directed the State Government to file a list of under trial prisoners who have been in jail, for a period of more than 18 months without their trial having commenced before the courts of magistrates.

It is submitted that while making the above observations, the Supreme Court was more concerned with Article 39-A and least bothered to Article 21. Right to free Legal Aid was raised to the status of a fundamental Right in Hoskot's case as a part of fair, just and reasonable procedure under Article 21 and this premise was reinforced in cases of Hussanara. Right to free Legal Aid was included in under the protective umbrella of Article 21, which is a fundamental Right under the

constitution. Article 39A a non-enforceable and non justifiable directive principle became an enforceable fundamental Right. Hence free Legal Aid is a fundamental Right which can be enforced against the state as defined in Article 12 of the constitution if free Legal Aid is denied for whatever reasons.

2.8 Environmental Protection and Human Rights

The protection and improvement of human environment has become a worldwide concern. A clean and healthy environment is the basic need for the existence of Life. The ecological imbalance contributes to the environmental hazards like acid rain, noise pollution, and air pollution. The depletion of ozone layer causes skin cancer, cataracts, damage to body's immunity system, mutation, loss of productivity. Environmental Law is an instrument to protect and improve the environment and to control or prevent any acts or emissions likely to pollute the environment. There are hundreds of environmental laws in India, directly or indirectly dealing with the subject of environment. In the world the constitution of India is the first which made provisions for the protection of environment which are Article 21, 47, 48-A, 51 (A) (g) and Sections 227 and 278 of Indian penal code Section 133 and 134 of the code of criminal procedure. These provisions contain clear mandate on the State and to the citizens to protect and improve the environment.

The Apex judiciary in India has been demonstrating its commitment to the protection of environment from time to time and it has given prime importance to the environmental promotion and protection through a series of trend setting judgments. The Supreme Court is also trying to bring an awareness of the massive problems of pollution and filling the gap between the legislation and its implementation by using its extraordinary powers. The higher judiciary in India delivered many environmental conscious judgments. By constructive interpretation of various provisions of the Law, the Supreme Court in particular has supplemented and strengthened the environmental Law. The cases relating to each and every aspect of environment have come up before the Supreme Court of India. The court has relaxed rigid and purely technical rules in admitting many cases involving the protection of the environment. The Supreme Court has played an activist and creative role in protecting the environment. Most of the actions in the environmental are brought under Article 32 and 226 of the constitution. The environmental litigations are generally based on the notions of violation of

fundamental Rights. The Supreme Court widened the horizons of environmental protection. It is an innovation of Indian judiciary and of Judicial Activism. The Apex judiciary made it clear that Public Interest Litigation is maintainable for ensuring pollution free water and air which is involved in right to live under the Article 21 of the constitution. The expansive and creative judicial interpretation of the word "Life" in Article 21 has led to the salutary development of environmental jurisprudence in India. The Right to Life is a fundamental Right under Article 21 and since the Right to Life connotes "quality of Life" a person has a right to the enjoyment of pollution free water and air to enjoy life fully. According to many environmentalists and jurists, the latest and most encouraging of all developments in India is the "Right to a clean and wholesome environment" and the "Right to clean air and water". These rights have been included in the Right to Life under Article 21 of the constitution.

In *Ratlam Municipality V/S Vardhi Chand*, AIR 1980 SC 1623, the Supreme Court for the first time treated an environmental problem differently from ordinary Tort or Public nuisance. In the instant cases the Apex court compelled the M.P. Municipality to provide sanitation and drainage despite the budgetary constraints, thereby enabling the "Poor to live with dignity". The Supreme Court expanded the principle of "Locus Standi" in environmental cases and observed that environment related issues must be considered in a different perspective. This development in judicial delivery system brought a new dimension and is considered a silent "Legal revolution" and it has cast away all the shackles of technical rules of procedure and encouraged the litigation from public spirited person. The court not only complemented petitioners who filed environment protection litigation but also awarded money to the petitioners. This development has paved the way for social interest litigation, class action litigation and common cause litigation and so the court made it clear and stated that the dynamics of the judicial process had new enforcement dimensions.

The Supreme Court gave an expansive meaning to right to environment in *Rural Litigation and Entitlement Kendra, Dehradun V/S State of UP*, (1986) 2 SCC 431. In the instant case, the representatives of the rural litigation and entitlement Kendra, Dehradun wrote a letter to the Supreme Court alleging that heat of illegal limestone quarries in the Mussore Dehradun region was divesting the fragile ecosystem in the area. The court treated the letter as a writ petition under Article

32 of the constitution. In the instant case, the court presupposes the violation of fundamental Right. The court ordered the closure of certain lime Stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. The court stated "the right of the people to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, house and agriculture land and pollution of air water and environment". In *Govind Sing V/S Shanti Swarup*, AIR 1979 SC 143, the Supreme Court has taken microscopic view on the contours of the law of Public nuisance. In the instant case the Supreme Court held that the effect of running bakery was injurious to the people, as it was polluting the environment by emitting smoke from chimney and ordered the closure of the bakery. The court said that "in a matter of this nature what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large.

In *M.C. Mehta V/S Union of India*, AIR, 1997 SC 734 the Supreme Court observed "The precautionary principle" and "Polluter pays principle" have been accepted as part of the Law of the land". In this case a Public Interest Litigation was filed alleging that due to environmental pollution there is degradation of the Taj Mahal, a monument of International reputation. According to the opinion of the expert committees the use of coke/coal by the industries Situated within the Taj Trapezium Zone (TTZ) were causing pollution and damage to the Taj Mahal, and also people living in that area. In the instant case the court ordered the re-location of polluting industries.

2.9 Summary

The right to enforce Human Rights as provided under the constitution of India is constitutionally protected. Article 32 of the constitution empowers the Supreme Court to issue writs for enforcement of fundamental rights. In the same way Article 226 of the constitution, High Court are empowered to issue writs. Another new approach has emerged in the form of Public Interest Litigation with the objective to bring justice within the reach of the poor and the disadvantageous sections of society. In the recent past the judges of the High Courts and the Supreme Court have from time to time given far reaching and innovative judgments to protect the Human Rights. Public Interest Litigation has heralded a new era of Human Rights promotion and Protection in India. A review of the decisions of the Indian Judiciary indicates that the judiciary has been playing a

vital role of harbinger of protection of Human Rights, where the executive and legislature have failed to address the problems of the people. It is evident that the Indian judiciary has been very sensitive and alive to the protection of Human Rights of people.

2.10 Some Useful Books

- I. Constitutional Law of India by Dr. J.N. Pandey, Central Law Agency.
- II. The Constitution of India by P.M. Bakshi, Universal Law Publishing Company.
- III. Administrative Law by Dr. U.P.D. Kesari, Central Law Publications.
- IV. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
- V. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
- VI. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
- VII. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
- VIII. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
- IX. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
- X. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

2.11 Check your Progress:

- A. Which of the following statements are true or false?
- I. Judiciary in every country plays role of harbinger in protection of human rights.
 - II. Supreme Court of India has power to review its own judgement.
 - III. Article 20 of the constitution of India provides right to life and personal liberty.
 - IV. Prem shanker v/s Delhi Administration case is not related to hand cuffing.
 - V. Solitary confinement has highly degrading and dehumanizing effect on the prisoners.

- VI. The 42nd Amendment Act, 1976 has included free legal aid as one of the Directive principles of state policy.
- VII. A clean and healthy environment is the basic need of the existence of life.

B- Fill in the blanks-

- I. Articles and of the constitution of India are the most significant constitutional remedy in protection of Human Rights of citizens.
- II. Article 21 of constitution of India provides that “ No person shall be deprived of his and except according to procedure established by law.
- III. Part IV of the constitution provides
- IV. Legal Aid is available in civil, , and administrative cases.
- V. In Ratlam Municipality v/s Vardhi Chand , the supreme court for the first time treated an environmental problem differently from ordinary Tort or

2.12 Answers to Check your Progress:

A

- I. TRUE
- II. TRUE
- III. FALSE
- IV. FALSE
- V. TRUE
- VI. TRUE
- VII. TRUE

B.

- I. 32and 226
- II. Personal life and liberty
- III. Directive Principles
- IV. Criminal V. Public Nuisance

2.13 Terminal questions:

- 1. Discuss the writ Jurisdiction of Supreme Court and High court.
- 2. Write a detailed note on the role of Supreme Court in protection of human rights.
- 3. Discuss in brief Environment and protection of human rights.

UNIT 3

Judicial Approach in Protection of Human Rights of Women

STRUCTURE:

- 3.1 Introduction
- 3.2 Human Rights of women
- 3.3 Violation of Women Human Rights
 - 3.3.1 Violation of Right to equality and Right to protection Against Discrimination.
 - 3.3.2 Violation of Right to Education
 - 3.3.3 Violation of Political Right
 - 3.3.4 Violation of Right to Property
 - 3.3.5 Violation of Right to Protection
 - 3.3.6 Violation of Right to equal opportunity for employment and Right to get equal wages for equal work
 - 3.3.7 Violation of Right to live with Dignity: Eve Teasing and Sexual abuse
 - 3.3.8 Violation of Right from Society, State and family system.
- 3.4 Constitutional protection to women and role of Judiciary in protection of their Human Rights.
 - 3.4.1 Constitutional Provisions
- 3.5 Constitutional Privileges
- 3.6 Legal Provisions
 - 3.6.1 The Crimes Identified Under the Indian Penal Code (I.P.S)
 - 3.6.2 The Crimes Identified Under the Special Laws (SLL)
- 3.7 Special Initiatives for women –
 - 3.7.1 National commission for women
 - 3.7.2 Reservation for women in Local Self Government
 - 3.7.3 The National plan of Action for the Girl child (1991-2000)
 - 3.7.4 National Policy for the Employment of women, 2001
- 3.8 Some Important pronouncement of Supreme Court relating to women.
- 3.9 Summary.

- 3.10 Some Useful Books
- 3.11 Check your Progress
- 3.12 Answer to check your progress
- 3.13 Terminal question

OBJECTIVES

After going through this unit you should be able to understand:

- basic Human Rights of women
- different kinds of violation of Human Rights of women
- legal protection of Human Rights of women
- various judgements given by supreme court of India in protection of Human Right of women.

3.1 Introduction

Human rights are those minimum rights which are compulsorily enjoyed by every individual as he/she is a member of human family. The constitution of India also guarantees the equality of rights of men and women. However, in the sphere of women's human rights in India, there exists a wide gulf between theory and practice. Indian society is a male dominated society where men are always assumed to be superior in society. The women in India very often have to face discrimination, injustice and dishonor. Though women in India have been given more right as compared to men, even then the condition of women, in India is miserable. The constitution of India has granted equal rights to men and women. According to article 14 "The state shall not deny to any person equality before law or the territory of India." And Article 15 stated-'States shall not discriminate against any citizen on grounds only of religion race, caste, sex, place of birth or any of them'. But today, it seems that there is a wide gulf between theory and practice. The women in India have always been considered subordinate to men. Though the articles contained in the constitution mandates equality and non-discrimination on the grounds of sex, women is always discriminated and dishonored in Indian society. Although various efforts have been taken to improve the status of women in India, the constitutional dream of gender equality is miles away from becoming a reality.

Though Human Rights are the minimum rights which are compulsorily obtainable by every member of human society, yet it has been found that each and every right of women is being violated against in one or other way. The crimes against women in India are increasing at a very fast rate.

3.2 Human Rights of women – First of all we must know what types of women's Human Right are there and how they are being violated against . They are –

- a) Right to equality
- b) Right to education
- c) Right to live with dignity
- d) Right to liberty
- e) Right to equal participation in politics
- f) Right to property
- g) Right to equal opportunity for employment
- h) Right to free choice of profession
- i) Right to livelihood
- j) Right to work in equitable condition
- k) Right to get equal wages for equal work
- l) Right to protection from gender discrimination
- m) Right to social protection even during retirement, old age and sickness
- n) Right to protection from inhuman treatment
- o) Right to protection of health
- p) Right to privacy in terms of personal life, family, residence, correspondence etc and
- q) Right to protection from society, state and family system.

3.3 Violation of Women Human Right

3.3.1 Violation of Right to Equality and 'Right to Protection against Discrimination':

Discrimination against the girl child starts the moment she enters into the mother's womb, in recent times even before birth, in the form of sex – determination tests leading to feticide and female infanticide. The home, which is supposed to be the most secure place, is where a woman opens her eyes in any way, she is killed after her birth by different cruel methods in some parts of the country. The very important 'right to life' is provided to women. In India, men are always assumed to be superior to women and are given preference.

3.3.2 Violation of Right to Education:

Education is the most important Human Right as it develops the personality and awareness of man. In India position of woman's education is not satisfactory. Young girls are brought up to believe that they are only suited to serve as wives and mothers. Despite improvement in the literacy rate after independence, there continues to be a large gap between the literacy levels of men and women. Almost half the woman populations are even unable to recognize language characters. At least 60 million girls lack access to primary education in India. Due to a large percentage of uneducated women in India, they are not even aware of their basic human rights and can never fight for them.

3.3.3 Violation of Political Right:

The Political status of women is very unsatisfactory, particularly their representation in higher political institutions – parliament and provincial legislation which is of great under representation which hampers their effective role in influencing policies regarding woman's welfare and development. Their representation has been unable to reach even 10% in Lok Sabha. Thus it is clear that:

1. There is male domination in Indian politics and almost all the parties give very little support to women in election despite their vocal support for 33% reservation and provincial legislation.
2. Women have made initiatives in political participation but they have not been accepted in politics.

3.3.4 Violation of Right to property:

In most of the Indian families, women do not own property in their own names and do not get share of parental property. Due to weak enforcement of laws protecting them, women continue to have little access to land and property rights to inheritance, but the ancestral property, while the daughters' shares were based on the share received by the father. Hence, father could anytime disinherit her but the son will continue to have a share in his own right. The married daughters facing harassment have no rights in ancestral home.

3.3.5 Violation of Right to protection of Health:

According to the World Bank report, malnutrition is the major cause of female infertility. The presence of excessive malnutrition among female children as compared to male children is basically due to differences in the intra – family

allocation of food between the male and female children. Normally the male members are fed before the female members of the family. According to Human Development Report, in rural Punjab, 21% of girls in low income families suffer from severe malnutrition as compared with 3% of boys in the same family. Even the low income boys are far better than upper income girls. Girl babies are less breast fed than boy babies, 60% of girl babies are born with low birth weight. Sometime due to weak economic conditions people totally ignore girl child. Sometimes due to economic distress and natural calamities floods, drought or earthquakes, the discrimination against the female child increases. Moreover it has been confirmed by various studies that the girl's diet is inferior to the boy's diet both in quantity and quality Boys are given more nutritive foods likes milk, eggs, butter, ghee, fruits and vegetables as compared to girls. Due to this inferior quality diet, girls are more vulnerable to infection and diseases. The reason again is that families spend less on medication for girls than for boys.

3.3.6 Violation of Right to equal opportunity for employment and Right to get equal wages for equal work –

The employment of the women in agriculture, traditional industries and in sizeable section of new industries is declining at a very fast rate. The reason is that the adoption of new technological changes requires new skill, knowledge and training. And woman in India, who constitutes a large share of world's illiterate, lacks such skills that for the same task, women are paid less than the males. Technological changes in agriculture and industry are throwing out women from the production process. The women workers are concentrated only in certain jobs which require so – called female skills. Thus, Indian Labor market is adverse to women workers. It shows that, the role of women in large scale industries and technology based business is very limited.

3.3.7 Violation of Right to Live with Dignity: Eve Teasing and sexual abuse: -

Eve teasing is an act of terror that violates a woman's body, space and self – respect. It is one of the many ways through which a woman is systematically made to feel inferior, weak and fearful. Whether it is an obscene word whispered into a woman's ear, offensive remarks on her appearance, any intrusive way of touching any part of woman's body, intended to be vulgar, all these acts represent a

violation of woman's person her bodily integrity. Thus, eve teasing denies a woman's fundamental life with dignity, solely on the basis of her sex. No place is really "safe" for women. Roads, buses, trains, cinema halls, parks, beaches, even women's house and neighborhood may be sites where her self – worth is abused.

3.3.8 Violation of Right from society, state and family system:-

A. Child marriage – Child marriage has been traditionally prevalent in India to this date. Discrimination against the girl begins even before their birth and continues as they grow. According to the law, a girl cannot be married until the family has dowry. Girl in India is taken as a burden on the family. Sometimes the marriages are settled even before the birth of the child. In south India, marriages between cousins are common as they believe that a girl is secured as she has been married within the clan. Parents also believe that it is easy for the child bride to adapt to the new environment as well as it is as for others to environment. Some believe that they marry girls at an early age so as to avoid the risk of their unmarried daughters getting pregnant. The reasons for child marriage are linked to poverty, illiteracy, dowry, landlessness and other social evils. The impact of child marriage is widowhood, inadequate socialization, education deprivation, law health/nutritional levels as a result of early pregnancies in an unprepared psychological state of young bride However, the Indian boys have to suffer less as it is a male dominated society.

B. Dowry harassment and Bride Burning – The demand of dowry by the husband and his family is also very common in India. Thereafter killing of the bride because of not bringing enough dowry is an added evil to it. Dowry and Dowry deaths are very common crime these days. In spite of the Dowry Prohibition Act passed by the government, which has made dowry demands in weeding illegal, the dowry incidents are increasing day by day. According to a survey, around 5000 women die each year due to dowry deaths and at least a dozen die each day in 'kitchen fires'.

C. Rape: - Young girls in India often are the victims of rape. Almost 255 of rapes were committed with girls under 16 years of age The Law against rape is unchanged for 120 years. In rape cases, it is very torturing that the victim has to prove that she has been raped. The victim finds it difficult to undergo medical examination immediately after the trauma of assault. The family of the victim is also reluctant to bring in prosecution due to family prestige and social status. The

approaching to the police authorities and thereafter procedural action taken on discourage victim to approach police. Mostly it is a bitter experience.

D. **Domestic Violence:** - Wife beating, abuses by alcoholic husbands are the violence done against women which are never publicly acknowledged. The cause is mainly the man demanding the hard earned money of the wife for his drinking. But an Indian woman always tries to conceal it as she is ashamed of talking about it. Interference of in-laws and extra marital affairs of the husbands are the other causes of such violence. The pitiable women are unwilling to go to court because of Lack of alternative support system.

3.4 Constitutional protection to women and Roles of judiciary in Protection of their Human Rights

Women have been subjected to various forms of exploitation, harassment and torture both in physical and sexual capacities for instance, female infanticide, child marriage, dowry, rape etc. Women have always been discriminated against men and have suffered denial and are suffering discrimination in silence. Self sacrifice and self denial are their nobility and fortitude and yet they have been subjected to all kinds of inequalities, infirmities, incongruities and discrimination and each child of the human civilization till date has known woman to be inferior sex. Indian society is a semi feudal society and is largely the same even today. She is supposed to perform all duties without any right. When women entered the paid labor force from the narrow confinement of the family, they experienced a new kind of harassment at the hands of employees, co-workers and supervisors. The framers of constitution were well aware of all inequalities from time immemorial. Therefore, several provisions were added in the constitution for the protection of women. Article 14 of the Indian constitution declares that equality before law and equal protection of law shall be available to all. Similarly, Article 15 (1) guarantees equality of opportunity for all citizens in matters relating to employment. In *Rajesh Kumar Gupta v/s state of Uttar Pradesh*, AIR 2005 SC 2540, and Supreme Court held that the reservation of 50% posts in favor of female candidates is not arbitrary. Before discussing the Supreme Court's decided cases in protection of Human Rights of women, you must know in brief the constitutional and legal provisions regarding protection of human Rights of women. These provisions are as follows :-

3.4.1 Constitutional provisions:

The constitution of India not only grants equality to women but also empowers the state to adopt measures of positive discrimination in favor of women for neutralizing the cumulative social, economic, educational and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the Law and equal protection of law prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth and guarantees equality of opportunity to all citizens in matter relating employment. Article 14, 15, 15(3), 16, 39(a), 39(c) and 42 of the constitution are of specific importance in this regard.

3.5 Constitutional Privileges

- i. Equality before Law for women (Article 14)
- ii. The state not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15 (1))
- iii. The state to make any special provision in favor of women and children (Article 15(3))
- iv. Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state (Article 16)
- v. The state to direct its policy towards serving for men and women equally the right to an adequate means of livelihood (Article 39 (a), and equal pay for equal work for both men and women (Article 39(b)).
- vi. To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for livelihood and no citizen is deprived of justice by reason of economic or disabilities (Article 39A).
- vii. The state to make provision for securing just and humane condition of work and for maternity relief (Article 42).
- viii. The state to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46).
- ix. The state to raise the level of nutrition and the standard of living of its people (Article 47).
- x. To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51 (A) (e)).

- xi. Not Less than one-third (including the number of seats reserved for women belonging to the scheduled castes and the scheduled Tribes) of the total number of seats to be filled by direct election among women and such seats to be allotted by rotation to different constituencies in a municipality (Article 243D(3))
- xii. Not less than one-third of the total number of offices of chairpersons in the panchayats at each level to be reserved for women (Article 243D(4))
- xiii. Not less than one-third (including the number of seats reserved for women belonging to the scheduled castes and the scheduled tribes) of the total number of seats to be filled by direct election in every municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a municipality (Article 243T(3))
- xiv. Reservation of offices of chairpersons in municipalities for the scheduled castes, the scheduled tribes and women in such manner as the legislators of a state may by law provide (Article 243 T (4)).

3.6 Legal Provisions

To uphold the conditional mandate, the state has enacted various legislative measures intended to ensure equal rights, to counter social discrimination and various forms of violence and at recites and to provide support services especially to working women.

Although women may be victims of any of the crimes such as 'murder' 'robbery', 'cheating' etc, the crimes, which are directed specifically, against women, are characterized as crime against women', These are classified under two categories.

3.6.1 The crimes Identified under the Indian penal code (I.P.C.):

- * Rape (sec. 376 IPC)
- * Kidnapping & Abduction for different purposes (sec. 363-373)
- * Homicide for dowry, Dowry Deaths or their attempts (sec. 302/304-B I.P.C.)
- * Torture, both mental and physical (sec.498-A IPC)
- * Molestation (Sec. 354 IPC)
- * Sexual Harassment (Sec. 509 IPC)
- * Importation of girls (upto 21 years of age)

3.6.2 The crimes identified under the special laws (SLL):

Although all laws are not gender specific, the provisions of law affecting women significantly have been reviewed periodically and amendments carried out to keep pace with the emerging requirements. Some Acts with special provisions to safeguard women and their interests are:-

- i. The Employees State Insurance Act. 1948
- ii. The Plantation Labor Act. 1951
- iii. The Family Courts Act, 1954
- iv. The Special Marriage Act, 1954
- v. The Hindu Marriage Act, 1955
- vi. The Hindu Succession Act, 1956 with amendment in 2005.
- vii. Immoral Traffic (prevention) Act. 1956
- viii. The maternity Benefit Act. 1961 (Amended in 1995)
- ix. Dowry Prohibition Act. 1961
- x. The Medial Termination of Pregnancy Act. 1971.
- xi. The Contract Labor (Regulation and abolition) Act. 1976
- xii. The Equal Remuneration Act, 1976
- xiii. The Prohibition of Child Marriage Act, 2006
- xiv. The Criminal Law (Amendment) Act, 1983
- xv. The Factories (Amendment) Act, 1986
- xvi. Indecent Representation of Women (Prohibition) Act, 1986,
- xvii. Commission of Sati (Prevention) Act, 1987
- xviii. The Protection of Women from Domestic Violence Act, 2005 etc.

3.7 Special Initiatives for women

3.7.1 National Commission for women:

In January 1992, the government set-up this statutory body with a specific mandate to study and monitor all matters relating to the constitutional and legal safeguards provided for women, review the existing legislation to suggest amendments wherever necessary, etc.

3.7.2 Reservation for women in local self-Government:

The 73rd constitutional Amendment Acts passed in 1992 by parliament ensures one-third of the total seats for women in all elected officers in local bodies whether in rural area or in urban areas.

3.7.3 The National Plan of Action for the Girl Child (1991-2000):

The Plan of Action is to ensure survival, protection and development of the girl child with the ultimate objective of building up a better future for the girl child.

3.7.4 National Policy for the Employment of women, 2001:

The Department of Women & Child Resource Development in the ministry of Human Resource Development has prepared a “National policy for the Empowerment of women” in the year 2001. The goal of this Policy is to bring about the advancement, development and empowerment of women.

One of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary standards developed by the judiciary which have a significant beneficial effect of making the lives of people better and the accomplishment of the government's goal easier. In addition, these standards may ensure a better understanding of the relationship between the people and their government, on the one hand and among the members of the international community, on the other. Thus Judiciary plays a vital role in the protection of Human Rights of women. Some of important cases decided by Supreme Court in protection of women are discussed below.

3.8 Some important pronouncements by Supreme Court relating to women

In the case Delhi working women's forum V/s Union of India a public interest litigation was filed under article 32 at the instance of the petitioner Delhi domestic working women forum to escape the pathetic plight of four domestic servants who were subjected to indecent sexual assault by seven army personnel. The incident had occurred in train while these six women were travelling by the Muri Express from Ranchi to Delhi.

The Supreme Court with a view to assisting rape victims has laid down the following broad guidelines-

1. The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice. The role of victim's advocate would not only be to explain

the victim the nature of proceeding to prepare her for the case to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

2. Legal assistance will have to be provided at the police station since victim of sexual assault might very well be in a distressed state upon arrival at the police station. The guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

3. The police should be under duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

5. The advocate shall be appointed by the court, on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the court was sought or obtained.

6. In all rape trials anonymity (name not to be disclosed) of the victim must be maintained, as far as necessary.

7. It is necessary, having regard to the directive principle contained under article 38 (1) of the constitution to set criminal injuries compensation board. Rape victims are frequently at a loss. Some for example are too traumatized to continue in employment.

8. Compensation of victims shall be awarded by the court on conviction of the offender and by the criminal Injuries compensation board whether or not a conviction has taken place. The board will look into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth, if this occurred as a result of rape. The court directed the National commission for women to evolve a scheme within six months and take necessary steps for its implementation at the earliest.

In a significant judgment in Vishaka V/s State of Rajasthan AIR 1997 SC 3011, the Supreme Court has laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work until legislation is enacted for this purpose. The court held that it is the duty of the employer or other responsible person in work place and other institutions, whether public or private, to prevent sexual harassment of working women. The judgment of the court was delivered by J.S. Verma, C.J. on behalf of Sujata V. Manohar and B.N. Kripal, JJ. on a writ petition filed by Vishaka a non-governmental organization working for "gender equality" by way of PIC seeking enforcement of fundamental rights of working women under articles 14, 19 and 21 of the constitution. The immediate cause for the filing of this writ petition was the alleged brutal gang rape of a social worker of Rajasthan. The court directed the employers to set up procedure through which working women can make their complaints heard. In holding so that court relied on international convention and norms to which India is a party and held that in absence of any domestic law on the point, they can be relied on interpreting the guarantee of "gender equality" in articles 14, 19 and 21 of the constitution.

In the case of Gaurav Jain V/S Union of India AIR 1997 SC 3021, the petitioner, a public spirited advocate "Gaurav Jain", filed a public interest petition seeking appropriate directions to the government for the improvement of the plight of prostitutes, fallen women and their children. He was inspired by reading an article entitled "a red light trap" society gives no chance to prostitutes offspring", published in India today dated July 11, 1988. The Supreme Court has issued a number of directions to the government and all social organizations to take upon appropriate measures for prevention of women in various forms of prostitution and to rescue them from falling them again into the trap of red light areas and to rehabilitate their children through various welfare measures so as to provide them with dignity of person, means of livelihood and socio-economic improvement. The court has issued the following directions:-

1. The court held that it is the duty of the Government and all voluntary non-governmental organization to take necessary measures for protecting them from prostitution and rehabilitating them so that they may lead a life with dignity of a person.
2. The court directed that they should be provided opportunity for education. Provide financial support and develop marketing facilities for goods

produced by them. If possible their marriages may be arranged so that the problem of child prostitution can be eradicated. Marriage would give them real status in society. They should be given housing facilities, legal aid, free counseling assistance and all similar aids and services so that they do not fall into the trap of red light area again.

3. The court held that economic empowerment is one of the major factors that prevents the practice of dedication of the young girls to prostitution as Devadasis Jogins or Venkatasins. Referring to the various measures taken up by different states, the court directed that the social welfare department should undertake similar rehabilitation programmes for the fallen victims so that the foul practice is totally eradicated and they are not again trapped into prostitution. The court gave example of the state of Andhra Pradesh where the state government is providing housing facilities, free treatment in hospitals and pension to Devadasis women of 60 years or above and adult literacy programme. Such measures are being taken by nongovernmental organizations in the states of Maharashtra, Karnataka and Andhra Pradesh.

4. The court directed that the rescue and rehabilitation of the child prostitutes and children should be kept under nodal department, namely, department of women and child development under the ministry of welfare and human resources, government of India, which will, devise suitable schemes for proper and effective implementation. The court directed the ministry of welfare government of India for the establishment of Juvenile homes.

5. The court directed to constitute a committee within a month from the judgment which would make an in-depth study into these problems and evolve suitable scheme as are appropriate and consistent with the directions given above. It shall submit its report within three months. On the basis of this report, direction would be given to the state governments for effective implementation of the schemes. The Nodal Department would enforce and will regularly be supervised by the Minister of welfare. A permanent committee of secretaries should be constituted to review the progress of implementation on annual basis and to take such other steps as may be expedient in the effective implementation of the schemes. Periodical progress as to funding and enforcement of the scheme should be submitted with registry of the Supreme Court. "It is hoped", the court said, the above law and

direction would relieve the human problem by rehabilitation of the unfortunate fallen women caught in the trap of prostitution, their children would be brought into the mainstream of the social order. These directions would enable them to avail the equality of opportunity and of status with dignity of person which is the arch of the constitution. The court has directed that all such trials must be held in camera.

Bodhisatwa Gautam v/s Subra Chakraborty, 1996 (1) SCC 490 The Supreme Court held that rape is a crime against humanity. It is basically inhuman and rape is a crime against society. It is violation of the victim's most cherished fundamental rights, namely, the right to life contained in Article 21.

The special provision under Article 15(3) by which the state encourage woman's participation in all activities shall be under the supervision and control of the state. This article can be in the form of either affirmative action or reservation. In a historic Judgments, **Sarla Mudgal v/s Union of India, 2000(2) ALD cri 686** the court held that the second marriage of Hindu after his conversion to Islam was void in terms of section 494 of IPC and husband was liable to be prosecuted for bigamy. In **Air India Stationary Corporation v/s united Labour Union, AIR 1989 SC 1185**, the Supreme Court has held that it is the duty of the state to take responsibility for further development of these human rights and fundamental freedoms.

In **Pragati Varghese v/s Cyril George Varghase, AIR 1999 ker 345**, the full bench of the Bombay High Court has struck down section 10 of Indian Divorce Act 18 under which a christen wife had to prove adultery along with cruelty or desertion while seeking

In **Yusuf Abdul Aziz v/s state of Bombay AIR 1954 sc 321**, it was held that section 497 of Indian Penal Code to be valid, which punishes man for adultery and excepts the women from punishment even though she may be equally guilty as an abettor.

In **Gautam Kundu v/s State, (1992) 2 CALLT 130 He, 96 CWN 751**, the woman refused the husband's application for a blood test to disprove paternity as it would be slanderous, embarrassing and humiliating for the woman. In another important decision the Supreme Court rejected the plea of a husband in which he had prayed that his wife should undergo a medical examination to prove her virginity. It was found to violate her right to privacy and personal liberty enshrined under Article 21

of the constitution. No court shall order a roving enquiry and there has to be sufficient material before the court to enable it to exercise such a discretion. No Legal-conscious citizen will forget the case of **Rupan Deal Bajaj v/s K.P.S. Gill, 1996 AIR 309, 1995 scc(6) 194**, which is the latest in the series upholding the dignity of women.

A Judgment delivered in **State of Punjab v/s Gurmit Singh 1996 AIR 1393, 1996 scc (2) 384**, the Hon'ble Supreme Court while convicting three rapists of a minor girl a divorce on the ground that it violates the fundamentals rights of a Christian women to live with human dignity under Article 21 of the constitution.

In **Latina Sundari v/s Rkehtar Nathan, AIR 2002 March 17, 18**, two vacancies in a trust were to be filled from the female descendants of the trustees. The scheme court which was the appointing authority, appointing two male members and observed that female descendants who appeared in the interview lacked practical experience. Setting aside the appointments of two males, the Madras High Court held that the two petitioners were qualified and eligible to be appointed to Education committee. It also absolved that a female descendants does not include males. The Indian Supreme court never hesitated to adopt the international standard of gender-Justice if the Provisions of international law do not come in conflict with the national Law. Human Right Act, National commission for women were formed after considering instrument of international Law. And as a matter fact all these commissions are working within the constitutional Limits and these recommendations are also taken into account while making and implementing the Law concerning women. In India, due regard is given to the international human rights organization. These organizations have freedom to visit any place in India. Under such a large umbrella of international and national law a complete legal protection is given to Indian women.

3.9 SUMMARY

Women are the wealth of India and they have contributed in almost every field and made the country feel proud at every occasion. They are in the front, leasing the county, making mile stones and source of inspiration for many, however, another reality of Indian Society is that there is systematic discrimination and neglect of women's in India, which could be in terms of inadequate nutrition denial or limited access to education health and property rights, child labor and domestic violence etc. The fear of sexual violence has been a powerful factor in restricting women's

behavior and sense of freedom. The struggle against violence is actually the struggle against the unequal distribution of power both physical and economic between the sexes.

The government of India has enacted several women Specific legislation to uphold the constitutional mandate and to protect women against social discrimination, violence and atrocities and also to prevent social evils like child marriages, dowry, rape, practice of sati etc. The crime against women under various legislations of India could be broadly classified into categories first the crimes indentified under the Indian penal code and second the crimes identified under the special laws. The constitutional and legislative provisions in India not only grants equality and protection to women, but also empower the state to adopt measures of positive discrimination in favor of women. In India, within the frame work of democratic polity, Laws and development policies, programs have been aimed at women's advancement in different spheres of life. Further, an analysis of the judicial decisions shows that the judiciary has adopted considerate and sympathetic attitude towards women who are victims of crimes. By laying down guidelines for protecting the interest amounts as compensation for the victims, the judiciary has shown much enthusiasm to uphold the dignity of women.

3.10 Some Useful Books

1. Dr. J.N. Panday Constitutional Law
2. Dr. C.S. Tripathi : Women and Criminal Law
3. D.D. Basu Constitutional Law
4. M.P. Jain – Indian constitution of India
5. P.M. Bakshi - Indian Constitution
6. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
7. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005 Edition:
8. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006,
9. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First

10. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214
ISBN : 8176296481, Publication Year : 2005
11. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479,
Publication Year : 2006
12. International Human Rights Documents. by P R Gandhi, Book Code :
006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

3.11 Check Your Progress

- A. Which of the following statements are true :
- I. Discrimination against the girl child starts when she is in the mother's womb.
 - II. Child marriage has not been traditionally prevalent in India.
 - III. Article 47 of the constitution of India deals with State to raise the Level of nutrition and the standard of living of its people.
 - IV. Vishaka V/s State of Rajasthan case is not concerned with sexual harassment of women at working place.
 - V. The government of India has enacted several women specific legislations.

B Fill In the Blanks:-

1. In election of panchayatsnumber of seats are reserved for women.
2. Article 15(3) of constitution directs the state to make special provision in favor of ----- and ----- .
3. The goal of national policy for the Employment of women is to bring about the ----- development and of women.

3.12 Answer to check your progress

(A)

- I. True
- II. False
- III. True
- IV. False
- V. True

(B)

- I. 1/3
 - II. Women and Children
 - III. Advancement and empowerment.
-

3.13 Terminal questions

1. Discuss various Human Rights of women. Describe how they are violated.
2. Discuss the role of judiciary in protection of Human Rights of women.
3. Discuss the constitutional provisions regarding protection of Human Rights of women.

Unit – 4

Judicial Approach for Protection of Human Rights of child

STRUCTURE:

- 4.1 Introduction and who is a Child?
- 4.2 What are Child Rights
- 4.3 Childs Rights under constitution of India
- 4.4 Human Rights Violation of Child
 - 4.4.1 Sexual Abuse of Child
 - 4.4.2 Different kinds of Child Sexual Abuse
 - 4.4.3 Cases
 - 4.4.4 Trafficking of Child
 - 4.4.5 Object for Child Trafficking
- 4.5 Legal Frame work that combats against the Human Trafficking in India
 - 4.5.1 The Constitution of India
 - 4.5.2 The Immoral Traffic (Prevention) Act 1956
 - 4.5.3 The Indian Penal Code.
- 4.6 Child Pornography
 - 4.6.1 Child Pornography in India
- 4.7 Child Labour and Human Rights
- 4.8. Role of Judiciary on Child Labour
- 4.9. Summary
- 4.10 Some Useful Books
- 4.11 Check Your Progress
- 4.12 Answer to check your progress
- 4.13 Terminal question

OBJECTIVES

After going through this unit you should be able to understand:

- who is child under the eye of Law
- what child Rights are.
- how human rights of child are violated
- legal protection available for the human rights of child.

4.1 Introduction and Who is Child?

The trouble with child's Human Rights begins with the very definition of a child under the law. There are several grey areas in the law here. Who is a child? When does childhood society's judgment about the evolution of children's capacities and responsibilities arises? Almost everywhere, age limits formally regulate children's activities, when they can leave school, when they can marry, when they can vote, when they can be treated as adults by the criminal Justice system, when they can join the armed forces and when they can work. But age limits differ from activity to activity from legislation to legislation and from country to country and in India too.

According to Article 1 of the United Nations convention on the Rights of the Child, 1989, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. The Article thus grants the discretion to individual countries to determine by law whether childhood should cease at the age of 12, 14, or 16 years, or whatever age they find appropriate.

The word 'child' in Indian laws has been used in various legislations as a term denoting relationship, as a term indicating capacity, and as a term of special protection. Underlying these alternative specification are very different concepts about the child.

For the purpose of criminal responsibility, the age limit is 7 and 12 years under the Indian penal code, 1860 for the purpose of protection against kidnapping, abduction and related offences, the age limit has boys and 16 years in the case of boys and 18 years in the case of girls.

However, the Indian penal code, while defining rape, in section 375, exempts a person from the charge of rape if he has forcible sexual intercourse with his wife, who is above 15 years of age.

Under the Immoral Traffic (prevention) Act, 1986, a child means a person who has not completed 16 years of age and a minor means a person who has completed 16 years of age but not completed 18 years.

Under the Child Labour Prohibition and Regulation Act, 1986, a child means a person who has not completed the 14 years of age; below the age of 14, he/she can work in non-hazardous industries. An area of concern is that no minimum age has been specified for child labour for purposes of special treatment under the juvenile justice (care and protection of children) Act, 2000, the age limit is 18 years for both boys and girls. The protection of women from Domestic violence Act, 2005 defines a child as any person below the age of 18 years and includes any adopted step-or foster child under the plantation Labour Act, 1951, a child means a person who has not completed his fourteenth year of age, while an adolescent means a person who has completed his fourteenth year of age but has not completed his eighteenth year of age.

Under the Merchant Shipping Act, 1951, no person under 15 years of age shall be engaged or allowed to work in any capacity in any ship, except in school ship, or training ship, in accordance with the prescribed conditions, or in a ship in which all persons employed are members of one family, or in a home grass, or where such person is to be employed on nominal wages and will be in the charge of his father or other adult near male relative.

Under the Age of majority Act 1875, every person domiciled in India shall attain the age of majority on his completing the age of 18 years and not before that. The Indian majority Act, 1875, was enacted in order to bring about uniformity in the applicability of laws to persons of different religions unless a particular personal law specifies otherwise, every person domiciled majority upon completion of 18 years of age. However, in the case of minor for whose person or property, or both a guardian has been or appointed or declared by any court of justice be for the age of 18 years and in case of every minor the superintendence of whose property has been assumed by the court of wards, before the minor has attained that age, of majority will be 21 years and not 18 years. The Hindu Minority and Guardianship Act, 1956 in sec. 4(a) defines a 'minor' as a person who has not completed the age of 18 years. The age of majority for the purposes of appointment of guardians of person and property of minors, according to the Dissolution Muslim marriages Act, 1939, is also the completion of 18 years.

An anomaly is prevalent as far as a child's consent to sexual intercourse is concerned. The law considers a person aged less than 18 years to be child/minor, not competent to take major decisions affecting her to take major decisions affecting herself or others for the purposes of the Indian majority Act, the child marriage Act, and the Representation of peoples Act. However, under section 375 of the Indian penal code, the girl is given the right to consent to sexual intercourse yet, she cannot marry at that age even with the consent of her parents. She cannot be taken out of the keeping of her lawful guarding even with her consent for lesser purpose.

But strangely, she can give consent to sexual intercourse as long as she does not go out of the guardianship/keeping of her lawful guardian.

The Hindu marriage Act, 1955, states that a female has to be 18 years of age before she can legally marry, similarly under the Christian and Parsi marriage laws, the age of marriage is 18 years under the Muslim personal law, and the age of marriage for both boys and girls is the age of attainment of puberty. In public Interest litigation, the complex issue of girl's marriageable age was brought before the supreme court of India by a father whose 15 years old daughter went missing and then claimed to have got married. But despite the girl not being of the marriageable age of 18 years and also being a year short of the age of consent for sex, the father found himself unable to press rape charges against the husband because of contradictory rulings by the courts. Two courts – Delhi and Andhra Pradesh have ruled that 15 years could be annulled if it has the girl's consent. In both the cases, though the girls, being 15 years old, had reached the age of discretion. The Supreme Court took a humanitarian approach and said that it would not set aside the orders of high courts, as that would unsettle the young couples.

The absence of comprehensive and common definition of the term 'child' creates confusion and dilemma. One would like to have a uniform age limit legally prescribed for the status of childhood, but that may perhaps not be possible. Some norms can be laid down; the same age limits in the laws appear to be arbitrary while some are based only on social-cultural perception and some on other grounds. In the best interest of the child interpretations were to be adopted, one could perhaps err on the side of a higher age limits for protective care and a lower age limit in respect of civil and cultural matters. The question of review of the definition of the 'child' in the light of Article 1 of the convention on the Rights of

the child has been referred considered by the commission while undertaking a comprehensive review of the code of criminal procedure, the Indian Evidence Act, and the Indian penal code.

4.2 What are Child Rights?

All people under the age of 18 are entitled to all the standards and rights guaranteed by the laws that govern our country and the international legal instrument. They have been accepted by ratifying them.

The principles outlined in the international human rights framework apply both to children and adults. Children are mentioned explicitly in many of the human rights instruments; standards are specifically modified or adapted where the needs and concerns surrounding a right are distinct for children. The Convention on the Rights of the Child brings together the children's human rights articulated in other international instruments. This Convention articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children.

4.3 Child's Right under Constitution of India

The constitution of India guarantees for child rights and has specially included for them as under:

4.3.1 Right to free and compulsory elementary education for all children in the 6 to 14 age group (Article 21 A)

4.3.2 Right to be protected from any hazardous employment till the age of 14 years (Article 24)

4.3.3 Right to be protected from being abused and forced by economic necessity to enter or strength (Article 39(e)).

4.3.4 Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment (Article 39(e)).

Besides these they also have rights as equal citizens of India, just as any other adult male or female:-

- I. Right to equality (Article 14)
- II. Right against discrimination (Article 15)
- III. Right to personal liberty and due process of law (Article 21)

- IV. Right to being protected from being trafficked and forced into bonded labour (Article 23)
- V. Rights of weaker sections of the people to be protected from social injustice and all forms of exploitation (Article 46)

4.4 Human Rights Violation of Child

4.4.1 Sexual Abuse of child:

Child sexual abuse is any kind of physical or mental violation of a child with sexual intent, usually by a person who is in a position of trust or power vis-à-vis the child. It is any sexual behavior directed towards a person under the age of 16 years, without informed consent. Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has by design or by regime of the usual societal or specific responsibilities in respect of the child engaged or permitted engagement of the child in activity of a sexual nature, which is intended to lead to the sexual gratification of the abusive person.

Child sexual abuse includes an adult exposing his/her genitals to a child or persuading a child to do so, an adult touching a child's genitals or making the child touch the adult's genitals, an adult involving a child pornography, an adult intercourse with a child, or any other sexual gesture or suggestion made by an adult towards a child.

Child sexual abuse means contacts or interactions between a child and an older or more knowledgeable child or adult (stranger, sibling, parent, or caretaker), when the child is being used as an object of gratification for the older child's or adult needs. Such contacts or interaction are carried out against the child using force, trickery, bribes, threats or pressure.

4.4.2 Different kinds of Child Sexual Abuse:

- a) Child Labourers and young domestic workers are most often used for the sexual gratification of the employers or other adults.
- b) Rape within the family.
- c) Due to increase in HIV/AIDS risk from adult prostitutes, there is an increased demand for younger child prostitutes.
- d) Sex tourism – foreign exchange through sex trade.
- e) Child marriages.
- f) Child pornography.

4.4.3 Cases:

1) Sexual intercourse below the age of 16 years amounts to rape, whether it is done with or without her consent (sec. 375(6) I.D.C) This is because consent of a minor is no consent. In the case of Harpal singh v/s state of Himachal Pradesh, AIR 19891 sc 361, it was argued that the prostitute used to do sexual intercourse and no injuries were found on her private parts It was held that it was a case of sexual intercourse with consent. But the Supreme Court held that since the girl was aged below 16 years, the question of consent was totally irrelevant. In the case of State of Madras v/s K.Govindam, (1969) cr. 823 (Ker), court observed that manipulation and movement of the penis in the hand of a minor boy in such a way that it creates an orifice for making the manipulated movement of insertion and with drawl of insertion and with drawl up to the point of ejaculation of semen comes under the purview of child sexual abuse/avulse and is an offence punishable as an unnatural offence (sec. 377 I.P.C.)

4.4.4 Trafficking of Child: -

Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent.

Trafficking in human beings, especially in women and children has become a matter of serious national and international concern. Women and children – boys and girls – have been exposed to unprecedented vulnerabilities. Commercial exploitation of these vulnerabilities has become a massive organized crime and a multimillion dollar business. Nations are attempting to combat this trade in human misery through legislative, executive, judicial and social action. Children by the promise of better employment and a more prosperous life taken away far from their homes for trafficking shall be protected. Some others are kidnapped and sold. Trafficking violates a child's right to grow up in a family environment and exposes him or her to range of dangers, including violence and sexual abuse.

4.4.5 Object for Child Trafficking:

There are various objects for which child are being trafficked. They are for bonded labour, domestic work, agriculture labour, construction work, carpet industry, garment industry fish/shrimp export as well as other sites of work in the formal and

informal economy some illegal objects are also behind trafficking such as begging, organ trade, Drug padding, smuggling, Sexual exploitation such as forced prostitution, socially and religiously sanctified forms of prostitutions, sex tourism, pornography, for marriage, adoption etc are also factors behind trafficking of child.

4.5 Legal Frame work that combats against the Human Trafficking in India

4.5.1 The Constitution of India:

It clearly states that the Right against exploitation is a fundamental right. Under Article 23, traffic in human beings and beggar (bonded labour) and other forms of forced labour are prohibited. Any contravention of this provision is a punishable offence.

4.5.2 The Immoral Traffic (prevention) Act 1956 -

The Government of India enacted the suppression of Immoral Traffic in women and girls Act 1956. The Act was amended in 1986 and re-titled as the Immoral Traffic (prevention) Act, 1956. The amended Act widened the scope of the law to cover both the sexes exploited sexually for commercial purposes and provided, inter alia, enhanced penalties for offences involving to prohibit prostitution in its commercialized form without rendering prostitution per se an offence. The Act lays down penalties for keeping a brothel or allowing premises to be used as a brothel, living on earnings of prostitution, prowling inducing and inducing person for the sake of prostitution, detaining a person in premises where prostitution is carried on, prostitution in or in the vicinity of public places, seducing or soliciting for purpose of prostitution and seduction of a person in custody, besides contemplating a specialized machinery for its enforcement, the Act envisages a comprehensive schemes for rescue, protection and corrective treatment of prostitution. The Immoral Traffic (prevention) Act, 1956 prescribes stringent action against those inducing children (below 16 years) and minors (16 to 18 years) in the offence of procuring, inducing or taking a person for the sake of prostitution. If the offence has been committed against a child, the punishment is rigorous imprisonment for a term of not less than 7 years, which may extend to life. If the victim is a minor, the punishment is from 7-14 years. The Act further provides that where any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has committed an offence of

detaining a person in premises where prostitution is carried on. Similarly, when a child or a minor found in a brothel, on medical examination, detected to have been sexually abused, it shall be presumed, unless the contrary is proved, that the child or minor has been detained under the purposes of Act.

4.5.3 The Indian penal code:

- The Indian penal code includes offences, among others, relating to exposure and abandonment of child under 12 years by parent or person having care of its wrongful or restraint or wrongful confinement, kidnapping, abduction, slavery and forced labour, and sexual offences.
- Of particular significance and offences relating to kidnapping from Lawful guardian (sec. 361),
- Kidnapping, abducting or inducing woman to compel her into marriage (sec. 366),
- Procurements of minor girls (sec. 366 A),
- Importation of girl from foreign country (sec. 366 B),
- Sling minor girls for purposes of prostitution (sec. 372),
- Buying minor girls for purpose of prostitution (sec. 373),
- Rape (sec. 375)
- Any unnatural offences (sec. 377)
- Sexual intercourse with a woman with or without her consent when she is under 16 years of age amounts to rape and the offender is punishable upto imprisonment for life.
- Kidnapping and/or abduction for export (kidnapping out of India sec. 360 IPC).
- Importation if girl from foreign country with intent to or knowledge that she might be forced to illicit intercourse (sec. 366 B)
- Kidnapping/abduction for slavery or to subject a person to grievous injury (such as in camel racing) etc (sec. 367 IPC)
- Buying or disposing of any person as a slave (sec. 370 IPC)
- Habitual dealing in slaves (sec. 370 IPC)

4.6 Child Pornography

Child pornography is publishing and transmitting obscene material of children in electronic form. In recent years child pornography has increased due to the easy access to the internet, and easily available videos on the internet. Child pornography is the most heinous crime which occurs and has led to various other crimes such as sex tourism, sexual abuse of the child etc.

4.6.1 Child Pornography in India:

Child pornography is a crime in India. Information technology Act, 2000 & Indian penal code, 1860 provides protection from child pornography. Child is the person who is below the age of 18 years.

In February 2009, the parliament of India passed the Information Technology Bill which made creation and transmission of child pornography illegal. The newly passed Information technology Bill is set to make it illegal to not only create and transmit child pornography in electronic form but even to browse it. The punishment for a first offence of publishing, creating, exchanging, downloading or browsing any electronic depiction of children in "obscene or indecent or sexually explicit manner" can attract five years in jail and a fine of Rs/- 10 Lakh.

Section 67 of the existing Act deals with "Publishing obscene information in electronic form" which is punishable. It is generally worded section that does not specifically define "Pornography" and make it an offence, and does not mention "Child Pornography" at all. But in its amended form, section 67 B proposes specifically to punish showing sexually explicit online or electronic content that depicts children. It will also be an offence to "cultivate, entice or induce children to online relationship with other children for a sexual act."

Punishment for first conviction with imprisonment which may extend to 3 years & fine which may extend to 5 lakhs rupees. And for subsequent offence imprisonment which may extent to 5 years & fine which may extend ton 10 lakhs rupees. Section 292 of the Indian penal code, 1860 does not per se deal with obscenity online.

4.7 Child Labour and Human Rights

The evil of employment of children in agriculture and industrial sectors in India is a product of economic, social and among others, inadequate legislative measures. The framers of the constitution, being aware of the likely exploitation by different

profit makers for their personal gain specifically prohibited employment of children in certain employments. Article 24 of the constitution deals with the child labour directly where as Article 15 (3), 21 A, 39(e), 39 (f) and 47 deals with child labour indirectly.

Article of the constitution prohibits the employment of children below the age of fourteen years in any factory or mine or engaged in any other hazardous employment. Article 15(3) of the constitution enables the state to make special provisions for the welfare of children. The directive principle of state policy contained in Article 38(e) directs the state to safeguard the tender age of children from entering jobs unsuited to their age and forced by economic necessity.

Article 38(f) imposes a duty on the state to secure facilities for the healthy development of children, and to protect childhood and youth against exploitation as well as moral and material abandonment. Whereas the Article directs the state shall provide for compulsory education to all children of the age of 6 to 14 years, Article 47 imposes a duty upon the state to raise the levels of nutrition and standard by living of its people and improve public health.

The government of India has enacted various welfare legislation for the working children from time to time. The basic aim of the legislation is to prohibit the employment of children in certain employments and regulate the conduct of the employers of child workers in such a way that, these poor innocent children are not exploited any more. The protective provisions of the enactments do not cover children employed in smaller establishment. However, the Government of India enacted the child labour (Prohibition and Regulation) Act, 1986 which prohibits the employment of children in hazardous work and also regulates the conditions of work in certain other employment where the employment is not prohibited.

The Act has many provisions to be welcomed, but at the same time, it has lacunas and its own limitations.

4.8 Role of Judiciary on Child Labour

The role of the supreme court of India has been a profound concern making better the lives of children, who were objects of exploitation. The supreme court in **Bamdhva Mukthi Morcha v/s Union of India, (1984)** 3 SCC 161, held that "The right to live with Human dignity enshrined in Article 21 derives its life breath from the directive principles of state policy and particularly Article 39(e)(f) and Article 41 and 42 and at the last, therefore it must include protection of health and

strength of workers, men and women and of tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of maternity relief. These are the minimum equipments which must exist in order to enable a person to live with human dignity.

In **Sheela Barse v/s union of India**, AIR 1986sc1773, the Supreme Court found that though several states have enacted children Acts for the fulfillment of constitution obligation for the welfare of children under Article 39(f), yet it is not enforced in some states. It shall be enforced and administered without delay. Justice Bhangwati made a suggestion to formulate and implement a national policy for the welfare of children. Further, the Hon'ble Justice observed that the children's programmers should find a prominent part in our plans for development of resource, so that our children grow up to become citizens, physically fit, mentally alert and morally healthy, endowed with the skill and motivation needed by society.

Then the Supreme Court in SCC 244 L.K. Pandey v/s Union of India, observed that welfare of the entire community, its growth and development depends upon the health and well-being of its children and that children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. Further the supreme court in Vishal Jeet v/s Union India, 1990 sc 1412, held that Article 39(e) and Article 23 of the constitution are strictly adhered to and every step is ensured to safeguard the interest of the child worker and save them against all forms of exploitation.

In **peoples union for Democratic Rights v/s Union of Indian**, AIR 1982 SC 1473, the supreme court held that the employment of children below 14 years of age was hazardous, ultra-vires to the Article 24 of the constitution. The court took a serious note of the construction industry being kept out of the employment of children Act, 1938. Expressing concern about the "sad and deplorable demission" the court advised the state government to take immediate steps for the inclusion of construction works in the schedule of the Act and to ensure that the constitution mandate of Article 24 is not violated in any part of the country.

The aforesaid view was reiterated in *laboures working on SalalHydra-Project v/s State of Jammu and Kashmir*, AIR 1984 sc 177, where the Supreme Court held that construction work being hazardous employment, no children below the age of 14 can be employed in such work because of constitution prohibition contained in

Article 24. In the instant case the Supreme Court has travelled beyond its traditional job, that is directioning the central government to persuade the workmen to send their children to nearby schools and arrange, books and other facilities such as transportation etc.

There are numerous cases where the judiciary has made significant contribution to the cause of child workers. The Apex court has given a new dimension to several areas such as locus standi, minimum wages, and Employment of children. The glaring decision that deal with the payment of minimum wages to the children and the protection in flesh trade, employment of children in hazardous occupation, reflect the failed welfare of the children including child workers. The court also expressed its hope that the state government would direct its policy towards securing that the children are given opportunities and facilities to condition of freedom and dignity, exploitation and against moral and material abandonment.

The constitution of India provides Dignity, Equality, Liberty and freedom and the International Law through conventions and declaration has tried to stop the abuse of violation of rights of the child that exists at various levels unless a vibrant social movement along with the liberal legal culture is built up, the plight of the children and flagrant violation of their rights cannot be stopped. A radical change in the social outlook coupled with wider dissemination of legal literacy is required to promote the Human Rights of the child. For the promotion and protection of child rights, the National commission for protection of child rights, and children's courts were constituted in accordance with the mandate of the commissions for protection of child Rights Act, 2005.

4.9. Summary

India has the largest child labour force in the world. Since independence, the state has become fully conscious of its welfare function and its responsibilities towards children and consequently codified a number of enactments in consonance with the Directive principles of state policy as enshrined in the India constitution and the ILO convention and recommendation and adopted various measures for the protection and welfare of children; nevertheless child labour is increasing day by day indicating ambiguities and deficiencies in the present Legislative measures.

The principles outlined in the international human rights framework apply both to children and adults. Children are mentioned explicitly in many of the human rights instruments; standards are specifically modified or adapted where the needs and concerns surrounding a right are distinct for children. The Convention on the Rights of the Child brings together the children's human rights articulated in other international instruments. This Convention articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children.

This compilation and clarification of children's human rights sets out the necessary environment and means to enable every human being to develop to their full potential. The articles of the Convention, in addition to laying the foundational principles from which all rights must be achieved, call for the provision of specific resources, skills and contributions necessary to ensure the survival and development of children to their maximum capability. The articles also require the creation of means to protect children from neglect, exploitation and abuse.

All children have the same rights. All rights are interconnected and of equal importance. The Convention stresses these principles and refers to the responsibility of children to respect the rights of others, especially their parents. By the same token, children's understanding of the issues raised in the Convention will vary depending on the age of the child. Helping children to understand their rights does not mean parents should push them to make choices with consequences they are too young to handle.

The Convention expressly recognizes that parents have the most important role in the bringing up children. The text encourages parents to deal with rights issues with their children "in a manner consistent with the evolving capacities of the child" (article 5). Parents, who are intuitively aware of their child's level of development, will do this naturally. The issues they discuss, the way in which they answer questions, or the discipline methods they use will differ depending on whether the child is 3, 9 or 16 years of age.

The Convention on the Rights of the Child has been used around the world to promote and protect children's rights. In the years since its adoption the world has seen significant advances in the fulfillment of children's rights to survival, health and education through the provision of essential goods and services, and a growing

recognition of the need to create a protective environment to shield children from exploitation, abuse and violence.

However there is still much to be done to create a world fit for children. Progress has been uneven, with some countries lagging considerably behind others in giving child rights its deserved prominence on national agendas. And in several regions and countries some of the gains appear in danger of reversal from threats like poverty, armed conflict and HIV/AIDS.

Every one of us has a role to play in ensuring that every child enjoys a childhood. If you are a parent, teacher, social worker or other professional working with children, raise awareness of the Convention on the Rights of the Child among children. If you are a member or employee of an organization working for children's rights, raise awareness of the Convention and its Optional Protocols, research and document governmental actions and policies and involve communities in promoting and protecting children's rights. If you are a member of the media, promote knowledge and understanding of children's rights and provide a forum for children's participation in society. If you are a parliamentarian, ensure that all existing and new legislation and judicial practice is compatible with your country's international obligations, monitor governments' actions, policies and budgets and involve the community—including children—in relevant decision making.

Everyone can participate in respecting, protecting and fulfilling children's rights. And UNICEF can help. Whoever you are and wherever you are, contact your local UNICEF office or National Committee to see what you can do.¹¹

4.10 Some useful books

1. Constitution Law of India by Dr. J.N.Panday, Central Law Agency.
2. The Constitution of India by P.M.Bakshi, Universal Law Publishing co.
3. Administrative Law by Dr. P.D.Kesari, Central Law Publication.
4. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
5. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005

¹¹ http://www.unicef.org/crc/index_what.html

6. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
7. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
8. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
9. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
10. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

4.11 Check your Progress

A. Which of the following statements are true : -

1. According to United Nations convention a child means every human being below the age of 18 years.
2. Article 21A of constitution of India states Rights to free and compulsory education for all children between 6 and 14 years of age group.
3. Article 39 of Constitution states Right to freedom of speech.
4. Sexual Abuse of child means any kind of physical or mental abuse of child.
5. Object of trafficking of child is to provide free education to child.
6. Buying minor girls for purpose of prostitution is offence under sec 373 of I.P.C.
7. Child pornography means publishing and transmitting obscene material of children in electronic form.

B. Fill In The Blanks : -

1. Article 21A of constitution states Rights to.....andeducation for all children between the age group of 6 to 14 years.
2. Sexual intercourse below the age of 16 years amount tounder I.P.C.
3. The constitution of India states that Right against exploitation is a.....
4. The Immoral Traffic (Prevention) Act 1956 protects child from

5. Child Pornography is a.....India.
6. People union for Democratic Right v/s union of India case relates toof children.

1.12 Answer to check your progress

(A)

- | | |
|----------|---------|
| 1. True | 2. True |
| 3. False | 4. True |
| 5. False | 6. True |
| 7. True | |

(B)

- | | |
|------------------------|-----------------|
| 1. Free and compulsory | 2. Rape |
| 3. Fundamental Rights | 4. Prostitution |
| 5. Crime | 6. Employment |

4.13 Terminal Questions:

1. Discuss the Human Rights of a Child.
2. Discuss the Constitutional Provisions relating to the protection of a child.
3. Discuss the role of Judiciary in protection of Human Rights of a child.

UNIT - 5

JUDICIAL APPROACH FOR PROTECTION OF HUMAN RIGHTS OF WEAKER SECTION OF SOCIETY

STRUCTURE:

- 5.1 Introduction
- 5.2 Rights of Women
- 5.3 Freedom from Bonded or Forced Labour
- 5.4 Rights of the Child
 - 5.4.1 Violence against Children
- 5.5 Child Labour
- 5.6 Rights of the Scheduled Castes and Scheduled Tribes
- 5.7 Minority Rights
- 5.8 The Rights of the Disabled
- 5.9 Disabled
 - 5.9.1 Disability : Definition and Causes
 - 5.9.2 Approaches to Disability
 - 5.9.3 Laws and Provisions dealing with a Disability
 - 5.9.4 International Provisions
 - 5.9.5 National Provisions: The Constitution of India
 - 5.9.6 Disability Laws
- 5.10 Steps towards Prevention and early Detection of Disabilities
- 5.11 Summary
- 5.12 Some Useful Books
- 5.13 Check Your Progress
- 5.14 Answer to Check Your Progress

OBJECTIVES

After going through this unit you should be able to understand:

- who the weaker sections of society are
 - how their Human Rights are violated
 - what are the constitutional and legal provisions for protection of their Human Rights
-

5.1 Introduction

Article 28 of the Universal Declaration of Human Rights, 1948 recognizes that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. Closely following this, Article 38 of the India Constitution requires the state to “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, This indeed is the ultimate objective of the whole Part IV of the Constitution. The right to development has not come to be recognized as “an inalienable human right. In which all human rights and fundamental freedoms can be fully realized. It is also recognized that “The human person is the central subject of development. The right to development in India is grossly impeded by the stupendous nature of the developmental problems which India faces. At the root of these problems are poverty, illiteracy and overpopulation which form a vicious circle each contributing to the other While the British could be blamed for the conditions in which the country found itself in 1947, the succeeding governments have not done enough for the eradication of poverty and illiteracy and reverse the process of population explosion . At independence India’s population was around 360 million; it is now a billion in 1970 some 16 per cent of the population was below the poverty line, now it has risen to 37 percent of the current population. These problems have a multiplier effect on all other social and economic problems.

In 1992, the top 20 percent of the population accounted for more than two fifths of the total consumption expenditure while the bottom 20 percent had a share of a mere 8.5 percent of the total consumption. The top 10 percent spent eight times

more as such as the bottom 10 percent. There are parts of India, such as the tribal belts of the districts of Kalahandi and Bolangir in the state of Orissa, exposed to “the scourge of poverty, malnutrition and even starvation” attributed to repeated crop failures, inhuman exploitation of the tribal’s and politicization of human calamities, with the administration “woefully unequal to the task” Evidently, the poverty eradication programmes started with a new zeal since the seventies have failed to mitigate, let alone prevent, such human tragedies. The Government of India has announced plans of setting up a nationwide public distribution system whereby availability of 10 kilograms of food grains per head per month at cheapest rates is ensured for each family below the poverty line.

Our five year plans are likely to have a special thrust for rural development “with poverty alleviation programmes as its major component” These would encompass programmes for reduction of rural unemployment land reforms, improved access to water resources, drought, prone area programme and desert development programme. The Chief Ministers Conference of January 1997 had identified “seven basic minimum services” namely safe drinking water, primary health services, universal primary education, public housing assistance to shelter the less poor, better nutrition for children, road linkages with all villages and habitations, and public distribution system for the poor. The Prime Minister of India has recently admitted that over 400 million Indians are illiterate, despite the fact that the first fifty years of expansion of educational facilities have credited India with one of the largest educational infrastructure in the world. The shelter shortage of by 1997 was estimated to be 7.57 million dwelling units. The process of globalization and liberalization, now afoot in India, has not found favor in certain quarters and the fear that it is harmful for the uplift of the poor is often expressed. It is contended that trade liberalization has led to decline in food grain production and consumption. It would hit hard the landless rural communities due to the loss of traditional markets, and deprive them of food entitlements and purchasing power.

The International Labour Organization, in its World Employment Report for 1996-97, cautioned against economic liberalization on all fronts at one go as it would lead to sharp increases in underemployment and poverty. While economic reforms are essential, they should be pursued in a phased manner, accompanied by programmes to strengthen the productive capacity of the poor, development of

rural infrastructure, credit schemes and improved access to education and health services” India has registered a discernible level of development for the last fifty years on many fronts. It has also mastered some of the most modern technologies such as those in the fields of communication, space and nuclear energy. However, the magnitude of the problems engendered by poverty, illiteracy and population explosion has apparently dwarfed these achievements and demand greater and more sustained efforts. In the meantime, the Indian society will continue to be bedeviled by the maladies of inequality and exploitation, unless the governmental efforts are equally complemented by committed non government ones.

5.2 Rights of Women

Two principal facets of rights of women in India are highlighted here namely the problem of equality with men and trafficking and other undesirable practices and atrocities against women. Underlying these are the age old attitudes and customs of an ancient male dominated society. While violations of women’s rights are not unknown in other societies, including the developed ones, what aggravate them in the context of the Indian society are poverty, illiteracy and some of the rationally and morally untenable social customs, such as dowry, sati etc. The right to equality in the context of women has many aspects equal pay for equal work equality of opportunity, equality before law, political equality, and equality of status and so on. A number of laws exist in the statute book. However implementation of these laws has left much to be desired. Parliament enacted the Indecent Representation of Women (Prohibition) Act in 1986 to expand the law of obscenity contained in the Indian Penal Code, 1860 and to counter a growing tendency of indecent representation of or references to women in publications such as advertisements, which is derogatory to women. However, the implementation of this Act has not been effective. Despite the Suppression of Immortal Traffic in Women and Girls Act, 1956, poverty has pushed a number of women into one of the oldest professions in the world. Co-ordinate action is called for not only to retrieve and rehabilitate them but to prevent their exploitation.

There has been a significant increase in reported crimes against women at least in certain metropolitan cities like Delhi. Parliament is currently considering a law to reserve 33 percent of the sets in the LoK Sabha (the Lower House of Parliament) and the state legislative assemblies. This follows the 73 rd Constitution (Amendment) Act, 1986 which reserved 30 percent of seats in councils at village,

bloc and district levels. However, the male dominated political parties have so far stalled all attempts at getting the measure adopted into law, In order to address the problems of implementation of women's rights; Parliament enacted the National Commission of Women Act 1990. While the Act empowers the Commission to investigate, examine and review all matters relating to the safeguards provided for women under the Constitution and other relevant laws, the Commission feels that its powers are not equal to its tasks, and that it should have power to security or summarily decide on cases of violation of gender justice. Also, there should be commissions for women at state and district levels as well. Given the traditional male domination in the Indian society, the Commission has a most unenviable task.

5.3 Freedom from Bonded or Forced Labour

Despite the constitutional interdiction, poverty and illiteracy continue to be the breeding grounds for exploitation of human being and keeping them often in perpetual bondage. The Bonded Labour (Abolition) Act adopted in 1976 has been an attempt to implement Article 23 of the Constitution. However, the indigent circumstances keep people in bondage and their exploiters reaping profits from their cheap or free labour. The Supreme Court' decision in the Bandhua Mukti Morcha case injected a fresh momentum in efforts to eradicate forced labour. It lead to a 1985 amendment to the Act of 1976 to broaden the application of the law. It also lead to further Court judgements declaring that labour on payment of unreasonably low wages amounts to forced labour prohibited under the law .

Pledging one's labour or the labour of one's children for little or no wages in repayment of a debt has been the bane of India's problem of rural indebtedness. Clearly no effective answer to it is in sight except long term economic development. In the meantime, there will continue to be reports of forced or bonded labour

5.4 Rights of the Child

Indian became a party in 1992 to the International Convention on the Rights of the Child 1989, following popular demand. There is no doubt that all human right (save perhaps the political rights) must apply to the child as they are essential for the development of the human beings. While the rights of the child call for a comprehensive treatment, we shall confine to its two aspects in the context of the

Indian society which have lately highlighted the need for urgent affirmative action. They are the incidence of violence against children, including violence by the criminal justice system, and the practice of child labour.

5.4.1 - Violence against Children

Trafficking in children is prohibited under the Suppression of Immoral Traffic in Women and Girls Act 1956 (strengthened by an amendment of 1986). Yet the Act is not implemented. The National Crime Records Bureau's report on "Crime in India" has reported a rise in crime against children in recent years. There are also reports of growing violence against street children in many urban areas. Parliament enacted the Juvenile Justice Act, 1986 principally for "the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. The Act improves on and replaces the Children Act, 1960 and other various state enactments on the subject. It creates the following new offences: cruelty to juvenile, employment of juveniles for begging, giving a juvenile intoxicating liquor or narcotic drug or psychotropic substance, and exploitation of juvenile employees. It provided for juvenile homes for neglected children and special homes and observation homes for delinquent juveniles. However, for lack of resources the number of such juvenile homes so far established has been limited. Also, some of those few which exist are not properly run, even a brutal murder of an inmate by another took place in a Delhi Observation Home. The National Crime Records Bureau's data indicate that juvenile delinquency continues to show a declining trend. In 1994 it recorded a 17.2 percent drop over 1993. A total of 5,962 cases were registered against juveniles in 1994, and 38.4 percent of juvenile in custody were awaiting trial. A disturbing trend, however, has been the introduction of juveniles to serious crimes.

5.5 Child Labour

Large scale exploitation of children for a free or cheap labour has been a bane of independent India. There is no reliable data on the exact number of children being exploited at work. In India the estimates range from 20 million to 100 million. Children are engaged in a variety of industries or vocations-making of matches and fireworks, carpet making, glass bangle-making, brasswares, plastic and rope weaving, salt extraction, incense stick production, diamond cutting and polishing,

biscuit-making, steel rolling and chips recycling, domestic work, prostitution, construction industry, etc. This painful reality exists despite the Employment of Children Act, 1938 (amended 1985), the Child Labour (Prohibition and Regulation) Act, 1986 (which prohibits employment of children in hazardous occupations and regulates it in others), and other laws like the Factories Act, 1948. Indeed, child labour exists more in the unorganized section than in organized, which makes its detection difficult, although some of the NGOs seem to be doing extremely effective work in this regard. The Prime Minister of India in his Independence Day address to the nation on 15th August, 1994 pledged elimination of child labour from all hazardous industries by the year 2000. The government's hands are now being forced by a revolutionary Supreme Court judgment of 10th December, 1996. The Government has been given a period of one year to implement this decision. One hopes that the Supreme Court's initiative will operate as the much-awaited shot in the Arm. It would appear that there is also scope for private initiative. The rights of the girl child have received a special emphasis the world over recently. India is notorious for its neglect of the girl Child. The problem is multifaceted; it encompasses feticide, female illiteracy, social discrimination, child marriage and so on. There is a need for changing social attitudes through a process of social mobilization. There is also a need for concerted administrative, legal and social action to eliminate inequality of the girl child, female feticides and female infanticides.

5.6 Rights of the Scheduled Castes and Scheduled Tribes

As seen already, for historical and socially wrong reasons, the Indian society perpetrated a system of exploitation and dehumanization of some of the socially and economically most backward classes. These classes, as identified in a Schedule to the Constitution, are known as the Scheduled Castes and Scheduled Tribes. Majority of them are below the poverty line. The legal and political system provides for a range of measures of affirmative discrimination in their favour, such as reservation of seats in legislatures, reservation of jobs, reservation of seats in educational institutions, special scholarships, etc. Yet much of their lot is yet to cross the Rubicon of inequality, and still subjected to indignities, humiliation and harassment by some of the members of more advanced classes in society. The rationale behind the Scheduled Castes and the Scheduled Tribes (Prevention of

Atrocities) act, 1989 has been to stem the atrocities against them and to strengthen the constitutional interdiction. Also, in 1990 the Constitution was amended to establish a seven-member high-level National Commission for the Scheduled Castes and the Scheduled Tribes to investigate and monitor all matters relating to the safeguards provided for Scheduled Castes and Scheduled Tribes, to examine specific complaints of violation of rights and safeguards, and to make recommendations to the government for effective implementation of these rights and safeguards.

Despite these legislative measures, atrocities against the Scheduled Castes and Scheduled Tribes are being reported whether as part of custodial violence, bonded labour, violence against women or other human rights violations. The Commission on Scheduled Castes and Scheduled Tribes has expressed concern over the rise in the number of such atrocities. Protection of land rights has become a crucial issue. The answer to the economic backwardness of these classes appears to lie in spread of education, not necessarily in reservations or measures of affirmative discrimination. The reservations of affirmative discrimination has a knack of benefiting more advanced segments of these classes, and in the process, other less fortunate ones remain left in the lurch. Problems of the tribals too cannot be solved within the framework of reservations alone.

The recent Indian politics have thrown up another issue- protection of other backward classes. The Indian society is highly segmented and that there are other backward classes other than the Scheduled Castes and the Scheduled Tribes, which need special attention. However, the approach to meet the problem of bringing of social justice to these sections of people adopted by the government appears to be two-pronged-one, creation of a system of reservations, and two, determination of OBCs based on caste rather than economic criteria. Both tend to be populist measures aimed at "vote-grabbing through causing social divisions". There is much truth in the statement: "Today backwardness is neither a social stigma nor a handicap. It is the politician's chartered vehicle to power and pelf".

5.7 Minority Rights

The term "minority" has not received adequate definition in the Indian context although it is clear that the Indian context is different from the European. Article 30 of the Constitution speaks of "all minorities, whether based on religion or language ". While it does not deny the existence of minorities identified on criteria

other than religion and language, the current political vocabulary accepts only religious and linguistic minorities. The founding fathers of the Constitution were indeed more keen to insure the protection of religious minorities as part of the transition of India into independence." The partition of India into two countries resulted from the false apprehensions that the majority community in India would not ensure the rights of a minority community. Yet India has had a tradition of tolerance and the social synthesis of diverse religion, a tradition lately marred by the rise of groups and political parties advocating religious fanaticism. The politics of religion have to do with this more than anything else. Such groups were responsible for the pre-planned destruction of the Babri Masjid in December, 1992 which fomented considerable ill-feelings leading to several riots aimed more at one community than the other. Happily, the religious fanaticism is confined to small groups and the Indian electorate has time and again endorsed secularism and forced many of these groups even to moderate on their policies. The National Commission for Minorities Act was enacted in 1992 aimed at protection of religious minorities such as Muslims, Sikhs, Buddhist and Parsis. While the legislation and the Commission need strengthening, much more can be done by the commission than what it has been able to achieve so far, spread of secular education will go a long way in providing a firm foundation for development of minorities in India, There is enough law to protect various religions, or to prevent misuse of religious institutions for purposes other than religious.

5.8 The Rights of the Disabled

The rights of the disabled came to be formally recognized in India only recently, although they are readily read into Article 21 of the Constitution. According to one estimate, there are about 60 million disabled persons in the country belonging to various categories of disability. These categories include the blind, the deaf, the dumb, physically handicapped, the mentally retarded and the mentally ill. In the context of the India society, the disabled suffer from social stigma of various degrees, and this, more than other factors, stands in the way of their claims to equality and social justice. Thanks to the pressure exerted by the NGOs, Parliament adopted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act in 1995. However, the NGOs feel that there is

considerable tardiness on the part of the government in the implementation of the law. The 1995 law awaits formulation of rules and regulations, and appointment of the Central and state coordination committees as well as the executive committee and the Chief Commissioner of the Disabled Persons. While there are reservations of seats in the universities no such provision exists for the school level education yet. Therefore, the legislation largely remains merely on paper, despite its coming into force on 7th February, 1996. Regardless of any legislation, the Indian society has done precious little for a “barrier-free environment” for the handicapped. The public buildings, public transport system, public places, all unfortunately reminds one of this. Similarly, the Mental Health Act, 1993, which replaced the archaic Lunacy Act, 1912, has not come into force in all states, despite the requirement that it be implemented by 1st April, 1993. A number of judgments of the Supreme Court have revealed the shabby management of some of the 37 mental hospitals in the country. It is however, gratifying to note that the social awareness about the need for protection of the rights of the disabled and also the awareness on the part of the disabled themselves of their rights, has been gradually growing.

5.9 The Disabled

Old age disability are considered to be constrains on healthy existence of human beings. People belonging to these two categories are vulnerable. They are unable to take charge of their own lives and need help of others. For example, although the Constitution of India guarantees the person with disability and people in old age the full range of civil , political, economic, cultural and social rights yet these groups lead the life of deprivation. There is lack of necessary arrangements which can actualize the constitutional guarantees into reality.

Aging brings with it illness and general disability like low vision, blindness, deafness, arthritis, loss of mobility etc. Due to these conditions old aged people are unable to take care of themselves and need assistance in this regard. In the contemporary world there is debate focusing on idea of 'society for all'. This indicates that we must struggle to create a society that treats its entire members with respect and dignity. A democratic society must accept and accommodate the differences existing instead of excluding certain groups. Everyone including the old and disabled should have equal claims to resources and entitlements available in the society. Unfortunately these two groups have not been the beneficiaries of

the 'main-stream' society. The dominant social attitude towards a person with disability has been that of pity. There has been widespread discrimination against them in all walks of life. Consequently, they face exclusion, isolation and neglect the society

5.9.1 - Disability : Definition and Causes

Disability is defined as a condition grounded in the physiological, biological and intellectual impairment of an individual. World Health Organization (WHO) in 1976 has defined disability as lack of ability to perform an activity in a manner or within a range considered normal for a human being. It prevents fulfillment of a role that is considered normal. A handicap is a disadvantage for a given individual resulting from impairment and disability. The deeper understanding of disability tells us the term disability is itself flawed. All human beings are able in temporary way as we do not know when we may lose our ability due to some mis-happening or accident etc. On the other hand every individual has certain special ability. Therefore it is crude on our part to label some who do not fall in our category of 'normal' as disabled. It will be better if we use the term physically and mentally challenged people.

It is estimated that there are about 600 million people in the world who have disability of one or the other form. India alone has 22 million disabled people as highlighted by 2001 census of our country. The causes of disability include war, civil conflict, poverty, overcrowding and unhygienic living conditions, accidents, natural disasters, old age, congenital diseases etc. On the one hand poverty causes disability on the other hand disability and its consequences are increased by poverty. Disability often results in loss of income. It demands additional expenditure on medical treatment, purchase and maintenance of special devices etc. Malnutrition in various forms also results in disability like blindness, beriberi, pellagra, rickets etc. There are a number of occupational hazards for workers employed in stone quarrying, leather industry, glasswork, weaving, diamond cutting and hand embroidery. Children employed with carpet, cracker and match industry are especially at a great risk. Many women and children are abducted for being used in prostitution or slavery and beggary run in high risk of emotional, mental and physical disabilities.

5.9.2 Approaches to Disability

The issue of disability can be approached by four models: the charity model, bio centric model, the functional model and human rights model. The charity model treats people with disability as helpless victims needing care and protection and relies on goodwill of benevolent humanitarianism for care of the disabled. On the other hand human right model views all human beings irrespective of their disabilities as equal claimant to all rights and opportunities. It focuses on equality and non discrimination, reasonable accommodation, accessibility, equal participation, inclusion and fiefdom.

The rights of persons with disabilities to participate in their societies can only be achieved primarily through political and social action. Legislation has been enacted to guarantee to the disabled persons the rights to and opportunities for schooling right and access to community facilities, to remove cultural and physical barriers and to ensure that discrimination against disabled persons is discouraged and ended.

The emergence of disability rights movement brought with some change, including strong cross disability unity and major legal redefinition of disability. During the 1980s, the disability movement received a big boost with the UN General Assembly designating 1981 as the International Year of the Disabled. This has brought focus on three relatively new areas; (1) The progressive awakening of persons with disabilities to their status as a disadvantaged minority, and to the need for them to assert for their rightful place in the community; (2) the growing realization that in the past, the disabled have been relegated to the role of little more than "objects of condescension and charity"; and (3) the emerging global resolve to protect the rights of such disadvantaged people as potentially productive and contributing citizens.

5.9.3 Laws and Provisions Dealing with a Disability

While there has been concern for rights of various sections of society right from the beginning in general, this concern was expressed in the shape of equality for all. During the last few years there has emerged awareness to consider specific rights for vulnerable groups. Both at international community level and in various state specific formulations for these groups have either been accepted or are in the process of formulations.

5.9.4 International Provisions

There have been many international instruments created for protecting and promoting rights of the disabled. They provide the basic framework to ensure rights and other safeguards against discrimination and deprivation. Most important of these are:

- Universal Declaration of Human Rights, 1948
- The International Covenant on Civil and Political Rights, 1966
- The International Covenant on Economic, Cultural and Social Rights, 1966
- The UN Declaration on the Rights of Mentally Retarded Persons
- The UN Declaration on the Rights of Disabled Persons Right

Along with these UNO declared 1983-92 as Decade of Disabled Persons.

5.9.5 National Provisions: The Constitution of India

In the Constitution of India, the Preamble, Fundamental Rights (Part III) and the Directive Principles of State Policy (Part IV) outlay a constructive role of the state towards weaker and disadvantaged people. In the list of Fundamental Rights, Article 14 guarantees Right to Equality (right to equality before law and equal protection of law). The entry 24 in list III of schedule VII deals with welfare of labour, provident funds, liability of workmen's compensation, invalidity and old age pensions etc.

Indian legislature and judiciary also have promoted equality and social justice to achieve dignity of physically and mentally challenged people. Certain legal safeguards have been created like Persons with Disabilities (Equal opportunities, protection of Rights and Full Participation) Act 1995. It prohibits discrimination on the basis of disability in matters of public employment and in access to public facilities. On the positive side we have increase in litigation concerning disability. However, at present the disposal of such cases by the judiciary and quasi judicial bodies are very slow.

The government of India has established the Central Social Welfare Board to assist voluntary agencies in organizing welfare programmes for certain vulnerable groups including persons with disability.

5.9.6 Disability Laws

Since independence India has promoted welfare of the disabled persons which include:

- Opening of special employment exchanges
- Setting up of vocational rehabilitation centers
- Establishment of sheltered workshops
- Job reservation in certain identified positions ; and
- Provision of financial assistance

5.10 Steps towards Prevention and early Detection of Disabilities

(A) As per the Act, the Government and the local authorities are to undertake the following actions:

- i. Surveys, investigations and research concerning the cause of disabilities.
- ii. Promote methods of preventing disabilities
- iii. Screen all children at least once in a year for early detection.
- iv. Training of staff at Primary Health Centres.
- v. Initiate or sponsor awareness campaigns.
- vi. Take measures for prenatal, and post natal care of mother and child.
- vii. Create awareness amongst the general public on related issues through use of various media.

(B) The Act requires the Government and appropriate authorities to

- i) Ensure for education till a child with disability attains the age of 18 years.
- ii) Take steps to integrate the students with disability in the normal schools.
- iii) Set up special schools throughout the country to cater for the needs of special education to the disabled.
- iv) Equip the special schools with vocational training facilities.
- v) Make schemes and programmes for non formal education i.e. open schools, interactive electronic media, special books and equipment, part time classes etc.
- vi) To initiate research for designing and developing assistive devices, teaching aids, special teaching material etc.
- vii) To create facilities to train teachers to impart education to children with special needs.
- viii) To prepare a comprehensive education scheme to include the following

- a) Transport facilities.
- b) Financial incentives to the parents of the disabled children.
- c) Setting right the architectural barriers in buildings.
- d) Supply of books, uniforms etc.
- e) Grant of scholarships.
- f) Setting up of forum for the parents of disabled children to voice their grievances.
- g) Suitable modification in the system of examination.
- h) Restructuring of curriculum.

C. Employment

- i. Identification of posts which can be reserved for persons with disabilities.
- ii. Reservation for the disabled in every establishment.
- iii. Vacancies which cannot be thus filled on a particular occasion are to be carried forward.
- iv. A record of such enrolment is to be maintained by each employer.
- v. The schemes to ensure employment is to be maintained by each employer
 - Training opportunity
 - Relaxation in upper age limit
 - Regulating the employment
 - Institutionalize health and safety measures
 - Creation of an authority to administer the scheme

D. Affirmative Action:

- i. Provision of aids and appliances to persons with disabilities.
- ii. To form schemes for persons with disabilities for preferential allotment of land at concessional rates for house, business, setting up special recreation centres, special schools, research centres, factories. .

E. Non Discrimination

- i. Transport
 - Adaptation of rail compartments, buses, vessels and aircrafts to facilitate access.
 - Adapt toilets in various modes of transport to permit the wheel chair users to use them conveniently.

- ii. On road
 - Installing auditory signals for the visually handicapped.
 - Curb cuts and slopes in pavements for wheel chair users.
 - Engravings near zebra crossing for people with low or no vision.
 - Engravings on the edges of railway platforms.
 - Warning signals taking into account the various types of disabilities.
- iii. In Public Buildings
 - Construction of ramps.
 - Adoption of toilets for wheel chair users.
 - Braille symbols and auditory signals.
- iv. Promotion
 - If an employee acquires a disability during service he/she will not be dispensed with or reduced in rank.
 - No promotion shall be denied to a person merely on the ground of his disability.

E. Social Security

The Government and the local authorities shall within the limits of their economic capacity undertake the following: -

- Rehabilitation of all persons with disabilities.
- Grant of financial assistance to non government organizations
- Consult the non-governmental organization working for the cause of disabled persons while forming policies.
- Formulate insurance schemes for the benefit of employees with disabilities.
- Formulate a scheme for payment of unemployment period ~~III I, w nace to~~ persons enrolled with the special Employment Exchange enrolled for more than two years and could not be placed in any gainful employment shall be taken into care.

Mechanisms for Implementation:

It has to be aware and compassionate citizen with whose help the provisions of the law will be implemented. However the following have been catered for: -

1. Coordination Committees at Central and State level with adequate participation of the disabled, the NGOs, eminent persons.
2. The disabled people must be made well versed with the law and involved in the consultative exercises with the planners and providers of services and goods.
3. The law treats disability as civil rights rather than. a health and welfare issue.
4. By encouraging greater participation of disabled people in all activities of society the law projects them as assertive and productive service providers and not mere receivers.
5. Positive image of disabled people should be highlighted through the media.

5.11 Summary

In our country, there are various (NGOs) voluntary organizations and self-help groups working for irradiation of disability. These NGOs in collaboration with the Government provide training, employment and other support services to the disabled. They encourage Government to legislate disabled friendly policies and programmes.

However, many of the voluntary organizations view people with disability as dependents who need help to carry day-to-day activity of their lives. This is a problematic approach. On the other hand organizations work on right based approach. They are led by themselves. These self-help groups view people and help them.

5.12 Some useful books

- I. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
 - II. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
 - III. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
 - IV. Teaching Human Rights, by Harry Dhand, Book
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Code : 004182, ISBN : 8172732066,
Publication Year : 2005, Edition: First

V. Teaching of Human Rights, by Jagannath Mohanty,
Book Code : 005214 ISBN : 8176296481,
Publication Year : 2005

VI. Introducing Human Rights, Book Code : 005450,
ISBN : 0195681479, Publication Year : 2006

VII. International Human Rights Documents. by P R
Gandi, Book Code : 006599, ISBN : 817534152X,
Publication Year : 2001, Edition: First

5.13 Check your progress

(A) Check your progress

Which of the following statements are true:

- (i) Weaker sections of the society are vulnerable groups
- (ii) Poverty and illiteracy continue to be the breeding grounds for exploitation of man and for keeping them often in perpetual bondage.
- (iii) Trafficking in children is not prohibited under the suppression of Immoral Traffic in Women and Girls Act 1956.
- (iv) In Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, atrocities are against person not scheduled caste.
- (v) The full form of WHO is World Health Organ.

(B) Fill in the blanks

- (i) Fundamental rights and the _____ outlay a constructive role of state towards weaker and disadvantaged people.
- (ii) The government of India has established the _____ to assist voluntary agencies in organizing welfare programmes for certain vulnerable groups including persons with disability

15.14 Answer the check your progress

(A)

- (i) True
- (ii) True
- (iii) True

- (iv) False
- (v) False
- (B)
- (i) Directive Principles of State Policy.
- (ii) Central Social Welfare Board.

5.15**Terminal questions:**

- 1 Explain the meaning of Weaker Section of Society,
2. Discuss the Human Rights Violation of Weaker section of the society.
3. 3 Discuss the Human Rights Violation of disabled persons of the society.

UNIT - 6

Development and Human Rights Violations

STRUCTURE:

- 6.1 Introduction
- 6.2 Development and Human Rights Violation in India
- 6.3 Industry and Human Rights Violations
 - 6.3.1.-Environment
 - 6.3.2.-Displacement of Population
 - 6.3.3-Global Warming
 - 6.3.4- Child Labour
- 6.4 Dams and Human Rights Violation
 - 6.4.1- Displacement of Population
 - 6.4.2- Environment
 - 6.4.3- Dam blast and Flood
- 6.5 Urbanization and Human Rights Violation
 - 6.5.1- Flood
 - 6.5.2- Displacement
 - 6.5.3- Environment
- 6.6 Deforestation and Human Rights Violation
 - 6.6.1- Environment
 - 6.6.2- Bio - diversity
- 6.7 Rivers Inter Linking Process and Human Rights Violation
 - 6.7.1- Displacement
 - 6.7.2- Bio - diversity
 - 6.7.3- Resource Exploitations
- 6.8 Technology and Human Rights Violation
 - 6.8.1- Effect on Ozone Layer
 - 6.8.2- Nuclear reactor
 - 6.8.3- Mass Killing
- 6.9 Others Sources of development in Human Rights Violation

- 6.9.1- Uneven Economic Development
- 6.9.2- Development led Trafficking
- 6.9.3- Arms Proliferation
- 6.10 Apex Court's decisions on Development and Human Rights Violations.
- 6.1 Summary
- 6.12 Some Useful Books
- 6.13 Check Your Progress
- 6.14 Answer to Check Your Progress.
- 6.15 Terminal Questions

OBJECTIVES

After going through this unit you should be able to understand:

- how development affects Human Rights violation
- urbanization and Human Rights violations by it
- what measures or guidelines are given by Supreme Court of India in relation to development and Human Rights violation

6.1 Introduction

The concept of human rights is a very challenging issue now a days Human rights are simply defined as the rights which every human being is entitled to enjoy and be protected. These rights are civil, political, economic, social and cultural. Generally Human Rights are defined as essential claim of individuals recognized by the society and enforced by the state. These rights are essential conditions for full development of a person as a human being. To protect all these human rights there have been a number of domestic and international documents adopted since the beginning of 20th century especially after the end of Second World War. In India also lots of provisions have been made for this noble purpose. Many institution both government and non government were formed to protect these rights. Many constitutional provisions are there to look after the human right concern in India.

Though a number of documents and provisions are there to stop violation of human right in India but it has really failed in limiting violation of human rights throughout the nation. Human Rights in India are violated in several grounds. Police, armed forces and state agents violate human rights by using force against

the innocent poor woman rights and children. People are displaced which violates the human rights. Development activities also violate human rights in India.

6.2 Development and Human Rights Violation in India

Though Human Rights are violated in several sectors but it is important to give a brief look at the violation of Human Rights in India by development activities. As India is a developing nation it has been going through a period of transition. This development and transition has resulted in Human Rights violation. The people's movements in all corners of India have brought forth a number of serious issues related to rights, resources and life of the people, particularly the deprived section of the population. All these issues, if pursued in approach towards the development projects, policies and the paradigm itself. The struggle by the tribal's, peasants, backward classes, labourers and other sections of population against the displacement and destitution against big Dams, destructive and large scale industries, sanctuaries and national parks, five star tourism and other development projects have added an important aspect to the exploration.

Here, the struggle for the dam project by affected persons was to emphasize for the demand for a more human and equitable resettlement and particularly after 1980 in Narmada, Subarna-rekha, Koel-Karo and scores of such projects. The struggle have evolved a set of promises regarding the resettlement and displacement. On the other hand Industrialization, intensive agriculture, toxic dumping, deforestation and construction of large dams have damaged earth's surface water with all cruelty. Keeping in view the increasing demand for water the government of India brought out a new National water policy, which states that water is a prime natural resource, a basic need and a precious national asset. Planning development and management of water resources need to be governed by national perspectives (National Water Policy, 2002). While there exists excellent literature on different alternatives to water management the national perspective guiding water resource development in India, since Independence, has focused on the supply based paradigm of large water resource development projects as the only alternative to meet water and other uses in a sustainable manner. The policy decision announced by the government of India on the interlinking river project for managing fresh water resources in the twenty first country is based on the national perspective plan of a linear model of decision- making and its subsequent stages of implementation.

6.3 Industry and Human Rights Violation

Industry is a major source of development. Development is generally determined with industrialization. But this industrialization has led to major human rights violation all over the world and especially in India. In India establishment of industry has polluted the nation, displaced the people and also led to violation of workers' rights. In Industries children are employed, workers are exploited; thousands of raw materials are over used. Industrialization led to the violation of human rights in India on the following grounds.

6.3.1. - Environment:-

In India because of industrialization environmental pollution took place to a large extent. It occurred by big emission of poisonous gas, water from industries. In India industrialization is also affecting environment by noise pollution by its waste materials. We find lots of examples for that in which accidental happening by Union Carbide in Bhopal is the most burning example.

6.3.2- Displacement of Population: -

Industrialization also led to displacement of people in India. Many industrial projects in India have displaced several local people. For example, we can point out to Tata Nano project in West Bengal in which due to fear of displacement the project of Tata Nano was shifted to other place.

6.3.3- Global Warming:-

Another aspect of human rights violation in India by industrialization is global warming. Because of setting up of several industries the humidity level increases in India. Industrialization has resulted in global warming which violates human rights not only in India but all over the globe.

6.3.4. Child labour:-

Another human rights violation in India by industrialization is child rights violation. It is noticed that now a days industries are using many under aged workers as they are cheap and easily available. So it also seen that industrialization has also led to human rights violation.

In these ways industrialization in India has led to human rights violation on several grounds.

6.4 Dams and Human Rights Violation

Another aspect of development is construction of dams in several parts of the nation which also results in human rights violation. In Arunachal Pradesh because of dams several people are going to be displaced. It will also lead to flood problem in Assam. There is a proposal of construction of large scale dams in Siang, Subansin, Pagaladia, Tipalmukh. In this way construction of dams violates human rights. Construction of dams has led to human rights violation on following grounds :-

6.4.1 Displacement of Population:-

Construction of large scale dams had displaced a huge number of population in India. Because of lack of adequate policy of the government to resettle these displaced population, human rights violation takes place in India.

6.4.2 Environment:-

In India during the construction of dam's environment is affected adversely. Dam's construction has led to deforestation which affects the bio diversity of that area. Even construction of dams also affects the environment of the other areas vacated and occupied nearby due to that dam.

6.4.3 Dam Blast and Flood: - Another form of human rights violation caused by dams is blast of dams which led to flood in lower areas nearby the dams. When dam blast water flows in an unprecedented ways and the flood occurred because it harms the people.

In these ways construction of dams in India has led to human rights violation on several grounds.

6.5 Urbanization and Human Rights Violations

Another development related problem is urbanization and human rights violation with development and rapid growth of industrialization took place. This urbanization also resulted in human rights violation in India. Because of urbanization many people were displaced. Because of it people in urban areas failed to meet minimum basic health facilities and failed to have safe drinking water. Following are few areas where urbanization has led to human rights violation:

6.5.1 Flood:-

The unplanned urbanization in India especially in big and other cities is the reason of artificial flood. For example we can indicate the case of Guwahati and Mumbai

where a single rain results in artificial flood. The whole of the city is flooded with water and the life comes to stand still. It causes a lot of damage to human life, property and transport too.

6.5.2 Displacement:-

Urbanization and expansion of towns and cities results in displacement of local population inhabited in the nearby area. Urbanization in India is taking place at the cost of poor people who sacrifice their land in the name of development. People from villages come to cities in search of jobs and then settle there. This is causing damage to the rural areas as the working population is migrating to cities and no workers are available for rural work.

6.5.3 Environment:-

Another kind of human rights violation in India by urbanization is that it affects the environment. As urbanization takes place environment imbalance increases. Air, soil and water get polluted because of urbanization. Garbage in solid, liquid and gaseous form is severely damaging the land, water and fresh air.

In these ways urbanization in India has led to human rights violation on several grounds.

6.6 Deforestation and Human Right Violation

Along with development, expansion of industries and town causes deforestation. This deforestation also led to human right violation by affecting the environment. It also affects the livelihood of several tribal people for whom forest is a source of livelihood.

Deforestation in India violates human right on the following grounds:

6.6.1 Environment:-

First of all deforestation led to adverse effect in environment. It makes the environment imbalanced. It results in increase the level of carbon dioxide. It also results in less rain fall so deforestation caused by development attacks the environment.

6.6.2 Bio-diversity:-

Deforestation also affects bio- diversity. After cutting down of forest the inhabitants of the forest are displaced and many a time it leads to the end of a particular kind of inhabitants of the forest. Lots of tribes of forest have either

disappeared or are in danger of getting extinct. It affects in biodiversity and in short run or in long run it affects the human rights.

In these ways deforestation in India has led to human rights violation on several grounds.

6.7 Rivers Inter Linking Process and Human Rights Violation

River interlinking project in India is now a days a matter of discussion. Many people believe that this project will violate Human Rights of several people. To these people river interlinking project will harm human rights on the following grounds:

6.7.1 Displacement: -

River interlinking project will displace a great deal of populations. It will displace those people who are situated in those areas from where the linking river drain will flow.

6.7.2 Bio Diversity:-

Again some environmentalists believe that this project will affect the bio - diversity of India. They plead that it will harm the natural balance of the Indian environment.

6.7.3 Resource Exploitations: - Rivers interlinking project will lead to drainage of wealth from one place to another places with river water moving to new area. It will carry the river water resources and it will affect the local people from enjoying their own resources who are living in the vicinity of that area.

In these ways linking of river water in India has led to human rights violation on these several grounds.

6.8 Technology and Human Rights Violation

In India technology is also a source of human rights violation. The followers of Gandhian Philosophy are against technology and they oppose use of technology. Use of technology violates the human rights on the following grounds:-

6.8.1 Effect on Ozone Layer:-

Because use of the use of advance technology various gases are emitted. The emission of various gases like Carbon Monoxides, Sulphur and Chlorine leads in destruction of the ozone layer. Gas emitting from refrigerator also attacks the Ozone layer.

6.8.2 Nuclear Reactor:-

The nuclear reactors established for power generation also violate human rights. The radio activity emitted from the nuclear reactor not only harms the health of people but is responsible for change in genes of the coming generations. Chernobyl incident in Russia is the most burning example of that.

6.8.3 Mass Killing:-

Technology is also resulting in huge mass killing. Use of weapons in various wars and insurgencies are killing human being brutally. Because of technology Mumbai attack by terrorist was successful and many people were killed and the incident has had a great impact on the mind of the people for a very long time. Even the blast at Jaipur petrol pump which exploded claimed a number of lives of innocent people and it is also a result of development and technology which results in human rights violation.

In these ways technology in India has led to human rights violation on several grounds.

6.9 Other Sources of Development in Human Right Violation

Apart from all these above there are some other sources of human rights violation in India

6.9.1 Uneven Economic Development:-

The uneven economic development in India also violates human rights of the people. Because of uneven development many people from undeveloped areas are far from medical facilities, education facilities etc.

6.9.2 Development led to Trafficking:-

Development also led to trafficking of women and children. Because of smooth communication and traffic the weaker section is easily exploited illegally and their Human Rights violation happens.

6.9.3 Arms Proliferation:-

Development also leads to arms proliferation and drags supply of many arms easily. Development in India helps the terrorist organization to easily transport arms and ammunitions for their terrorist activities.

In India these are the ways which violate the human rights. Here we have seen that because of development activity large scale human rights violation takes place. Development had violation takes place.

6.10 Apex Court's Decision on Development and Human Rights Violations

In the case of Rural litigation and Entitlement Kendra v/s State of U.P., (1985) 2 SCC 431, the court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazard in them. The court had appointed a committee for the purpose of inspecting certain lime stone-quarries. The committee suggested the closure of certain categories of stone quarries having regard to adverse impact of mining operations therein. Large scale pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area.

In M.C. Mehta v/s Union of India, (1987) 4 SCC 463, the Supreme Court ordered the closures of tanneries at Jajmau near Kanpur, polluting the Ganga. The matter was brought to the notice of the court by the petitioner, a social worker, through public interest litigation. The court said that notwithstanding the comprehensive provisions contained in the Water (Prevention and Control of Pollution) Act and the Environmental (Protection) Act, 1987 no effective steps have been taken by the Government to stop the grave public nuisance occurred by the tanneries at Jajmau, Kanpur. In these circumstances, it was held that the court was entitled to order the closure of tanneries unless they took steps to set up treatment plants.

In Shiram food and fertilizer case, the supreme court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood, to take all necessary safety measures before reopening the plant. There was a leakage of Chlorine gas from the plant resulting in death of one person and causing hardships to workers and residents of the locality. This was due to the negligence of the management in maintenance and operation of the caustic chlorine plant of the company. This was brought before the court through a public interest litigation. The management was

directed to deposit a sum of Rs.20 lakhs by way of security for payment of compensation claims of the victims of Oleum gas leak with the Register of the court. In addition, a bank guarantee for a sum of 15 lakhs was also directed to be deposited which shall be en-cashed in case of any escape of chlorine gas within a period of three years from the date of the judgment resulting in death or injury.

In *M.C. Mehta (2) v/s Union of India*, the petitioner brought public interest litigation against Ganga water pollution requiring the court to issue appropriate directions for the prevention of Ganga water pollution. He claimed that although parliament and the state legislatures have passed several laws imposing duties on the central and state Boards constituted under the Water (Prevention and Control of Pollution) Act and the municipalities under the U.P. Nagar Mahapalika Adhiniyam, they have just remained on paper and no proper action has been taken pursuant thereto. The supreme court held that the petitioner, although not a riparian owner (living on the river side) is entitled to move the court for the enforcement of various statutory provisions which impose duties on the municipal and other authorities. He is a person interested in protecting the lives of the people. Who make use of the Ganga water? The nuisance caused by the pollution of the river Ganga is a public nuisance which is wide spread affecting the lives of large number of persons and therefore any particular person can take proceedings to stop it as distinct from the community at large. Accordingly, the court directed the Kanpur Nagar Mahapalika to submit its proposals for effective prevention and control of water pollution within 6 months to the Board constituted under the Water Act.

It also directed the Mahapalika to get the dairies shifted to a place outside the city and arrange for removal of waste accumulated at the dairies so that it may not reach the river Ganga, to lay sewerage line wherever it is not constructed, to construct public latrines and urinals, for the use of poor people free of charge, to ensure that dead bodies or half burnt bodies are not thrown into the river Ganga and to take action against the industries responsible for pollution, licences to establish new industries should be granted only to those who make adequate provisions for the treatment of trade effluent flowing out of the factories. The above directions apply mutatis to all other Mahapalika and municipalities which have the jurisdiction over the areas through which the river Ganga flows.

In *Indian Council for Enviro-Legal Action v/s Union of India*, (1996) 3 SCC 212, the supreme court has held that if by the action of private corporate bodies a person's fundamental right is violated the court would not accept the argument that it is not 'State' within the meaning of Art.12 and therefore, action cannot be taken against it. If the court finds that the government or authorities concerned have not taken the action required of them by law and this has resulted in violation of the right to life of the citizens, it will be the duty of the court to intervene. In this case an environmentalist organization filed a writ petition under Art.32 before the court complaining the plight of people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures. The fact was that in a village Bichari in Udaipur district of Rajasthan an industrial complex had developed and respondents have established their chemical industries therein. Some of the industries were producing chemicals like Oleum and single phosphate. The respondents had not obtained the requisite licences and nor did they install any equipment for treatment of highly toxic effluents discharged by them. As a result of this the water in the wells becomes unfit for human consumption. It spread diseases, death and disaster in the village and surrounding areas. The villagers revolted against all this resulting in stoppage of manufacturing 'H' acid and ultimately these industries were closed. But the consequences of their action remained in existence causing damage to the village. The court requested the National Environment Engineering Research Institute to study the situation and to submit their report.

In the technical report, it was found that out of 2440 tonnes of sludge about 720 tonnes was still there. With a view to concealing it from the eyes of the inspection teams the respondents had dispersed it all over the area and covered it with earth. In spite of the court's order they did not remove the sludge. The supreme court held that the writ was maintainable and directed the Government and the authorities concerned to perform their statutory duties under various Acts- Environment (Protection) Act, 1986, Water Prevention and Control of Pollution Act, 1947, as amended up to date, Air (prevention and control of pollution) Act, 1981 and Hazardous Wastes (management and handling) Rule, 1989. This is social action litigation on behalf of the villagers whose rights to life is invaded and infringed by the respondents as is established by the various reports of the experts. The court held that the respondents were responsible for all the damage to the soil, to the underground water and to the village in general. Regarding the determination

of cost of remedial measures, the court held that the Central Government had power to decide it. The principle on which the liability of the respondents was fixed is that the cost of remedial measures, will be determined on the principle that 'the polluter must pay. "this is the responsibility for" repairing damage caused by the industry.

In an another case viz M.C. Mehta v/s union of India, (1996) 4SCC 750, the supreme court had ordered the shifting of 168 hazardous industries operating in Delhi as they were causing danger to the ecology and directed that they be reallocated lands to the National Capital Region as provided in the master plan for Delhi. The court directed these industries to close down w.e.f 30-11-1996. The court gave necessary specific directions for the protection of the rights and benefits of the workmen employed in these industries. Likewise in Council for Environmental Action v/s union of India, (1996) 5 SCC 281, the court issued appropriate orders and directions for implementing and enforcing the laws to protect ecology. The petition was filed by a registered voluntary organisation working for the cause of environment protection in India as a public interest litigation complaining ecological degradation in coastal areas. It was contended that the government was not implementing its own notification which was issued to regulate activities in the said zones. It was said that there was blatant violation of this notification and industries were being set up causing serious damage to the environment and ecology of that areas. It held that the matter be raised before the concerned State High Court which shall issue necessary orders or directions.

In another case of M.C. Mehta v/s union of India, AIR 1997 SC 735 (Pollution of Taj Mahal) the petitioner Mr. M.C. Mehta filed a public interest litigation in the court drawing the attention of the court towards the degradation of the Taj Mahal due to the atmospheric pollution caused by a number of foundries, chemically hazardous industries established and functioning around the Taj Mahal, and requested the court to issue appropriate directions to the authorities concerned to take immediate steps to stop air pollution in Taj Trapezium (TTZ) Mr. Justice Kuldip Singh, who is known as green judge for his decisions on pollution, delivering the judgment of the court on behalf of the court held that the 292 polluting industries locally operating in the area are the main source of pollution and directed them to change over within fixed time schedule to natural gas as industrial fuel and if they could not do so they must stop functioning beyond 31

Dec. 1997 and be reallocated alternatives plots in the industrial estate outside Taj Trapezium (TTZ). The corporation / Government shall then provide alternative plots to the industries which are seeking relocation. The closure by Dec.31, 1997 is unconditional and applicable to new and old both units. The Deputy Commissioner, Agra and the Superintendent police shall effect the closure of industries. The U.P. State Government shall render all assistance to the industries in the process of relocation.

The court also look care of rights and benefits of the workers employed in these industries and issued necessary directions. They shall be entitled to the following rights and benefits:-

- a) The working shall have continuity of employment in the relocated industries with the same terms and conditions.
- b) The period between the closure and its restart shall be treated as active employment and shall be paid to their full wages.
- c) The workmen who agree to shift with the industry shall be given one year's wages as shifting bonus to help them settle at the new location. The said bonus shall be paid before Jan. 31, 1998.
- d) The workmen who opt for closure shall be deemed to have been retrenched by May 31, 1997 and shall be paid compensation in terms of section 25 f(b) of Industrial Disputes Act. These workmen shall also be paid in addition six years' wages as additional compensation.
- e) The compensation payable to the workmen in terms of this judgment shall be paid by the management within two months of the retrenchment.
- f) The gratuity amount payable to any workmen shall be paid in addition.

In Ramesh v/s Union of India, (1998) 1SCC 668, it has been held that public interest litigation for ensuring communal harmony is maintainable under Art.32 of the constitution. In Subhas Kumar v/s State of Bihar, AIR 1991 SC 420 it has been held that public interest litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in the right of life under Art.21 of the constitution. If anything endangers or impairs that quality of life in violation of laws a citizen has right to have recourse to Art.32 for removing the pollution of water or air which may be detrimental to the quality of life. Such a petition under Art.32 is maintainable at the instance of affected persons or even by a group of social workers or journalists.

In *M.C. Mehta v/s Union of India*, (1991) 2 SCC 137, it was held that public interest litigation against pollution in Delhi caused by increasing number of petrol and diesel driven vehicles is maintainable. The court directed the Delhi Administration to make the central Motor Vehicle Act 1989 effective from April, 1991 and to implement it seriously and effectively.

In *Sachindanand Pandey v/s State of W.B.*, (1987) 2 SCC 295, the appellants through a public interest writ petition challenged the Government of West Bengal's decision to allot a land for the construction of a five star hotel in the vicinity of the Zoological Garden of Calcutta. It was argued that multi-storey building in the vicinity of the zoo would disturb the animals and the ecological balance and would affect the bird migration which was a great attraction. The decision was thus taken without considering its impact on the zoo. The court held that although in view of the Articles 48-A and 51-A(g) whenever a problem of ecology is brought before the court it would not refuse on the ground that priorities are a matter of policy and so it is a matter for the policy making authority. At least the court may examine whether appropriate considerations are borne in mind and irrelevancies excluded. The court has always the power to give necessary directions. In the present case, however, it was held that the interference of the court was not called for. It was held that the decision to allot the land for the construction of Hotel was taken openly by the Government after taking into consideration all facts and consideration including ecology. Its action was neither against the interest of the zoo nor against the financial interest of the state. The Government had acted bonafide in allotting the land to the Taj Group of Hotels for the construction of a five Star Hotel at the vicinity of the zoo.

In *Vincent Panikurlangara v/s Union of India*, (1987) 2 SCC 165, the petitioner, an advocate and general secretary of public law services society, Cochin, filed a petition under Art.32 asking for directions for maintenance of approved standards of drugs and banning of injurious and harmful drugs. It was held that the public interest writ was maintainable as the issues raised by the petitioner were of vital importance, i.e. the maintenance and improvement of public health. The court directed the central Government to compensate and reimburse him for his expenses in recognition of his service for bringing the matter before the court. In *M.K. Sharma v/s B.E.L.*, (1987) 3 SCC 231, the petitioners, the Bharat Electronic Employer's union claimed that the employee working in the transmitter assembly room of the company, Bharat Electronic limited, a public sector undertaking, were

exposed to the ill effects of x-rays radiation because of the failure on the part of the company to comply with safety rules and safety measures and claimed.

6.11 Summary

Now a days Human Rights is a very challenging issue. India is a developing country; it has been passing through a transitional period. This development and transition has resulted in Human Rights violation to a very large extent. Though there are a number of documents and provisions to stop violation of Human Rights in India yet they failed in limiting violation of Human Rights throughout the nation.

Human Rights in India are violated on several grounds. Police, armed forces and state agents violated Human Right by using force against innocent human beings capitalists violate the Human Rights by exposing poor class; minorities are being exploited by majority section of people. Women rights and children rights are violated, people are displaced which violated the Human Rights. Development activities also violate Human Rights in India.

6.12 Some Useful Books

1. Constitutional Law of India by Dr. J.N. Pandey, Central Law Agency
 2. The Constitution of India by P.M. Bakshi, Universal Law Publishing co.
 3. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
 4. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
 5. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition: II
 6. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
 7. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
 8. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
 9. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First
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6.13 Check your progress

A Which of the following statements are true or false :-

1. Fundamental Rights as mentioned in part (iii) of constitution of India are nothing but Human Rights.
2. Human Rights are not essential conditions for full development of a person as a human being.
3. Human Rights violations are directly related to development.
4. Keeping in view the increasing demand for water, the government of India brought out a new National water policy programme.
5. Global warming does not affect Human Rights violation
6. Now-a-days industries are using many under aged workers as they are cheap and easily available.
7. Rural litigation cases are related to pollution by lime stone quarries.

(B)

1. Human rights are ----- by the state.
2. India is a -----nation and it has been going through a period of transition.
3. Industry is a major source of -----.
4. In India pollution by industrialization is affecting -----.
5. Global warming violates -----.

6.14 Answer to check your progress

(A)

- | | |
|----------|----------|
| 1. True | 2. False |
| 3. True | 4. True |
| 5. False | 6. True |
| 7. True | |

(B)

- | | |
|-----------------|----------------|
| 1. Enforceable | 2. Developing |
| 3. Development | 4. Environment |
| 5. Human Rights | |

6.14 Terminal questions

1. Discuss the relation of development and Human Rights.
2. Discuss how development affects the Human Rights through various

means.

3. Discuss some important supreme court cases in protection of Human Rights Violations.

UNIT 7

Science and Technology Advancement and Human Rights Violations

STRUCTURE:

- 7.1 Introduction
- 7.2 Impact of Science and Technology on Human Rights
- 7.3 Human Rights affected by Scientific and Technological Progress.
- 7.4 Promotion of Human Rights through Technology.
- 7.5 International Instruments as a means of Protection against abuse of Science and Technology.
 - 7.5.1 Instruments of a General Character.
 - 7.5.2 Instruments of specific character- the Right of Life.
 - 7.5.3 The Right to Physical and Spiritual Integrity.
 - 7.5.4 The Right to Privacy.
 - 7.5.5 The Right to Information.
- 7.6 Globalization, Development and Human Rights.
- 7.7 Summary
- 7.8 Some Useful Books
- 7.9 Check your Progress
- 7.10. Answers to Check your Progress
- 7.11 Terminal questions

OBJECTIVES

- After going through this unit you will be able to understand
- advancement of science and technology in society
 - how science and technology affect human rights
 - various national and international instruments for protection of human rights against abuse of science and technology.

7.1 Introduction

The advancement of science and technology is surely one of the greatest organized creative activities of human kind today. The material world that we see around us, and the way society functions today are direct manifestations of these advances. The origin of science lies in the evolution of the human brain and the intrinsic sense of curiosity in human being to exposé, to know and to understand the world around. Historically, the origin of science goes back to the beginning of the civilized existence from its earliest days. Science has been embedded in society. There has been a continuous process in society as a whole, based on day to day experiences and this can become the body of knowledge from which applications and understanding have grown.

Sir Francis Bacon wrote: "Human knowledge and human power are coextensive for ignorance of causes prevents us from producing affects Nature can only be ruled by being obeyed, for the causes which theory discoursers give the gules which practice applies". Bacon's words bring mankind's perspective and understating of the world in which we live in to increase the basis of our material existence, and to help us fight the physical and biological calamities. Our progress through life depends upon the advancement of knowledge. Knowledge increase the power in humanity, and the power is used for the good of poor as well as the evils. The decision as to how these powers are used, have to be based on ethical and moral values and principle these lie outside the domain of science.

For a long time scientific advancement have been related largely to felt needs. There were of course, some visible scientific accomplishments not related to felt needs. These were motivated by a desire to know and understand nature. Sometimes this led to conflicts with the establishment constituted by those who welded religious or state power. These are exemplified by the prosecution of Galileo. The conflicts that arise relating to the acceptance of the helio-centric theory of Copernicus and disagreements that still continue concerning the Darwinian theory of evolution. Often these conflicts involved individual scientists and related to conceptual developments.

There is one aspect of science which has always been of great concern to individual scientists, and more recently to the scientific community as whole. This relates to the connection between human science and weapons of destruction. The interest of scientists and investors in manners of war, and in fact as consultants for

the military is not something new. It has had long and honorable history for example, Leonardo da Vinci, who is generally known for his genius in the creative arts, was also a great scientist. In his letter to the Duke of Milan, to whom he offered his services, he dwelt extensively on his skills in the area of invention of the apparatuses of war, indeed it is only at the end of his letter that he mentioned the skills he possessed as an architect, sculptor and painter which might be of use in time of peace. Leonardo recognized that there could be circumstances that might make it necessary to become involved in military work. He said: I find a means of offence and defense, in order to preserve the chief gift of nature which in liberty'' but equally, he was also aware that inventors could be used in ways neither as originally conceived nor to the liking of their originator. In commuting on his ideas for a subordinate, he said : "Now by an appliance many are able to remain under water for long time. On account of the evil nature of men, who would practice assassinations at the bottom of the seas by breaking the ships in their lowest parts and sinking them together with the crews who are in them. "He was thus opposed to the indiscriminate developments of weapons of horror to be used purely for conquest and exploitations. Leonardo's concerns are applicable significantly to the situation today faced not only by individual scientists but by the scientific community as a whole. There is often the felt need to develop weapons of war to keep the peace; but with it is the fear of their misuse.

We must remember that many weapon systems today are based on steps function development in technology. These are not initially conceived by the politicians and the military, they result from research efforts of scientist and technologists. Once it is known that the feasibility exists, political, military and industrial decision-makers proceed further. It is difficult to blame an individual scientist, who acts purely as a processional function in an establishment which happens to be concerned with defense rather than civilian enterprises. Professionally the jobs would not be significantly different as far as the individual scientist is concerned. It is at the higher levels of designing and systems integration, that the real difference lies. Thus there is a great commonality between space launcher systems and defense missile systems but there is also some difference.

It is clear from what has been said that whereas science and technology have provided enormous capabilities to create horrendous investments of the arms race, the ultimate responsibility for the overall situation lies with the society as a whole.

These issues came to the fore in a major way with the Manhattan project on the development of the atom bomb and its subsequent use over Hiroshima and Nagasaki. This led to the awakening of the social conscience of science in a collective manner. As scientific advances take place at an increasing rapid pace, there are many who feel that a large number of the ills that affect human society are due to these developments. They point out to the possibilities of nuclear war which could wipe out very large part of humanity of human expectations that have been aroused leading to large scale consequences- depletion, environmental degradation, climate change , ozone layer changes. Consumerism with wide ranging consequences such as recourse and possible unknown risks as we move into new area of biology where humanity now has extraordinary power but cannot necessarily predict and understand the consequences, or make risk assessments.

It is important that these issues are discussed in society. But it must be remembered that what is called for is not putting limits on scientific enquiry but taking steps to ensure that the applications are such as to benefit human society as a whole. Such a perspective has to be taken by society on the basis of common, shared moral and ethical value systems that is the need of the hour; not indeterminate philosophical analysis but practice promotion of common shared ideal.

As we move into the immediate future, quite clearly, nuclear science, Environment, Information Technology and Biotechnology are the areas where humanity is faced with fundamental moral and ethical questions. In the area of nuclear science one has deep concerns about the development and stockpiling of nuclear weapon system with all their implications for large scale. The environment is an area which has sprung into prominence over the last quarter of the century. From the obvious tangible problems of a local nature, one has seen the evolution of problems of a regional nature, and then of global nature ozone depletion, increases in atmospheric concentration of green house gasses with possibilities of climate change and consequent hazards, destruction of bio-diversity are all examples of enormous global problems that are looming before us. The origin of these problems is anthropogenic. They relate to the increase of population to its present very large dimension, and still rising, posing questions concerning the carrying capacity of the globe; and the rising tide of expectations and consumerism, particularly energy related, whilst advances in science and technology certainly have enabled humanity to get much more from much less, it must be accepted that

very advances have been the precursors to the problems being encountered. The potential for conflict on environmental issues is enormous. This is an area where one has to re-evaluate priorities for human kind; this turn implies a choice of values.

Environmental ethics demands many fundamental values: equity within this generation as also inter-generation equity; harmony with nature and an understanding that humanity cannot be regarded as something separate from the rest of the earth system. Indeed advances in modern biology provides us that human beings are the same. Functional character sticks with animals, plants and all living systems base on the fundamental element, DNA.

Issues facing us in the area of environment are not philosophical, theological are religious as normally understood. They relate to values that are applicable to situations in real life; that everything on earth has to function in harmony as a system and it is only in such a system that humanity can flourish. Whilst these values and concepts lie outside the domain of science and technology, once they are accepted, then the great capabilities available through science and technology can be directed to the fulfillment of life, based on these values.

In the area of information technology, one is moving to the possibility of connecting every human being on earth with every other from times not so long ago when human beings developed as individuals, families, small tribes and communities. They have now rapidly moved to global connectivity. The consequences of this on the understood human psyche are not yet understood in material ways, it would certainly be highly productive. In terms of thought processes and especially those that relate to the inner core of the human being there could be enormous advantages through this connection; bringing about a feeling of the true oneness of the human race. Though we have developed, but we have to ask ourselves whatever the natural systems that we have inherited can adopt it to such a steep scientific changes. This has wide-spread societal implications as it hold great promise in diverse fields such as food production, health, energy and industry. But there are also concerns and fears. Today food production globally is adequate for the present population of a ground 6 billion. However, in 20 years, there will be to billion more people to feed and there is no more significant arable land available. Biotechnology holds the promise of higher yields and disease free

crops. In crop protection, genetic engineering would enable transfer, across crop, of genes that proved protection; this is not possible in classical crop breeding.

Application of advances in genetic engineering and cell biology arouse fears relating to eugenics and human cloning. While few would have objection to prevents children from being prejudiced, it is important to recognize, that there is no place for complacency.

7.2 Impact of Science and Technology on Human Rights

Since the adoption of the universal declaration of Human Right in 1948, the international commodity has sought constantly to elaborate and refine the normative frame work within which human rights should be respected. However, despite considerable discussion devoted to the subject, refinements of human rights legislation with respect to the world's rapidly advancing scientific and technological powers have failed to keep pace with other branches of United Nation human right law making. It is evident that, as societies evolve, so too do the conditions under which human right in any given society can most effectively be realized. Theses condition naturally change and, in some cases, expand or become more complex. In addition, new scientific and technological developments also modify the means to act which the state, private enterprise, and the individual have at their disposal. As a result, the nature and scope of human right violations –as well as the conditions which must be met in order to protect that right –are in permanent state of flux and demand continual re-valuation.

Advancement in science and technology has so far proved a mixed blessing with respect to the protection of human rights. For instance, cheaper and more efficient means of communication which have evolved over the past 20 to 30 years have served to increase the flow of information across the World in all kinds : geographical, political, industrial, and interpersonal. Thus the right to freedom of expression and in particular, the right to information is enhanced. However, it must be acknowledged that the same advance in technology that offered human beinge great access to information also permit governments, political parties and other bureaucrats to gain even tighter control of that information. Furthermore, the relative ease with which information can now be communicated almost instantaneously to wide audiences heightens the danger passed by the dissemination of faulty or distorted information, i.e. disinformation. It is in these particular contracts that the slogan “the right to know” has become of crucial

importance in interpreting Article 19 of the International Covenant on Civil and Political Right which states : “Everyone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds”. With the evolution of society, new conditions give birth to new aspirations which could lead to reformulation of right that have been expressed differently in previous situations. However, the ease with which human right are formulated and reformulated is in contrast to the absence of effective remedies contrary to common-law tradition in which remedies precede right, human right are aspirants which can be declared even in the absence of remedies. The exercise in reformulating right can foster the illusion that solutions can be found. Or worse, this could be way to avoid providing solutions.

The international human right norms related to science and technology offer a corpus of texts which can be analyzed in terms of the underlying conceptions of man and society that prevail in the international community at particular moments. In as much as scientific and technological progress interferes with life and death with different types of societies and communities (such as the family), as well as with nature and the environments human right problems which arise from this process are numerous and diverse, varied discussion have developed internationally on such problems as the right to privacy the beginning & end of life, manipulation of the minds etc, from the human rights angle.

Advances in science and technology provide opportunities to promote human rights and to prevent situations where rights are violated. For example, some human rights groups are using the Internet to report abuses and build public opinion; satellite imagery can be used to detect signs of genocide and refugee movements; and with the help of forensic science along with scientific methods for documentation and analysis, victims of atrocities can be identified, the scope of violations determined, and perpetrators brought to justice. However, many of these technological advances can be used to infringe on human rights. Though unlikely, satellite images may be used by terrorist groups to plan attacks; new genetic technologies have serious human rights implications; and increased use of computerized databases with personal information have implications for the right to privacy. The concept of human rights has been evolving over several hundred years. Today, international, regional, and national laws, agreements, and declarations have been adopted to protect and promote human rights. With the help

of new technologies, awareness of human rights abuses has increased, and public sensitivity to abuses has grown. At the same time, there has been an increase in the number of countries committing torture, ill-treatment, and other forms of human rights violations, according to the human rights group - Amnesty International.

7.3 Human Right affected by Scientific and Technological Progress

Among the human right enumerated in the Universal Declaration of Human Rights, the following rights would seem to be particularly affected by scientific and technological progress:

- The right to life, in the sense that science (Biology, Medicine, etc.) as well as technology (Gene Technology), nuclear technology etc can determine or influence birth and death fertilization, embryo transplantation, euthanasia techniques, untested drugs are examples.
- The Right to physical and spiritual integrity (Article 5 stipulates that no one shall be subjected to torture or to cruelty, inhuman or degrading treatment or punishment). Use of drugs and other chemical controls of the minds, psychological and physical testing methods, and behaviour therapy are still often used in interrogation. The right of privacy (Article 12 stipulates) that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attack upon his honour and reputation). The developments in recording, surveillance devices, personality tests and other communication techniques based on electronics optics and acoustics as well as new reproduction techniques have considerably changed the ways in which privacy could be protected.
- The Right to freedom of opinion and expression and the right to information (Article 19) developments of micro-electronic communication technology have changed the condition in which this right is exercised.
In a less precise way, the exercise of the following rights is influenced by scientific and technological progress:-
- The Right to property (Article 17) developments of new forms of property, such as software have given rise to new thinking about the right to property.

- The Right work (Article 23). Developments of new technologies have changed market structure affecting the right to work.
- The Right to a standard of living adequate for the health and well being himself and of his family, including food, clothing, housing and medical care and necessary social services (Article 25). Scientific and technological progress can endanger new forms of discrimination in the exercise of this right, lack of access to medical information can also affect adversely the right to health.
- The Right to education (Article 26) Developments in communication and information technology can promote this right but they can also create new forms of discrimination in education.
- The Right freely to participants in the cultural life of the community to enjoy the arts and to share in scientific advancements and its benefits (Article 27). Scientific and technological developments do not in themselves guarantee this right, but combined with the reinforcement of freedom of expression, the right to information and the right to education, this right can be promoted, thanks to a better communication technology.

Thus scientific and technological progress can have both negative and positive impacts on human rights. The effects depend often on the right to information and freedom of expression in as much as technological progress produces condition favourable to disinformation and cultural indoctrination. The right to information and freedom of expression seems to be a crucial factor in transforming scientific and technological progress into condition conducive to a better respect of human right.

7.4 Promotion of human rights through technology

There is a growing number of groups working to promote human rights. Human Rights Internet, an organization that has tracked human rights non-governmental organizations (NGOs) for over 20 years, currently communicates with more than 5,000 organizations and individuals around the world who work to advance human rights. New technology can serve as an important tool in the work of these groups. However, access to the Internet and advanced technologies is very unevenly

distributed. The growth of the World Wide Web has been very important for human rights groups in developed countries, the media, and international organizations. However, according to the UN's International Telecommunications Union, only about 190 million people have access to the Internet (this is only about 3.2 percent of the world's population). The cost of access to the Internet in many parts of the world is very high.

Although the concept of international human rights has been evolving for several hundred years, it was after World War II that the system of human rights that we have today came of age. In the aftermath of the war, the Holocaust, and the Nuremberg Tribunal prosecuting war criminals, the Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948. The declaration is not legally binding but has obtained an important status and has become the primary document declaring "a common standard of achievement for all peoples and all nations." Two other documents join with the declaration to form an important part of the UN human rights instruments. These are the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted in 1966. In addition, there are many other UN human rights instruments addressing a broad range of concerns. In 1993, the UN established the position of the High Commissioner for Human Rights. Regional human rights systems have also emerged, and provisions to protect human rights can be found in almost all national constitutions. Ninety-three countries have signed and six have ratified a 1998 treaty to establish an international criminal court (ICC) with jurisdiction over cases of genocide, war crimes, and crimes against humanity. As opposed to previous ad hoc tribunals, such as those for Rwanda and the Former Yugoslavia, the ICC will be permanent, allowing for more swift justice. The treaty will come into force when it has been ratified by 60 countries. The treaty is supported by a large majority of the world's countries and many human rights groups. However, the court might be weakened because of opposition to its establishment from the United States, China, India, and others. The United States is not backing the tribunal, citing fears that US military personnel abroad may become targets of politically motivated prosecutions. New technologies can assist in obtaining important evidence to be used at war crimes tribunals. For example, developments in forensic science and DNA-testing allow for easier identification of victims of atrocities and can help present evidence that will bring perpetrators to justice. After the Kosovo conflict, advanced technology

has been used to establish a "three-dimensional crime scene" thus providing evidence for the trial of war crimes. A high-tech camera linked to satellites photographically mapped the extent of human rights abuses. Today, increased availability of information on human rights violations, networking, and other capabilities are made possible by the Internet and databases. Reports of violations in one part of the world instantly can be distributed via the World Wide Web, mobilizing human rights groups on the other side of the globe. Groups also are using the Internet to garner national as well as international support and documentation for their causes.

The Zapatistas in the Mexican state of Chiapas are one example. However, repressive governments ranging from China to Saudi Arabia keeps tight controls on Internet access and communication. Using these technologies in any way that might be interpreted as criticizing some governments can have severe repercussions. To protect sensitive data from coming into the wrong hands, human rights groups often encrypt their e-mail and computer files. However, some governments are reluctant to allow this kind of encryption. The United States, citing that encryption may be used by criminals and terrorists, had until very recently strict restrictions on export of encryption technology. These restrictions have now been eased, but in many parts of the world merely using encryption makes one a target for government investigation and persecution.

Based on its own reports and documentation, Amnesty International estimates that in the countries it monitors, the percentage of countries committing torture or ill-treatment grew from 55 percent to 66 percent between 1988 and 1998. The percentage of countries responsible for death from torture increased from 22 to 27 percent. For extrajudicial executions, the percentage increased from 17 to 25 percent over the last decade. Reports of documented disappearances increased from 9 percent to 20 percent over the same time period.

7.5 International Instruments for Protection against Abuse of Science and Technology

7.5.1 Instrument of a General Character:

The provision contained in the international covenants on economic, social and cultural rights, as well as on civil and political right, adopted on 16 Dec.1966 reiterate these rights enumerated above. The covenant on civil and political right

protects the right to life (Article 6) the right to physical and spiritual integrity (Article 7), the right to privacy (Article 17), and the right to information (Article 19), Article 7 Stipulates Specifically that "No one shall be subjected without his free consent to medical or scientific experimentation". Article 19 provides details about various forms of communication for receiving and imparting information, implying that freedom of expression. It covers the freedom by the advances in communication technology ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and) ideas of all kinds, regardless of frontiers either orally in writing or in prints in the forms of art on through any other media of his choice.")

7.5.2 Instruments of Specific Character -The Right of Life:

The Convention on the prevention and punishment of the crime of genocide, adopted by the general assembly on 09 December 1948, protects in article 11 (d) the right to life against the abuse of science and technology.

In the present convention, genocide means any of the following acts committed with intent to destroy in whole or in part a national, ethnic, racial or religious group as such:-

- (a) Killing member of the group.
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group condition of life calculated to bring about its physical detraction in whole or in part;
- (d) Imposing measures intended to prevent birth within the group;
- (e) Forcibly transforming children of group to another group.

The problems relating to the right to life passed by recent developments in gene technology have inspired many international and national research project on this matter. The council of Europe, as well as UNESCO, have ongoing research programmes on the impacts of gene technology on human right. However, this has not yet reached the stage of a normative instrument being drafted.

7.5.3 The Right to Physical and spiritual integrity:

Although right to physical and spiritual integrity do specifically refer to medical, scientific or biological techniques, the declaration on the protection of human rights of a person from being subjected to reuse and other cruel inhuman or degrading treatment or punishment (09. Dec. 1975). The code of conduct for law

enforcement officials (17 Dec. 1979), as well as the convention against torture and other cruel, inhuman or degrading treatment or punishment (10 Dec. 1984) protect this right against torture.

The principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (18 Dec. 1982) explicitly stipulates in principle :

It is contravention of medical ethics for health personnel, particularly physicians, to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that they may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments within the council of Europe, the convention for the prevention of torture and inhuman or degrading treatment or punishment was adopted on 07 July 1987 establishing a European Committee for the prevention of torture and inhuman or degrading treatment. The committee is authorized by the state parties to visit that person who is deprived of his liberty by public authorities.

7.5.4 The Right to Privacy:

National legislation has been elaborated in many western countries to protect personal data (Sweden in 1973, United States in 1974, New Zealand in 1976, Federal Republic of Germany in 1977, Denmark in 1978, Norway in 1978, France in 1978, Canada in 1982 and Japan in 1988). Within the United Nations, however, no specific normative instrument has been drawn up to protect the right to privacy. In the OECD and the council of Europe, the development of Computer-telecommunications technology gave rise to a movement to protect the right to privacy, especially in respect of the handling of personal data. The OECD adopted in 1981 the "Guideline on the protection and transformer flows of personal data". The council of Europe adopted, also in 1981 the "convention for the protection of individual with regard to automatic processing of personal data". It protects the right to privacy in the automatic processing of personal data without prohibiting their trans-border flows. UNESCO has also encouraged research in comparative legislation concerning data protection although no international norms have been established. The initial research result covering 1968-71 was published in the social journal in 1972.

7.5.5 The Right to Information :

In 1947 the United Nations established a sub-commission on freedom of information and the press. A world conference on this subject was held in 1948, but the sub-commission ceased to function in 1952, due in part to controversies over its function. As a consequence, no normative instrument has been elaborated by the UN on the right to information, with the exception of the convention on the international Right of Correction (16 December 1952). This convention assures the contracting state the right to exercise the right of correction against the contracting states within whose territories a news dispatch capable of damaging the states prestige or dignity or its relation with other.

7.6 Globalization, Development and Human Rights

The relation between globalization, development and human rights raises policy and legal questions. One such question is whether globalization of market-oriented economic system is essential for development and protection of human rights. While searching for an answer to this question we should analyze how we perceive the concept of development and human rights, especially in the context of developing countries. Human rights have become an integral part of the process of globalization in many ways. The Western countries are increasingly using their view of human rights concept as a yardstick to judge developing countries and to deal with economic and trade relations to extend development assistance. At the same time globalization intensifies impoverishment by increasing the poverty, insecurity, fragmentation of society and thus violates human rights and human dignity of millions of people.

Development or economic development is widely perceived as a historical process that takes place in almost all societies characterized by economic growth and increased production and consumption of goods and services. Development is also often used in a normative sense as a multi-valued social goal covering such diverse spheres as better material well-being, living standards, education, health care, wider opportunities for work and leisure, and in essence the whole gamut of desirable social and material welfare. But, in today's globalization, the concept of development itself is interpreted differently and the concept of right to development is not taken seriously.

The Preamble of the Declaration of the Right to Development, adopted by the UN General Assembly in 1986, describes development as "a comprehensive economic,

social, cultural and political process that aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of resulting benefits". The 1990 UN Global Consultation on the Right to Development as a Human Right, stated that the right to development is an inalienable human right with the human being as the central subject to the right and that all the aspects of the right to development set forth in the Declaration of the Right to Development are indivisible and interdependent, and these include civil, political, economic, social, and cultural rights. It was further maintained that the right to development is the right of individuals, groups and peoples to participate in, contribute to, and enjoy continuous economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. A development strategy that disregards or interferes with human rights is the very negation of development.

The aims and objectives of the so-called development models promoted by different governments or international development agencies are not compatible with human rights standards. A new model of development ideology is being promoted that is based on the market and its logic. Several decades of discussion on alternative development model is withering away and a dominant model of market-oriented development is taking roots in that place. As a result of the globalization process, more negative effects are visible now. Global integration of the structures, processes, and ideologies produce injustice, oppression, exploitation and mal-development in society. The systematic integration of the forces that are dominant in the globalization process intensifies human rights violations.

7.7 Summary

There is no question that human beings have the right to benefits from scientific and technological progress and this right logically implies that in order to make responsible qualitative judgments on how this "benefits" should be defined. People have the right to information concerning scientific and technological developments. Again it is clear that the key principle involved in making decisions about human rights in a world of rapidly advancing science and technology is "the right to information" . As scientific and technological developments continue to play an increasingly significant role in more and more human lives, the right to have free access to accurate, truthful, and complete information concerning these

developments should be self evident. It is thus appropriate to elaborate an international instrument which will reinforce the right to information. The absence of information equals, eventually, the absence of real choose and for democratic societies, nothing is more dangerous.

7.8 Some Useful Books

1. Constitutional Law of India by Dr. J. N Pandey, Central Law Agency .
2. The Constitutional of India by P.M Bakshi, Universal Law Publishing Co.
3. Dr. B.L Babel , Code of Civil Procedure, Central Law Agency
4. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
5. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
6. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition: II
7. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
8. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
9. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
10. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

7.9 Check your Progress

(A) Which of the following statements are true?

- I. Environmental ethics demands many fundamental values. Application of advances in genetic engineering and cell biology arouse fear of human cloning. Advancement of science and technology does not affect Human Rights. (The right to property)
- II. Developments of new forms of property, such as software have given rise to new thinking about the right to property.
- III. Currently with more than 5,000 organizations and individuals around the world who work to advance human rights.
- IV. Internet does not affect any type of human rights.

(B) Fill in the Blanks-

- I. The right to freedom of opinion and expression and developments of micro-electronic communication technology have changed the condition in which this right is exercised.
- II. There is a growing number of to promote human rights.
- III. To protect sensitive data from coming into the wrong hands, human rights groups often encrypt then and
- IV. The OECD was adopted in

7.10 Answer to check your progress

(A)

- I. TRUE
- II. TRUE
- III. FALSE
- IV. TRUE
- V. TRUE
- VI. FALSE

(B)

- I. Right to information
- II. Groups working
- III. Email and computer files
- IV. 1981

7.11 Terminal questions

- I. Discuss how advancement of science and Technology violates human rights.
- II. Discuss various National and International instruments in protection of human rights.

UNIT-8

CYBER WORLD AND HUMAN RIGHT VIOLATIONS

STRUCTURE:

- 8.1 Introduction
- 8.2 Internet
- 8.3 Internet and Human Rights
- 8.4 Some Important Definitions and Meanings
- 8.5 Law Relating to Cyber Crimes
- 8.6 Cyber Appellate Tribunal
- 8.7 Summary
- 8.8 Check your progress
- 8.9 Answer to Check your Progress
- 8.10 Terminal Questions
- 8.11 Some useful Books

OBJECTIVES

After going through this unit you should be able to understand:

- What is Cyber world?
- Effect of cyber world, internet etc on Human Rights.
- Various measures taken by Government of India to stop Human Right Violation.
- General provisions related to cyber crime.

8.1 Introduction

In the present age of Globalization and with ever growing role of information technology in it, there have emerged both opportunities and challenges for the protection and promotion of Human Rights. The spectacular advances in science and technology that have continued unabated throughout the 1980s have

emphasized the urgency of problems considered. With every step forward in science and technology, the power of these forces to affect Human Society for better or for worse has increased. The power of science and technology at the present time is greater than that was two years ago. Science and technology offer the opportunity par excellence for generating "productive patterns and interaction among all members of the international community".

Human rights are a vital field of attention in the drive to improve the Human condition. Increased information flows, rapidity of transmission and transparency characterized, inter alia, the contemporary world. Modern communications, especially the internet and television, have rendered time-space factor obsolete, over the years, the presence of views anchors, reporters, photo journalists and other media actors in human crises has become a common occurrence. In that sense media has emerged a powerful instrument in the bringing to light violation of human rights. States are under pressure to fulfill international obligations while at the same time are losing some of their sovereign powers. Thus there have emerged interesting developments and challenges for human rights movements all over the world. In this unit we will discuss some of these developments and laws relating to protection of abuse or violation of human rights.

8.2 Internet

Modern era is an era of constant change. We can easily foresee the rapid increases in the population which is expected to double over the next few decades. Factors responsible for this change are technology; another source is knowledge and information. The quantum of information available to the individual is projected to double every five years. More people, more tools and more knowledge are the realities of modern life. The future promises us more changes than we have ever experienced before. The rise of information technology as an artifact of everyday life as the modern world has brought with the drawn of a new era often christened as the 'Age of Information'. It is changing the way we perceive the world, how we think and communicate with one another, what we learn, where we work, entertain ourselves, spend free time, shop and even meet people. We are communicating faster through Internet and acquiring knowledge.

The Internet is a global system of interconnected computer networks that use the standard Internet protocol suite (TCP/IP) to serve several billion users worldwide. It is a network of networks that consists of millions of private, public, academic,

business, and government networks, of local to global scope, that are linked by a broad array of electronic, wireless, and optical networking technologies. The Internet carries an extensive range of information resources and services, such as the inter-linked hypertext documents of the World Wide Web (WWW), the infrastructure to support email, and peer-to-peer networks.

Most traditional communications media including telephone, music, film, and television are being reshaped or redefined by the Internet, giving birth to new services such as voice over Internet Protocol (VoIP) and Internet Protocol television (IPTV). Newspaper, book, and other print publishing are adapting to website technology, or are reshaped into blogging and web feeds. The Internet has enabled and accelerated new forms of human interactions through instant messaging, Internet forums, and social networking. Online shopping has boomed both for major retail outlets and small artisans and traders. Business-to-business and financial services on the Internet affect supply chains across entire industries.

The internet provides us a virtual environment where these changes in perceptions and relationships are constantly happening, enabling new social realities to emerge. Today, partially because we manipulate information with great ease, we are discovering the realities of our social constructs.

The internet has become widely useful, with the most remarkable speed. It has been accepted much quicker than the telephone or the radio. As the internet forges ahead ambitiously towards critical mass, some social scientists are beginning to examine carefully the policy implications of current demographic patterns of its access and usage. Unsurprisingly, access is not distributed haphazardly, but correlates strongly with income and educational levels. It is assumed that most transactions in the new society will in a near future be mediated by information and communication technologies. In such an environment, the ability to harness information and communication technology is certainly critical in the production of material and non-material goods and services and, more important, in their consumption. It also applies to social activities such as education, entertainment art and generations of awareness.

Cyber crime refers to any crime that involves a Computer and a network¹².

Cybercrime, also called computer crime is done with the use of a computer as an instrument to further illegal ends, such as committing fraud, trafficking in child pornography and intellectual property, stealing identities, or violating privacy. Cybercrime, especially through the Internet, has grown in importance as the computer has become central to commerce, , news, entertainment, and government. The computer may have been used in the commission of a crime, or it may be the target.¹³ Netcrime refers to criminal exploitation of the Internet.¹⁴ Dr. Debarati Halder and Dr. K. Jaishankar (2011) defines Cybercrimes as: "Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm to the victim directly or indirectly, using modern telecommunication networks such as Internet (Chat rooms, emails, notice boards and groups) and mobile phones (SMS/MMS)".¹⁵ Such crimes may threaten a nation's security and financial health.¹⁶ Issues surrounding these types of crimes have become high-profile, particularly those surrounding cracking, copyright infringement, child pornography, and child grooming. There are also problems of privacy and when confidential information is lost or intercepted, lawfully or otherwise.

8.3 Internet and Human Rights

As already mentioned that the internet as a new medium of communications has become quite useful as means for dissemination of information. In Human Rights movement also it is becoming a significant tool to generate awareness, protect international human rights standards and expose violation of human rights both by

1. Moore, R. (2005) "Cyber crime: Investigating High-Technology Computer Crime," Cleveland, Mississippi: Anderson Publishing.

¹³ Warren G. Kruse, Jay G. Heiser (2002). *Computer forensics: incident response essentials*. Addison-Wesley. p. 392. ISBN 0-201-70719-5.

¹⁴ David Mann And Mike Sutton (2011-11-06). "Netcrime". Bjc.oxfordjournals.org. Retrieved 2011-11-10

¹⁵ Halder, D., & Jaishankar, K. (2011) *Cyber crime and the Victimization of Women: Laws, Rights, and Regulations*. Hershey, PA, USA: IGI Global. ISBN 978-1-60960-830-9

¹⁶ Internet Security Systems. March-2005.

states and non-states actors. It allows individuals to express their ideas and opinions directly to a world audience and easily to each other, while allowing access to many more ideas, opinions and information than previous media allowed. It has been observed that internet is a transformative force that can help open closed societies and provide the near-instantaneous flow of information to inform the public, mobilize for change and ultimately hold institutions accountable.

According to center for democracy technology and its access to use has global interactive medium to promote and defend human rights, civil and political rights worldwide. Through the internet, citizens from the most repressive regimes are able to find information about matters concerning their own governments and their human rights records that newspaper may dare point.

The government of India perceives that telecommunications and information technology is a prerequisite for the socio-economic transformation of the country. It also realizes that this sector has a vital role to play in India's Gross Domestic product. In order to translate this reality into a concrete action, the Government of India felt that a forward- looking telecommunication and information policy is necessary. The Government owned media has been made autonomous through establishment of Prasar Bharti. Now private radio and T.V. channels operate without much governmental control and interference.

In 1994, The Government announced the National Telecom Policy. The latter included among others, the objective of universal availability of basic telecom services to all villages. The policy contained the internet service provision (ISP) by private operators who were licensed to operate and provide such services. However, the 1994 policy could not meet the declared objectives because the private sector entry into the venture has been slower than what was envisaged. An act was promulgated on the 28th March, 1997 to provide for the establishment to the Telecom Regulatory Authority of India (TRAI). The Department of Information Technology (DIT) has set up the National Internet Exchange of India (NIXI) in 2004 to ensure that the internet traffic, originating and destinating for India, should be routed within India. The latter aimed at providing an effective regulatory frame work and adequate safeguard to ensure fair competition and protection of consumer interests.

The Government of India has also enacted "The Information Technology Act 2000" to provide legal recognition for transactions carried out by means of

electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto. This Act came into force on 17th of October 2000.

8.4 Some important Definitions and Meanings

Cybercrime:

Cybercrime ranges across a spectrum of activities. At one end are crimes that involve fundamental breaches of personal or corporate privacy, such as assaults on the integrity of information held in digital depositories and the use of illegally obtained digital information to blackmail a firm or an individual. Also at this end of the spectrum is the growing crime of identity theft. Midway along the spectrum lie transaction-based crimes such as fraud, trafficking in child pornography, digital piracy, money laundering, and counterfeiting. These are specific crimes with specific victims, but the criminal hides in the relative anonymity provided by the Internet. Another part of this type of crime involves individuals within corporations or government bureaucracies deliberately altering data for either profit or political objectives. At the other end of the spectrum are those crimes that involve attempts to disrupt the actual workings of the Internet. These range from spam, hacking, and denial of service attacks against specific sites to acts of cyber-terrorism—that is, the use of the Internet to cause public disturbances and even death. Cyber-terrorism focuses upon the use of the Internet by nonstate actors to affect a nation's economic and technological infrastructure. Since the 2001, public awareness of the threat of cyber-terrorism has grown dramatically.

Identity Theft and Invasion of Privacy

Cybercrime affects both a virtual and a real body, but the effects upon each are different. This phenomenon is clearest in the case of identity theft. In the United States, for example, individuals do not have an official identity card but a Social Security number that has long served as a de facto identification number. Taxes are collected on the basis of each citizen's social security number, and many private institutions use the number to keep track of their employees, students, and patients.

Access to an individual's social security number affords the opportunity to gather all the documents related to that person's citizenship—i.e., to steal his identity. Even stolen credit card information can be used to reconstruct an individual's identity. When criminals steal a firm's credit card records, they produce two distinct effects. First, they make off with digital information about individuals that is useful in many ways. For example, they might use the credit card information to run up huge bills, forcing the credit card firms to suffer large losses, or they might sell the information to others who can use it in a similar fashion. Second, they might use individual credit card names and numbers to create new identities for other criminals. For example, a criminal might contact the issuing bank of a stolen credit card and change the mailing address on the account. Next, the criminal may get a passport or driver's license with his own picture but with the victim's name. With a driver's license, the criminal can easily acquire a new Social Security card; it is then possible to open bank accounts and receive loans—all with the victim's credit record and background. The original cardholder might remain unaware of this until the debt is so great that the bank contacts the account holder. Only then does the identity theft become visible. Although identity theft takes places in many countries, researchers and law-enforcement officials are plagued by a lack of information and statistics about the crime worldwide. Interpol, the international policing agency, has not added any type of cybercrime, including identity theft, to its annual crime statistics. Cybercrime is clearly, however, an international problem.

Internet Fraud:

Schemes to defraud consumers abound on the Internet. Among the most famous is the Nigerian, or "419," scam; the number is a reference to the section of Nigerian law that the scam violates. Although this con has been used with both fax and traditional mail, it has been given new life by the Internet. In the scheme, an individual receives an e-mail asserting that the sender requires help in transferring a large sum of money out of Nigeria or another distant country. Usually, this money is in the form of an asset that is going to be sold, such as oil, or a large amount of cash that requires "laundering" to conceal its source; the variations are endless, and new specifics are constantly being developed. The message asks the recipient to cover some cost of moving the funds out of the country in return for receiving a much larger sum of money in the near future. Should the recipient

respond with a check or money order, he is told that complications have developed; more money is required. Over time, victims can lose thousands of dollars that are utterly unrecoverable.

The victim willingly provides private information that enables the crime; hence, these are transactional crimes. Few people would believe someone who walked up to them on the street and promised them easy riches; however, receiving an unsolicited e-mail or visiting a random Web page is sufficiently different that many people easily open their wallets. Despite a vast amount of consumer education, Internet fraud remains a growth industry for criminals and prosecutors.

Computer fraud is any dishonest misrepresentation of fact intended to let another to do or refrain from doing something which causes loss. In this context, the fraud will result in obtaining a benefit by:

- Altering in an unauthorized way. This requires little technical expertise and is not an uncommon form of theft by employees altering the data before entry or entering false data, or by entering unauthorized instructions or using unauthorized processes;
- Altering, destroying, suppressing, or stealing output, usually to conceal unauthorized transactions: this is difficult to detect;
- Altering or deleting stored data;
- Altering or misusing existing system tools or software packages, or altering or writing code for fraudulent purposes.

Other forms of fraud may be facilitated using computer systems, including bank fraud, identity theft, extortion, and theft of classified information.

Password:

A password is a word or string of characters used for user authentication to prove identity or access approval to gain access to a resource (example: an access code is a type of password), which should be kept secret from those not allowed access.

The use of passwords is known to be ancient. Sentries would challenge those wishing to enter an area or approaching it to supply a password or watchword, and would only allow a person or group to pass if they knew the password. In modern times, user names and passwords are commonly used by people during a log in process that controls access to protected computer operating systems, mobile phones, cable TV decoders, automated teller machines (ATMs), etc. A typical computer user has passwords for many purposes: logging into accounts,

retrieving e-mail, accessing applications, databases, networks, web sites, and even reading the morning newspaper online.

Despite the name, there is no need for passwords to be actual words; indeed passwords which are not actual words may be harder to guess, a desirable property. Some passwords are formed from multiple words and may more accurately be called a passphrase. The term passcode is sometimes used when the secret information is purely numeric, such as the personal identification number (PIN) commonly used for ATM access. Passwords are generally short enough to be easily memorized and typed.

Most organizations specify a password policy that sets requirements for the composition and usage of passwords, typically dictating minimum length, required categories (e.g. upper and lower case, numbers, and special characters), prohibited elements (e.g. own name, date of birth, address, telephone number). Some governments have national authentication frameworks that define requirements for user authentication to government services, including requirements for passwords.¹⁷

It is advised by the experts not to write password anywhere and remember it nicely to remain away from trouble. Easier passwords are under easy vulnerability. Everyone should be extra careful in selecting passwords.

Some Common Cyber Frauds are through ATM:

The automated teller machine (ATM) are those through which many people now gets cash. In order to access an account, a user supplies a card and personal identification number (PIN). Criminals have developed means to intercept both the data on the card's magnetic strip as well as the user's PIN. In turn, the information is used to create fake cards that are then used to withdraw funds from the unsuspecting individual's account.

Double swiping, the oldest, most common method, involves a waiter or a store employee taking your card at the cash register, swiping it in the correct device, then swiping it in a second device that captures the card number.

A few years ago, **grabbing** was in vogue. In grabbing cases, a thief would affix a device (or sometimes just chewing gum) to a card reader, which would grab the card so that the owner couldn't remove it. Sometimes, in a more elaborate scam,

¹⁷ <http://en.wikipedia.org/wiki/Password>

the thief would offer to help the stuck consumer, suggesting that he or she try to enter the PIN a few more times while the thief observed and memorized it.

These days, **skimming** is all the rage. Thieves install counterfeit readers in ATMs to capture card information, and they use tiny cameras or fake keypads to capture PIN numbers. In a recent case, nearly 300 people lost card numbers and PINs at a gas station ATM in Sierra Madre, Calif. They lost nearly \$82,000 altogether. The gas station closed abruptly at the end of 2010, and police have asked all customers to double-check credit card and bank statements.

"It's a clever crime," says Gil Luria, an equities analyst at Wedbush Securities in Los Angeles who tracks the ATM industry. "I wish the people who are smart enough to do that would get a real job."

The U.S. Secret Service, which investigates these types of electronic crimes, recommends that consumers make sure their cards are only swiped once when they make purchases and that they cover the keypad when they enter their PINs.

Meanwhile, the ATM industry is coming up with ways to stop the crime. The latest technology involves making the card slots vibrate to baffle efforts to read the magnetically recorded information.¹⁸

Similarly Internet lottery, gambling, pornography and Computer or Net sabotage are examples of other cyber crimes. Criminals attracts the net user and then trap in such a way that person comes to know the commitment of crime when he is cheated or looted.

Obscene or offensive content:¹⁹

The content of websites and other electronic communications may be distasteful, obscene or offensive for a variety of reasons. In some instances these communications may be illegal.

Over 25 jurisdictions within the USA place limits on certain speech and ban racist, blasphemous, politically subversive, libelous or slanderous, seditious, or inflammatory material that tends to incite hate crimes.

The extent to which these communications are unlawful varies greatly between countries, and even within nations. It is a sensitive area in which the courts can become involved in arbitrating between groups with strong beliefs.

¹⁸ <http://money.howstuffworks.com/personal-finance/banking/common-atm-scams.htm>

¹⁹ Wikipedia.org

One area of Internet pornography that has been the target of the strongest efforts at curtailment is child pornography.

Child pornography: Child pornography is publishing and transmitting obscene material of children or for children in electronic form. In recent years child pornography has increased due to the easy access of the internet, and easily available videos on the internet. Child pornography is considered the most heinous crime which occurs with children and has led to various other crimes such as sex tourism, sexual abuse of the child etc. which makes a lifelong bad and fearful physical and mental impact throughout their life.

Some of the important definitions given in Information Technology Act, 2000 are-

(i) Section 2 (1) (c) of Act defines "access" as- with its grammatical variations and cognate expressions, means gaining entry into, instructing or communicating with the logical, arithmetical or memory function resources of a computer, computer system or computer network.

(ii) Section 2 (1) (b) defines "addressee" means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

(iii) Section 2 (1) (d) defines "affixing electronic signature" with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of electronic record by means of electronic signature.

(iv) Section 2 (1) (f) defines "asymmetric crypto system" means a system of a secure key pair consisting of a private key for creating a electronic signature and a public key to verify the electronic signature.

(v) Section 2 (1) (h) defines "certification practice statement" means a statement issued by a certifying authority to specify the practices that the certifying authority employs in issuing electronic signature certificates.

(vi) Section 2 (1) (i) defines "computer" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.

- (vii) Section 2 (1) (j) defines "computer network" means the inter-connection of one or more computers or computer systems or communication device through-
 - (a) the use of satellite, microwave, terrestrial line, wire, wireless or
 - (b) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained
- (viii) Section 2 (1) (k) defines "computer resource" means computer, computer system, computer network, data, computer data base or software.
- (ix) Section 2 (1) (l) defines "computer system" means a device or collection of device, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions.
- (x) Section 2 (1) (n) defines "cyber security" means protecting information, equipment, devices computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption, modification or destruction.

8.5 Law relating to Cyber Crimes

Chapter IX of Information Technology Act, 2000 States Penalties, compensation and adjudication are as under:

S.43- Penalty and compensation for damage to computer and computer system, etc.

If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network-

- (a) access or secures access to such computer, computer system or computer network or computer resource;
- (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium.
- (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network.

- (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
- (e) disrupts or causes disruption of any computer, computer system or computer network;
- (f) denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;
- (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this act, rules or regulations made there under;
- (h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.
- (i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
- (j) steal, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

He shall be liable to pay damages by way of compensation to the person so affected.

S.43A- Compensation for failure to protect data-

Where a body corporate, processing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

S.44- Penalty for failure to furnish information, return, etc-

If any person who is required under this act or any rules or regulations made thereunder to:

- (a)** furnish any document, return or report to the controller or the certifying authority fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure.

- (b) file any return or furnish any information book or other documents within the time specified therefore in the regulations fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;
- (c) maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

S.45- Residuary Penalty-

Whoever contravenes any rules or regulations made under this act, for the contravention of which no penalty has been separately provided, shall be liable to pay a compensation not exceeding twenty-five thousand rupees to the person affected by such contravention or a penalty not exceeding twenty five thousand rupees.

S.46- Power to adjudicate-

(1) For the purpose of adjudging under this chapter whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made there under which renders him liable to pay penalty or compensation, the central government shall, subject to the provisions of subsection (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry in the manner prescribed by the central government.

(1A) the adjudicating officer appointed under sub-section (1) shall exercise jurisdiction to adjudicate matters in which the claim for inquiry or damage doest not exceed rupees five crore;

- Provided- that the jurisdiction in respect of the claim for injury or damage exceeding rupees five crore shall vest with the competent court.

(2) The adjudicating officer shall, after giving the person referred to in sub-section (1) a reasonable opportunity for making representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section.

- (3) No person shall be appointed as an adjudicating officer unless he possesses such experience in the field of Information Technology and legal or judicial experience as may be prescribed by the central government.
 - (4) Where more than one adjudicating officers are appointed, the central government shall specify by order the matters and places with respect to which such officers shall exercise their jurisdiction.
 - (5) Every adjudicating officer shall have the powers of a civil court which are conferred on the cyber appellate tribunal under sub-section (2) of section 58, and-
 - (a) All proceedings before it shall be deemed to be judicial proceedings within the meaning of section 193 and 228 of the Indian Penal Code.
 - (b) Shall be deemed to be a civil court for the purposes of section 345 and 346 of the code of criminal procedure, 1973.
 - (c) Shall be deemed to be a civil court for purposes of order XXI of the civil procedure code, 1908.
- S.47 Factors to be taken into account by the adjudicating officer-
While adjudicating the quantum of compensation under this chapter, the adjudicating officer shall have due regard to the following factors, namely;-
- (a) The amount of gain of unfair advantage, wherever quantifiable, made as a result of the default;
 - (b) the amount of loss caused to any person as a result of the default;
 - (c) the repetitive nature of the default.

8.6 Cyber Appellate Tribunal

Chapter X of Information Technology Act, 2000 deals with the Cyber Appellate Tribunal. Provisions related with cyber appellate tribunal are as under:

S.48 Establishment of Cyber Appellate Tribunal-

- (1) The central government shall, by notification, establish one or more appellate tribunals to be known as the cyber appellate tribunal.
- (2) The central government shall also specify, in the notification referred to in sub-section (1), the matters and places in relation to which the cyber appellate tribunal may exercise jurisdiction.

S.49 Composition of Cyber Appellate Tribunal

- (1) The cyber appellate tribunal shall consist of a chairperson and such number of other members, as the central government may, by notification in the official gazette, appoint:
- Provided-that the person appointed as the presiding officer of the cyber appellate tribunal under the provisions of this act immediately before the commencement of the Information Technology (Amendment) Act, 2008 shall be deemed to have been appointed as the chairperson of the said cyber appellate tribunal under the provisions of this act as amended by the Information Technology (Amendment) act 2008.
- (2) The selection of chairperson and members of the cyber appellate tribunal shall be made by the central government in consultation with the Chief Justice of India.
- (3) Subject to the provisions of this act-
- (a) the jurisdiction, power and authority of the cyber appellate tribunal may be exercised by the benches thereof;
 - (b) a Bench may be constituted by the chairperson of the cyber appellate tribunal with one or two members of such tribunal as the chairperson may deem fit;
 - (c) the Benches of the cyber appellate tribunal shall sit at New Delhi and at such other places as the central government may, in consultation with the chairperson of the cyber appellate tribunal, by notification in the official gazette, specify;
 - (d) the central government shall, by notification in the official gazette, specify the area in relation to which each Bench of the cyber appellate tribunal may exercise its jurisdiction.
- (4) Notwithstanding anything contained in sub-section (3), the chairperson of the cyber appellate tribunal may transfer a member of such tribunal from one Bench to another Bench.
- (5) If at any stage of the hearing of any case or matter it appears to the chairperson or a member of the cyber appellate tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of more members, the case or matter may be transferred by the chairperson to such Bench as the chairperson may deem fit.

S-58- Procedure and powers of the Cyber Appellate Tribunal-

- (1) The cyber appellate tribunal shall not be bound by the procedure laid down by the code of civil procedure, 1908, but shall be guided by the principles of natural justice and subject to the other provisions of this act and of any rule, the cyber appellate tribunal shall have powers to regulate its own procedure including the place at which it shall have its sitting.
- (2) The cyber appellate tribunal shall have, for the purposes of discharging its functions under this act, the same power as are vested in a civil court under the code of civil procedure, 1908, while trying a suit, in respect of the following matters, namely:-
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents or other electronic records;
 - (c) receiving evidence on affidavits,
 - (d) issuing commissions for the examination of witnesses or documents;
 - (e) reviewing its decisions;
 - (f) dismissing an application for default or deciding it ex parte;
 - (g) any other matter which may be prescribed.
- (3) Every proceeding before the cyber appellate tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian penal code and the cyber appellate tribunal shall be deemed to be a civil court for the purposes of section 195 and chapter XXVI of the code of criminal procedure, 1973.

8.7 Summary

In present day life it is difficult to live without electronic gadgets. Present generation cannot imagine life without mobile or computer and that too without internet. Day by day users or subscribers to these devices are increasing. These devices are not safe in use. People face severe damage due to their innocence or negligence. They easily become victims of the persons hunting in cyber world for such types of persons. This causes the violations of their human rights.

As we have seen that human rights are natural rights because they are not given to a human being by any authority, nor are these based on any positive law, they are

natural rights and they are attached to human beings by virtue of being a human. These rights are justified per se, by virtue of our natural condition, our human condition. However, naturally given rights are often violated by different actors under a variety of pretexts. Such violations include violation by cyber world and science and technology. In present globalized era technology have emerged both opportunities and challenges for the promotion and protection of Human Rights. In this concern government of India has also enacted laws in order to protect violation of Human Rights in the cyber world which are done by developments in electronic devices. No doubt it is a good begging for the protection of poor and innocent human beings.

8.8 Check your Progress

- (A) Which of the following statements are true or false?
- (i) The present age of globalization and ever growing role of information technology, there have emerged both opportunities and challenges for the promotion and protection of Human Rights.
 - (ii) The full name of TRAI is Telephone Regulatory Authority of India.
 - (iii) The term "addressee" is defined in section 2 (1) (b).
 - (iv) "Asymmetric Cry to System" means a system of a secure key pair consisting of a private key for creating a electronic signature and a public key to verify the electronic signature.
 - (v) Section 45 of Information Technology Act 2000, defines Residuary Penalty.
- (B) Fill in the blanks-
- (i) Modern communications, especially the_____and_____ have rendered time-space factor obsolete over the years.
 - (ii) NIXI means_____.
 - (iii) "Computer resource" means computer, _____, computer network data, computer data or software.
 - (iv) The cyber appellate tribunal shall consist of_____and such number of member as appointed by central government.
 - (v) The cyber appellate tribunal shall not be bound by the procedure laid down by the_____

8.9 Answer to check your progress

(A)

- (i) True (ii) False
(iii) True (iv) True (v) True

(B)

- (i) Internet and Television
(ii) National Internet Exchange of India
(iii) Computer System
(iv) Chairperson
(v) Code of Civil Procedure 1908.

8.10 Terminal questions:

- (i) Discuss cyber world
(ii) Discuss the Human Right violation by Cyber world.
(iii) Discuss the constitution of cyber appellate tribunal
(iv) Discuss the provisions of punishment for cyber crimes.

8.11 Some Useful Books

1. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
2. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
3. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition: II
4. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
5. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
6. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
7. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

UNIT-9

LAW AND ORDER AUTHORITIES AND HUMAN RIGHT VIOLATIONS

STRUCTURE:

- 9.1 Introduction
- 9.2 Functions of Public Authorities
- 9.3 Procedure to file Police Report
- 9.4 Investigation of Cases
- 9.5 Investigation Procedure
- 9.6 Constitutional and Statutory Safe Guards
- 9.7 Arrest and Detention
 - 9.7.1 Rights against Arbitrary Arrest
 - 9.7.2 Supreme Court Guidelines
 - 9.7.3 Human Rights Commission Guidelines
 - 9.7.4 Human Treatment of Determines
 - 9.7.5 Right of Women Detainees
 - 9.7.6 Juvenile Detainees
- 9.8 Demonstrations and Use of Force
 - 9.8.1 Unlawful Assembly
- 9.9 Some Useful Books
- 9.10 Check your Progress
- 9.11 Terminal Questions
- 9.12 Answers to Check your Progress

OBJECTIVES:

After going through this unit you should be able to understand:

- the role of Public Authorities in Society
- the functions of Public Authorities
- the procedure of working of Public Authorities.
- how Human Rights are protected by Public Authorities.

9.1 Introduction

It is well established that a basic function of the government is to maintain peace and security within the borders of the country. As police are one of the means by which Governments fulfil this function, it is a significant organ in the governance of a country. Another basic function of the government is to ensure that it meets its obligations under international law to promote and protect the human rights of people within its jurisdiction. Police are also one of the means by which governments fulfil this function. As mentioned above, in the present-day democratic regimes, these obligations are particularly important and must be fulfilled. In any democratic society, the expected role of police is the protection of people's constitutional rights through the effective enforcement of law and order within the framework of the existing laws of the land. According to international humanitarian standards, a significant aspect of police work in democratic processes and forms of government is very much related with human rights. The notion of democratic policing, accordingly, is accountability of the police to the public they serve. It is essential for the promotion and protection of human rights that police officials be personally accountable to the law for their own acts of omission. Therefore, an integral part of police is the commitment of the force in respecting and upholding various constitutional safeguards concerning the rights and privileges of citizens. At the same time as an agency to maintain law and order and investigate crimes police has been given many powers including to use force, arrest and detain. These powers can be used both for protection of citizens and violation of their rights. As is well known that image of police in India is not very good. They tend to misuse their powers. It may be mentioned that in modern day enlightened world even suspects of having committed crime or those who are arrested or detained are entitled to be treated as human beings and treated in dignified manner. Therefore, it is essential for us to know our rights and duties of police towards us in different situations, so that in cases of violation we can protest and approach appropriate channels for

redressal. In the following pages we will discuss this.

9.2 Functions of Public Authorities

As already mentioned Police is the strong arm of the state to maintain law and order in society. However, in a democratic society primary concern of police is not to suppress dissent and opposition but to work for the larger public order. In a democratic welfare society the purpose and objectives of a police organization can be stated as:

- The prevention and detection of crime
- The maintenance of public order
- The rendering of humanitarian assistance in emergencies to those in need
- The promotion and protection of human rights.

To perform the above functions, policemen are bound to perform their duties within the framework of constitution and various rules and regulations which govern police working. No doubt at present the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, terrorist activities and fundamentalism. But it is essential that in general law enforcement and maintenance of public order must be compatible with:

- Respect for, and obedience to, law,
- Respect for the dignity of human person, and
- Respect for and protection of human rights.
- In spite of international norms and standards, constitutional provisions and democratic principles and codes, many police officers are not yet mentally prepared to accept human rights as an essential part of the system, partly because they do not know what is meant by human rights, and partly because they are afraid of loss of their power and authority. Many a time they are also in a dilemma as they are confronted with situations in which they may feel justified in breaking the law in order to achieve results or they be subject to external pressures. However, in general, among the police forces in India, there is a tendency:

- to use overwhelming force in putting down demonstrations,

- to exert physical pressure to extract information from detainees,
 - to deploy excessive force to secure arrest,
 - torture under-trials, and
 - to make fake encounters on the pretext of suppressing extremist activities.
- Such actions violate human rights of the people. Violation and abuse of rights may also be in the form of arresting or releasing a wrong person, detention of arrested persons in police custody for prolonged periods even without informing them of the reasons of arrests, application of excessive use of force, etc. As per the established norms, a police official shall be deemed to have committed abuse of authority if he/ she:

- makes an arrest without good and sufficient cause
- uses any unnecessary violence towards any prisoner, detainee or other person with whom he/she may be brought into contact in the execution of his/her duty or

is uncivil to any member of the public.

Police officials, therefore, have to be careful so as not to violate any human rights in

- recording complaints,
- making any arrest,
- detaining alleged culprits,
- investigating cases,
- Maintaining of public order, acting as a protective agency.

As already mentioned, because of the changed nature of policing and of human rights which are vulnerable to policing activity, human rights violations by police are now considered offences punishable under criminal law. In addition, establishment of National Human Rights Commission and State Human Rights Commissions specifically to receive complaints of violations and abuse of powers and investigate the same have made police officials accountable in more ways than one. Let us see what rights citizens have and what are the duties of police in respect of above mentioned tasks?

9.3

Procedure to file Police Report

Every person is entitled to right of equality before law and equal protection of law.

Therefore, asking for protection of law is a fundamental and human right of every individual. It is important for police officials to concern themselves with the welfare of the victims for basic humanitarian reasons and to ensure their willing assistance in the investigation 'of the crimes and in ensuring judicial process. The first step in this direction is the recording of complaint.

The rule of law is : "If a general law is broken any person has a right to complaint, nt, whether he has personally suffered injury or not. Every crime committed is considered an offence against the entire society. So every member of the society has the right to inform the state through a police officer representing the state."

Information given to a police officer has to be recorded in writing according to Section 154 of the Criminal Procedure Code. This information known as the "first information report" or F.I.R. is important for many reasons. It is the first step of the criminal procedure that leads to the trial and punishment of a criminal or anti-social element. An investigation proceeds on the basis of the first information. The main objective of the information is to set the criminal law in motion and help the investigation authorities to get information so as to take the necessary steps in order to bring justice.

The offence committed may be cognizable or non-cognizable. In cognizable cases the police can investigate information received without a Magistrate's orders. While police cannot investigate a non-cognizable offence without the order of the Magistrate, the police officer has to register the complaint if it is brought to him. In such cases, the complaint may not be registered as an FIR but in a separate book or daily diary in the form prescribed by the State government. Such reports will be referred to the Magistrate for necessary orders. Thus, in general, a police officer is bound to enter all reports brought to him about all cognizable or non-cognizable offences. If he refuses to enter such a report or if he enters a report which was not at all made to him or makes incorrect report he is guilty under section 217 of the Indian Penal Code. The section reads, "whoever, being a public servant, knowing disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, knowing br disobeys

any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely to thereby save any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or with both."

There is a general complaint that a large number of cases are not registered by the police. It is both a dereliction of duty and violation of human right and law. In such cases, the complainant may send the substance of such information, by writing and by post, to the Superintendent of police. The Superintendent may investigate the case himself or direct the investigation to be made by any police officer subordinate to him who will have all the powers of an officer in charge of that case. Refusal to record the FIR by the police officer is punishable departmentally as also legally (Section 217 IPC). The punishment is imprisonment up to 2 years, or fine or both. It is important to note the following points:

- Any person aware of the commission of any offence can give information to the police officer.
- It must be given to the officer-in-charge of the nearest police station.
- It can be given orally or in writing.
- If given orally, it must be written down by the police officer and read to the complainant to be found correct.
- It shall be signed by the informant.
- The information must be entered in the Station House Register, (Section 154(1) Cr. P.C.) and substance thereof in the daily diary.
- A copy of the information as recorded (FIR) must be given to the informant free of cost (Section 154(2) Cr. P.C.)

It is worth mentioning here that there is no such law which says that the FIR should give each and every detail about the commission of crime. It should be information sufficient to induce the police officer to investigate the offence.

However, the investigation can be started even without the FIR.

If the Station House Officer does not take any action on the FIR registered at the police station, complainant can approach the Police Superintendent or the District Magistrate for investigation and taking action against the concerned police officer.

The victim can also file petition with the judicial magistrate and on that basis, the magistrate can take action against the concerned police officer. If these authorities fail to take action, the victim can approach the high Court or the Supreme Court and can file a write petition.

For the protection of the victim and redressal of the grievance, the following essential principles prescribed for police ought to be borne in mind:

- All victims of crime, abuse of power or human rights violations shall be treated with compassion and respect.
- Victims shall have access to mechanisms of justice and prompt redress.
- Redressal procedures shall be expeditious, fair, inexpensive and accessible.
- Victims shall be informed of their rights in seeking redress and protection.
- Victims shall receive all necessary legal, material, medical, psychological and social assistance, and shall be informed of the availability of such assistance.
- Inconvenience to victims in the handling of their cases shall be minimized.
- The privacy and safety of victims shall be protected.
- Unnecessary delay in the handling of victims' cases shall be avoided.

9.4 Investigation of cases

Effective, ethical and lawfully conducted criminal investigation is an extremely important aspect of policing. According to Indian laws, an officer of a police station can investigate without the order of a magistrate any cognizable offence committed within the local limits of that Police Station (Sec. 156(1) Cr. P.C.).

For the investigation of crime in accordance with ethical principles, there must be respect for human dignity and human rights, and compliance with the law by

investigators. A criminal can be punished only in conformity with the requirement of law. Investigation of crime in a democratic society entails accountability and responsiveness of the investigators to the community. Furthermore, investigations must be conducted with due regard to the principle of non-discrimination. According to the Universal Declaration of Human Rights : "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 defense." (Article II)

- A crime is an offence against society. It is the responsibility of the State to prevent crime and to punish criminals. Therefore, the investigation of crime is one of the essential tasks of the police in any society.
 - It is the first essential step in the administration of justice.
 - It is the means by which those accused of a crime may be brought before the courts and their guilt or innocence determined.
 - It is also essential to the well-being of society, for crime distresses people and undermines social and economic development.
- The purpose of investigating a crime is
- To gather evidence
 - To identify the presumed author of the crime
 - To present evidence before a court so that guilt or innocence may be decided.

9.5 Investigation Procedure

- 1) Though investigation generally follows the lodging of an FIR, the receipt of information is not a pre-condition for investigation. It can be initiated on information or otherwise.
- 2) For the commencement of investigation :
 - i. Police should have reason to suspect the commission of a cognizable offence.
 - ii. Police should be satisfied about the existence of sufficient grounds for embarking on an investigation.
- 3) No police officer shall investigate a non-cognizable offence without the

order of a magistrate having power to try such a case.

4) The police conducting the investigation can require the attendance of any person in connection with the case. But no male below the age of 15 years or any woman shall be required to attend at any place other than the place in which such a male or woman resides. To obtain information from women and children below 15 years, the police officer must go to the place where they reside (Sec. 160 (1) Cr. P.Q).

5) If the attendance of a person is required by the police, an order to such an effect should be issued in writing. Such a person has a duty to attend before the police officer and answer all the questions relating to the case put to him.

6) It is obligatory for the police officer to pay reasonable expenses to every person attending the investigation at a place other than his residence (Sec. 160(2) Cr. 10 PCI)

7) An investigating officer can examine a person acquainted with the facts of the case and reduce the statement made by such a person in writing. There should not be a long delay on the part of the investigating authority in recording statements, though no oath or affirmation is required in an examination and it is not obligatory to reduce in writing the statement of the person examined.

8) While recording statements, the investigating officer cannot give a gist (or a short version) of what was said by a witness or simply say that all witnesses gave the same statements. Each statement should be recorded as made and not in any indirect form of speech. (Section 161 (3) of Cr. P.C.).

9) A person making statement to a police officer during the course of an investigation is not bound to sign the document. However, the statement of a witness can be used during trial by the accused and also by the prosecution (with, the permission of the trial court) to contradict the witness.

10) No police officer shall offer or make any inducement, threat or promise. (Section 163 of Cr. P.C.). And no police officer shall prevent any person from making any statement which he may be disposed to make of his own free will during the course of an investigation. It also means that a person is free to make a confessional statement if he so desires. However, a confession obtained by threat or violence is not a valid confession and it will not be

admitted as evidence at the trial. In fact, the confession made by an accused to a police officer has evidence value i.e. it cannot be used during trial against the accused. The Criminal Procedure Code, Section 164, has made special provisions regarding the manner of recording a valid confession.

11) If a person in police custody desires to make a confession, he must do so in the presence of a magistrate and the magistrate must satisfy himself that the confession made is voluntary. He should inform the accused that he is not bound to make a confession. (Section 164 of the Cr. P.C.) It is necessary that the confession be signed by the accused or it is not admissible as evidence.

12) An investigating officer is authorized to conduct a general search but must record in writing his reasons for making the search within the limits of his own circle or even within the limits of another police station (Section 166, Cr. P.C.). The search must be conducted properly, thoroughly and systematically. The search should not be restricted to the eye level, which is a normal tendency. The search should be carried out in pairs and from opposite side to each other. All the physical evidences must be marked, numbered and photographed. They should be documented carefully. Photographs serve as permanent record of the facts at the scene of crime.

13) In the case of an arrested and detained person, if the investigation cannot be completed within the period of 24 hours fixed by Section 57 of the Cr. P.C. the investigating officer should transmit a copy of the diary relating to the case to the nearest judicial magistrate, if he believes that the accusation is well founded. This is done to make the magistrate see if the remand is necessary.

14) If upon investigation, it seems that the evidence is sufficient, the police officer is required to send the case to the magistrate or release the accused if there is no 'sufficient evidence'.

15) Every investigation is to be completed without undue delay. After closing the investigation the police officer has to submit a "Completion Report" or "Charge Sheet", stating the details of the case.

9.6

Constitutional and statutory safe guards

The following are some of the statutory provisions which lay down the rights of those involved in investigations and under custody:

- 1) The Constitution of India guarantees the fundamental right to a citizen not to be compelled to be a witness against himself. (Art 20 (3))
- 2) Section 220 of the IPC provides for punishment to an officer who detains or keeps a person in confinement with a corrupt or malicious motive.
- 3) Wrongful confinement of a person is an offence under section 348 of the IPC.
- 4) Section 330 of the IPC says : "Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security I may or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

The above can be explained by two illustrations. "A", a police officer, tortures "Z" to confess that he committed the crime. "A" is guilty under the section. Again, "A, a policeman, tortures" "B" to induce him to point out where a stolen property is deposited. "A" is guilty under this provision.

- 5) Another provision of the IPC which protects suspects from third degree methods by the police to extort confessions is Section 331. It is similar to Section 330, except that it deals with "grievous hurt" and the sentence may extend to ten years in jail. The guilty policeman can also be booked under the other provisions of the IPC, like causing hurt (Section 323) and murder (Sections 300 to 302).
- 6) Apart from these sections, several other provisions of IPC in Chapter XVI relating to "Offences Affecting Human Body", especially Section 319 to 352, are relevant here. Section 339 making "wrongful restraint" covers illegal custody. Giving or fabricating evidence to procure conviction and using evidence knowing it to be false are covered in Section 191 to 196 of IPC.
- 7) The Indian Evidence Act discourages forced confessions. Section 24 says that "a confession made by an accused is irrelevant in a criminal proceeding, if

the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him." In short, any attempt by a person in authority to bully an accused into making a confession or any threat or coercion would invalidate it if the fear was operating in the mind of the accused while making the confession. The court will accept only a voluntary confession.

8) Section 25 of the Evident Act categorically states that "no confession made to a police officer shall be proved as against a person accused of any offence". Section 26 further states that "no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of magistrate, shall be proved as against such person."

9) The Code of Criminal Procedure fortifies these procedures by providing more safeguards. Section 163 Cr. P.C. says that "no police officer or other person in authority shall offer or make, or cause to be offered or make, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act". Section 164 empowers an appropriate magistrate to record any confession or statement in the course of the investigation. The procedure and form are given in detail in the Section.

10) Complainants and witnesses on their way to any court are not required to accompany by the Police Officer. They cannot be subject to unnecessary restraint or inconvenience. They are not required to give any security for their appearance other than their own bond. If any witness or complainant refuses to attend or execute a bond, the officer-in-charge of the police station may forward him to the Magistrate who may detain him in custody until he executes the bond (Section 170 Cr. P.C.). These provisions are intended to indicate that while there is a civic duty enjoined on persons acquainted with the facts of the case to assist the State (Prosecution) during, the trial, no unnecessary restraints are placed on witnesses by the police.

11) Section 29 of the Police Act of 1861 prohibits unwarranted personal violence by police officers to any person in police custody.

Apart from the provisions of the Criminal Procedure Code and the Indian Penal Code, courts too have laid down strict guidelines for police conduct. In *Kedarnath vs. State of Punjab*, the Supreme Court observed: "Regardless of the nature of the crime, the method adopted for its detection must not be barbarous or fall below permissible civilized norms. The practice still prevailing with some police officers of putting a suspect on the third degree treatment is dangerous. Violation and violence cannot consist".

9.7 Arrest and Detention

The principle of individual liberty is one of the essential core principles from which all human rights flow. Deprivation of individual liberty is an extremely serious matter and can be justified only when it is both lawful and necessary. To arrest someone is to deprive him/her of his /her liberty. Under certain circumstances, Governments may feel it necessary and correct to limit individual freedoms in the wider public interest, and for the purpose of securing other benefits such as civil order and public safety. Human Rights instruments recognize such powers of governments. However, what is expected is that whatever the purpose or purposes of a person's arrest, there must be legal grounds for the arrest, and the arrest must be affected in a professionally competent and adept manner. It is of paramount importance for police personnel to be fully aware of rules and regulations and the procedures for carrying out the arrest.

Rights against Arbitrary Arrest

9.7.1

Article 22 of the Indian Constitution, while underlining the fundamental rights of citizens, guarantees four rights to persons arrested under any ordinary law. These are:

- a) The right to be informed as soon as possible of the grounds for arrest.
Even when released on bail, the Government is under obligation to give him details of the grounds of arrest so that the detainee is given the earliest opportunity to remove any mistake or misunderstanding and to enable him/her to prepare defense. The court can question the sufficiency of reasons given to the arrestee and in case of insufficient reasons, detention becomes unlawful.
- b) The right to be produced before a magistrate within 24 hours.

This is to avoid miscarriage of justice, so that there can be a correction at the earliest opportunity.

c) The right to consult and to be represented by a lawyer of his/her own choice.

This is a part of the rights of the accused as also the right to consult the lawyer away from the hearing of the police. Human rights principles endorse that in a criminal case the accused who cannot afford legal counsel and cannot defend himself is provided with one. In India, this practice is not prevalent except in capital punishment cases, where a counsel is provided to accused under the Criminal Procedure Code. Under legal aid law (Legal Services Authorities Act 1987) every poor person is entitled to be provided with a free lawyer.

d) Freedom from detention beyond the said period except by the order of the magistrate. If an arrested person has to be detained beyond 24 hours, the magistrate must authorize the police to do so.

Section 50 of the Criminal Procedure Code (Cr. P.C) also requires the police officer arresting any person to forthwith communicate to him full particulars of the offence for which he or she has been arrested or any other ground of such arrest. Similarly, Section 57 of Cr. P.C. provided for production of the arrested person before a Court within 24 hours of arrest.

Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.c. confers powers on any police officer to arrest a person without any order or warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Section 49, provides that the police are not permitted to use more force than is necessary to prevail the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offense. Section 56 contains a mandatory provision requiring the police, officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay.

There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an inquiry into the cause of death.

In human rights framework, the three principles of liberty, legality and necessity underlie the provisions on arrest. Therefore, no arrest can be made just because it is lawful for the Police Officer to do so. The existence of the power of arrest is one thing; the Justification for the exercise of it is quite another. No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonfides of a complaint and a reasonable belief both as to the person's complicity and also the need to effect arrest. Denying a person his liberty is a serious matter.

9.7.2 Supreme Court Guidelines

Supreme Court of India has been receiving a number of complaints about misuse of powers of arrest by the police or not caring for the rights of persons being arrested.

It has, therefore, issued specific guidelines to be followed by police personnel while making an arrest. These are the following:

- 1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
- 2) That the police officer carrying out the arrest of the arrestee shall prepare in a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
- 3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relation or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- 4) The time, place of arrest and venue of custody of an arrestee must be

notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organization in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5) The person must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7) The arrestee should, where he so requests, be also examined at the time of his arrest of major and minor injuries, if anything is present on his/her body, it must be recorded at the time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy be provided to the arrestee.

8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. The Director, Health Services should prepare such a panel for all tehsils and districts as well.

9) Copies of all the documents, including the memo of arrest referred to above, should be sent to the Area Magistrate for his record.

10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest, and at the police control room it should be displayed on a conspicuously-placed police board.

9.7.3 Human Rights Commission Guidelines

The National Human Rights Commission has been receiving a large number of complaints pertaining to human rights violation resulting from the abuse of police

power, particularly in respect of 'arrest and detention'. It, therefore, felt that the gap between the law and practice has to be narrowed down by prescribing elaborate and specific guidelines regarding 'arrest'. The objective was to minimize the scope of misuse or abuse of the power of 'arrest' without curtailing the power of the police in effective prevention and detection of crime and maintenance of law and order. Accordingly, the Commission, on 22 November, 1999, issued detailed guidelines to the Chief Secretaries and Directors General of Police of the States covering the powers of the police in the areas of 'pre-arrest', 'during arrest' and 'post-arrest'. The Chief Secretaries and DGPs of the States were advised by the Commission to get these guidelines translated into the respective local languages and distributed to all police personnel in police stations. They were also advised to incorporate these guidelines in the handbook to be given to all police personnel. The DGPs of the States were requested, in particular, to sensitize the police officials during the course of training and take prompt action against errant police officials. The Commission felt that this would increase credibility and respect for the police, and enable it to gain greater cooperation from the public.

9.7.4 Human Treatment of Detainees

Article 10 of the International Covenant on Civil and Political Rights lays out the general requirements on humane treatment of detainees which can be broadly stated as:

- a) All persons deprived of liberty should be treated with humanity and respect for the inherent dignity of the person;
- b) Accused person should be segregated from convicted persons;
- c) Accused juveniles should be separated from adult detainees.

Under the heading 'Protection against Cruel or Inhuman Treatment During Investigation', Section 330 of the Indian Penal Code states;

"Whoever voluntarily causes hurt for the purpose of extorting from the sufferer any confession or information which may lead to the detection of an offence.... shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to a fine".

In the case of an arrested and detained person, if the investigation cannot be completed within the period of 24 hours fixed by Section 57 of the Cr. P.C. he shall be produced before the magistrate with the request to be allowed to remain in police custody beyond 24 hours.

Section 167 of the Indian Criminal Procedure Code says that the investigating officer should transmit a copy of the diary relating to the case to the nearest judicial magistrate, if he believes that the accusation is well-founded. No magistrate shall authorize detention in any custody under this section unless the accused is produced before him

9.7.5 Right of women detainees

A female is to be arrested by Women Police Officer.

In relation to the arrest of a female, Section 51 of the Criminal Procedure Code provides that whenever it is necessary to cause a female to be searched, the search will be made by another female with strict regard to decency. Similar provisions are made in Section 100 (3) of the Criminal Procedure Code in relation to searchers under warrant.

Section 160 of the Criminal Procedure Code authorizes the investigating officer to summon the witness concerned with his case and it is obligatory on the person to appear before the officer and give information. Vide sub clause of the same section no woman shall be required to attend the summons at any place other than the place where she resides.

The special status of women is acknowledged with regard to main provisions:

- Dealing with separate accommodation
- On the question of discrimination

According to rule 8 of the Standard Minimum Rules for the Treatment of Prisoners of the United Nations Economic and Social Council (197), men and women should be kept in separate institutions as far as possible or the premises allocated to women be kept entirely separate.

Discrimination is dealt with principle 5 of the Body of Principles for the Protection of All persons under any Form of Detention which states that the principles are to be applied without distinction of any kind be it race, color, sex, language, etc, and the measures designed to protect the rights and special status of women especially pregnant women and nursing mothers, shall not be deemed as discriminatory.

Searches of detainees have to be carried out by persons of the same sex as the detainee and women police officials should supervise women detainees.

Section 51 of the Criminal Procedure Code (1973) with regard to an arrested person states: "Whenever it is necessary to cause a female to be searched, the

search shall be made by another female with strict regard to decency." Similarly, Section 53 of the Cr. P.c. on the examination of accused by medical practitioner states that in case of females, the examination shall be made only by or under the supervision of, a female registered medical practitioner.

9.7.6 Juvenile Detainees

There arise occasions when children are also suspected of committing crime. It is however, expected that such children are treated with utmost care so that their childhood is not demolished and because of harsh treatment they do not become hardened criminals. The basic principle is for reformation of juvenile, not to punish them.

The United Nations also has provided Rules for the Protection of Juveniles Deprived of their Liberty which stresses on the right to legal counsel, opportunities for work, education and leisure. The Convention on the Rights of Child prohibits capital punishment and sentences of life imprisonment of children and requires that children deprived of liberty be treated with respect for inherent dignity of a human person, kept separate from adults and be allowed to maintain contact with their family.

Section 360 and 361 of the Criminal Procedure Code (1973) spell out the procedural laws regarding juvenile justice in India. Section 360 (1) of the Cr. P.C. enables the courts to release an accused for an offence committed for the first time, not punishable with a death sentence. Thus it states that a juvenile first offender may be released on probation of good conduct. Section 361 (b) ensures that courts use the Children Act (1960) for treatment or rehabilitation of youthful offenders by requiring the courts to give reasons for not using these special laws in their judgment.

The Juvenile Justice (Care and Protection of Children) Act, 2000 provides:

- Any person in whose charge a juvenile is placed in pursuance of this Act shall, while the order is in force have the control over the juvenile as he would have if he were his parents, and shall be responsible for his maintenance, and the juvenile shall continue in his charge for the period stated by competent authority, notwithstanding that he is claimed by his parents or any other person (Section 11).
- Bail of Juvenile: (I) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code

of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

2) When such person having been arrested is not released on bail by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.

Information to parent, guardian or probation officer - Where a juvenile is arrested, the officer in-charge of the police station or the special juvenile police unit to which the juvenile is brought shall, as soon as may be after the arrest, inform-

a) the parent or guardian of the juvenile, if he can be found, of such arrest and direct him to be present at the Board before which the juvenile will appear; and

b) The probation officer of such arrest to enable him to obtain information regarding the antecedents and family background of the juvenile and other material circumstance is likely to be of assistance to the Board for making the inquiry (Section 12).

From the above it becomes clear that essential principles in cases of arrest are that no one shall be subject to arbitrary arrest or detention. No one will be arrested without proper grounds and without following prescribed procedure. Anyone who is arrested shall be informed at the time of arrest, of the reasons for his arrest and will be brought before a judicial authority promptly. While in detention, detainees will be treated in humane way and not tortured. Women and Children need to be treated with special care.

9.8 Demonstrations and use of force

In democratic societies one of the delicate duties that the police have to perform is maintaining order during demonstrations, processions, assemblies, rallies, etc. Both the international instruments on human rights and the constitution of India provide

rights to form associations and peaceful assembly without arms. However, there do arise situations of peaceful assemblies becoming violent, or disorderly. Many a time participants in rallies may carry certain instruments, though not weapons, which can be used as instruments for violence like lathis, etc. Such situations are generally termed as civil disorder. These can include spontaneous acts of revolt, riots, conflicts between groups, rowdy processions, communal clashes etc.

The police in every society are entrusted with a variety of powers of enforcing law and maintaining order including the use of force, in such situations. Keeping in view the importance of maintenance of law and order and public peace and to use force when required, international instruments have set principles and guidelines for the police to be followed with regard to dealing with unwanted or unlawful assemblies and use of force. Laws and codes of conduct for police in India also prescribe such guidelines and norms. The basic principles behind these are those of necessity and proportionality. The essential norm is that

- force should be used by police only when strictly necessary for law enforcement and maintaining public order,
- the application of force should be proportional, i.e. force should be applied only to the extent required for the legitimate ends of law enforcement and maintaining public order.

The Basic Principles on the use of Force and Firearms by Law Enforcement Officials states that everyone can participate in lawful and peaceful assemblies in accordance with principles of Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

In dispersal of assemblies that are unlawful but non-violent, police should avoid use of force, or if not practicable, restrict such force to the minimum extent necessary. In dispersal of violent assemblies, police may use firearms only when less dangerous means are not practicable and to minimum extent necessary.

It has already been underlined that the Constitution of India in Article 19 (1) gives the right of assembly to its citizens - "all citizens have the right to assemble peacefully without arms". This includes the right to hold meetings and take out processions. According to Article 19(3), individual rights and liberty must give precedence to public order in case of disturbed public tranquility, order or peace. If there is serious threat to public order or peace from any assembly it can in accordance with law be considered unlawful and dealt with accordingly.

9.8.1

Unlawful Assembly

When five or more people congregate with the purpose of compelling any person to do something unlawful, to take possession of something unlawfully, to create problems for lawful execution of any legal, administrative process or to overthrow any government, the offence of unlawful assembly results. Five or more people with an unlawful common objective are a necessity for an unlawful assembly to be fanned. The following are actions which a police officer or magistrate can take against members of unlawful assembly.

- 1) Preventive action against individuals to stop them from forming unlawful assembly or from committing any offence.
- 2) Punitive action against individual members of the assembly for having formed the unlawful assembly or having committed any other offences.
- 3) Collective action against the assembly as a whole either to prevent the forming of an assembly or to disperse one.
- 4) Defensive action in the exercise of the right of private defense to protect the lives and properties of persons threatened by member of an unlawful assembly.

When members of an unlawful assembly try to commit injury or damage to any public property, a police officer may intervene under Section 152 of the Criminal Procedure Code (1973) which states: "A police officer may on his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable."

At times a large unlawful assembly cannot be prevented or dispersed by taking action against individual members forming the assembly. The law thus, provides for action against unlawful assembly as a whole, as distinct from action against any individual member of the assembly.

Section 129 of the Criminal Procedure Code (1973) says that any magistrate or officer in charge of a police station may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace to disperse and it shall thereupon be the duty of the members of such assembly to disperse accordingly. Section 129 (2) goes on to say that if the assembly does not disperse then force may be used by the magistrate or police officer to disperse the same. Though the law makes provisions for the use of force all stages of

preventive, punitive, collective or defensive action and no limit is fixed to the amount of force to be used, it is accepted that in defense of lives or in dispersing dangerous and riotous mob, no harm can be caused to the wrong doer than is absolutely necessary to deter him from acts of rowdyism. In other words police should use force only when strictly necessary and use of force is always to be proportional to lawful objectives.

9.9 Some useful books

- VIII. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
- IX. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
- X. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
- XI. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
- XII. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005
- XIII. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
- XIV. Dr. B.L. Babel- Code of Civil Procedure, Central Law Agency, Allahabad
- XV. Ratanlal Dheerajlal- Law of crimes
- XVI. International Human Rights Documents. by P R Gandhi,

9.10 Check your Progress

- (A) Which of the following statements are true-**
- (i) The basic function of the government is to maintain peace and security.
- (ii) Police are the strong arm of the state to maintain law and order in society.
- (iii) FIR Means final information report to police.
- (iv) FIR can be filed U/S 154 of criminal procedure code.
- (v) A crime is an offence against the society.

(vi) A person making statement to a police officer during the course of an investigation is bound to sign the document.

(vii) Article 22 of the constitution is related to Arbitrary Arrest.

(B) Fill in the blanks-

(i) It is important for police officials to concern themselves with the _____ of the victims for basic humanitarian reasons.

(ii) A copy of the information as recorded (FIR) must be given to the _____ free of cost.

(iii) No police officer shall investigate a _____ without the order of a magistrate having power to try such a case.

(iv) Wrongful confinement of a person is an offence under section _____ of the I.P.C.

(v) All persons deprived of liberty should be treated with _____ and respect for the inherent dignity of the person.

9.11 Terminal Questions:

1. Discuss the function of Public Authorities.
2. Discuss the procedure to file a Police Report.
3. Discuss the procedure of investigation.
4. Discuss how human rights are violated by public authorities.
5. Discuss the role of law and order authorities in protection of human rights.

Q.12 Answers to Check your Progress:

(A)

(i) True

(ii) True

(iii) False

(iv) True

(v) True

(vi) False

(vii) True

(B)

(i) Welfare

- (ii) Informant
- (iii) Non-cognizable
- (iv) 348
- (v) Humanity

Unit 10

Human Right and Compensatory Jurisprudence in India

STRUCTURE:

- 10.1 Introduction
- 10.2 Legitimacy of Human Rights
- 10.3 Supreme Court and Fundamental Human Rights
- 10.4 Constitutional Tort and Compensatory Relief
- 10.5 Supreme Court and Award of Compensation
- 10.6 Summary
- 10.7 Some Useful Books
- 10.8 Check your Progress
- 10.9 Terminal questions
- 10.10 Answers to Check your Progress

OBJECTIVE

After going through this unit you will be able to understand;-

- concept of Human Rights
- legitimacy of Human Rights
- role of Supreme Court of India in protection of fundamental Rights
- compensatory relief given by Supreme Court and other courts.

10.1 Introduction

The language of human rights has over the years gathered great momentum in all legal systems of the world. The idea of human rights itself has become universalised, even though no convergence between socio-legal systems about the exact content and systems of protection of human rights is easily forthcoming. Indeed, despite this, the human rights have been described as “common language of humanity”. The human rights discourses have sought meaningfully to interpose human rights in every conceivable area of human activity. The national and international human rights law, which has grown over the years has been so

interpreted that it provides broad content to the rights regime of individuals, groups, sub-groups and minorities. Various theoretical justifications have been offered to the growing affirmation of 'the universal rights of man'.

The methodology for implementation of human rights at both national and international levels has not been free from difficulties. Even though the national constitutions and the legal regimes guarantee the human rights, yet the enforcement of these rights has been far from satisfactory. It is eventually the superior courts, which have an onerous task towards enforcement of human rights. Broadly speaking the Courts and National Human Rights Commissions and other designated authorities, have been empowered to uphold and enforce human rights and pass appropriate orders in this regard. Also the emergence of the victim protection jurisprudence has enlarged the scope of protection of human rights. However, this jurisprudence includes the protection programs for victims of crime, as well as victims of abuse of power. While as the former is the subject matter of criminal justice system, the latter is the subject matter of public law, and hence falls within the rubric of protection and enforcement of human rights regime. In our submission, compensatory jurisprudence falls within the realm of public law remedy, against abuse of power, resulting into abridgement of right to life and liberty. However, not all abuse of power, resulting into victimization can be brought under public law enforcement category particularly under compensatory jurisprudence

In India too, the human rights are catalogued in the Constitution. The Constitution of India guarantees civil and political rights in Part III and social, cultural and economic rights in Part IV . It also confers power on the Supreme Court and the High Courts to protect and enforce fundamental human rights in Part III. The Supreme Court acts as 'Sentinel on the qui vive' in relation to fundamental human rights. Over the years, and particularly in post-emergency era, the Indian Supreme Court has interpreted the rights regime broadly and enthusiastically. It has also resorted to judicial activism in key constitutional and legal interpretations, which has supported the cause of protection of human rights. In the process it has devised newer strategies to enforce the fundamental human rights. The Supreme Court and the High Courts have even awarded compensation to the victims of violation of human rights, in the exercise of their inherent constitutional powers. This remedy of claim of compensation is apart from the remedies available to such

victim under ordinary law of tort. The compensatory remedy may be seen as important fallout of constitutional tort litigation, which has increased in India in recent years. This is indeed a progressive way of looking at promotion and enforcement of human rights and has found general support in the Indian legal scenario. Even though the Courts have not been consistent in awarding such damages/compensation in violation of right to life, yet it exhibits a rich interplay between compensation as an individual remedy and the development of important constitutional norms. Indeed of late, Indian Supreme Court has been actively contributing to such constitutionalism. Looking at how Supreme Court has embarked upon the compensation as a remedy for violation of Fundamental Rights; it has given rise to arguments that every violation of such right under Art.21 of Indian Constitution should be accompanied by appropriate compensation, and should always be legally enforceable. This is so, because Supreme Court has taken into account the doctrine of strict liability in constitutional tort litigation. Secondly, should this right be forthcoming even in cases involving violation of other Fundamental Rights apart from Art.21.

This unit analyses the doctrine of award of compensation in case of violation of Fundamental Human Rights, as enunciated by the Indian Supreme Court. It tries to look at the justifications given by the Court for such awards. The unit highlights the position of Human Rights in Indian Constitution. It argues that these rights are justifiably included in our Constitution. The unit also examines the way in which Supreme Court has positioned itself in protection and enforcement of Fundamental Human Rights. This unit further analyze the concept of compensatory jurisprudence as enunciated and developed by the Indian Supreme Court. It also explains the theoretical basis as expounded by the Court. Various judgments of the Indian Supreme Court in this connection are also discussed.

10.2 Legitimacy of Human Rights

Human rights as a concept have evolved gradually over several centuries. They have been given a plurality of names, like rights of man, natural rights, human rights or Fundamental Rights, each one of them referring to different sets of non-derogatory rights which individuals must possess . Such a nomenclature has been the product of juristic thought emanating at particular periods of progressive evolution and realization of these rights. Even though the theoretical explanations of the legitimacy of human rights differ, yet they have made us believe that they

are indispensable for the holistic development of individual's personality. These rights are of such a nature that the State is under a duty not to violate these rights and the individuals have a right to the enforcement of these rights.

Every legal system, India being no exception to it, recognizes the legitimacy of human rights in their social and legal conscience. These rights are overwhelmingly necessary for overall human welfare. The United Nations has been a pioneer in building a universal consensus for the protection and promotion of human rights. Indeed the Universal Declaration of Human Rights, 1948 was a milestone in progressive realization of human rights throughout the world. It has provided a framework for all shades of human rights development. In fact the 1948 Declaration emphasizes that recognition of the inherent dignity and of equal and inalienable rights of all members of the human family, is the foundation of freedom, justice and peace in the world. Dereze and Sen rightly observed that integrity of democracy can deeply be threatened by widespread human rights violations. Post the 1948 Declaration, United Nations has worked well in the drafting of various conventions, treaties and protocols concerning universal realization of human rights. Human rights activists, trade union groups and others have even relied upon the 1948 Declaration, and subsequent international covenants, in their struggles for liberation and empowerment. Consequently, the provisions of the UN declaration find significant place in national constitutions throughout the world. It may be argued that the inscription of these rights in the constitutions of the world bear testimony to the legitimacy and importance of human rights. This gives us an impression of a trend of convergence of legal cultures towards universal protection of human rights. However, a visionary commitment to building institutions, laws and enabling conditions to secure fundamental freedom for all: all human rights, for all people in all countries have to be emphasized.

The making of India's Constitution also demonstrates the greatest concern for fundamental human rights and freedoms for people of India. Even much before the UN Charter concern for the protection of human rights, the concern for human rights of people of India was recurrent theme in the freedom struggle. The persistent demands for their protection reverberated throughout the freedom struggle. It was made as far back as in 1895 in the Constitution of India Bill, popularly called the Swaraj Bill, which was inspired by Lokmanya Tilak. The

demand was repeated in Mrs. Annie Besant's Commonwealth of India Bill finalized by the National Convention of Political Parties in 1925, by the Motilal Nehru Committee in 1928 at the Karachi Session of the Indian National Congress in 1932, and by the Tej Bahadur Sapru Committee in 1944-1945 .

The drafters of Indian Constitution had before them important documents like Magna Carta, Declaration of Rights of Man, US Constitution, even UN Charter and other social welfare laws of several countries. As rightly pointed out Seervai, the emphasis on human rights, in the UN Charter, to which India was a party, was not without its impact on our Constitution . In our submission many provisions in our Constitution bear the imprint of UN provisions. The Constituent Assembly discussed the subject of fundamental human rights extensively and painstakingly. Thereafter, the Assembly embodied in Preamble to the Constitution, the resolution to secure to all its citizens, justice social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote fraternity assuring the dignity of the individual and unity of the nation. The Preamble is the mirror of our Constitution. The Preamble indicates to secure the basic human rights to the people. The dignity of the individual secured by the Preamble and some of the Fundamental Rights are one of the basic features of the Constitution.

India is only the third country of the Common Law system to incorporate within it, a justifiable bill of rights, apart from U.S. and Ireland. It may be noted that entire human rights jurisprudence of India centers on Part III and Part IV of the Constitution. Part III of the Constitution, under the caption of Fundamental Rights, guarantees a fairly comprehensive array of basic human rights to citizens and casts a duty on the State not to violate these rights. While as Part III rights are enforceable rights, Part IV, the Directive Principles of State Policy incorporating socio-economic rights, are not enforceable, nevertheless they are fundamental in the governance of the country. Part III supplemented by Part IV and the Preamble represent the compendium of human rights and fundamental freedoms as enshrined in the Constitution of India. These rights cover a wide spectrum such as equality, freedom of expression, assembly and association, freedom of movement, freedom to carry on profession or business, freedom of conscience and freedom of religion. There are guarantees against retrospective criminal laws, double jeopardy and self-incrimination and against deprivation of life and personal liberty. Fundamental

Rights as enacted in our Constitution recognize not only the dignity of the individual, but also recognize the necessity for the full development of the individual and for preserving the unity of India. Minorities are guaranteed linguistic and cultural rights, and the right to establish and administer educational institutions of their choice. Seervai observes, "These religious and cultural freedoms remove the most potential sources of discord in a multi-racial society". At the same time, the Constitution provides an elaborate mechanism for the enforcement of such human rights. Part III of the Constitution itself guarantees the enforcement of these Fundamental Rights.

Commenting upon the legitimacy of these human rights, it has been observed that they inhere in the dignity of human beings and are therefore inalienable rights. Human rights are not gifts conferred by the State. Constitution and law do not create human rights. They are enacted to protect human rights, which inhere in individual's antecedent to constitutions and the laws. Fundamental human rights are essential for development of the human personality and for full realization of the human potential. Chief Justice Subba Rao observed, "Fundamental Rights are the modern name for what have been traditionally known as natural rights. They are moral rights, which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings he is rational or moral." Similarly, Mathew, J. in *Kesavananda Bharti v. Union of India* observed, "they are rights, which are inherent in human beings, because they are human beings, whether you call them by human rights or any other appellation. It was to secure the basic human rights like liberty and equality that people gave unto themselves by the constitution. These basic rights are essential features of our constitution". Similar sentiments have been echoed by Bhagwati J, when he observed, "these Fundamental Rights represent the basic values cherished by the people of India, since the Vedic times and they are calculated to protect the dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent. They weave a "pattern of guarantee" on the basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in its various dimensions". Actual working of the Constitution shows that the inclusion of Fundamental Rights has been more than justified. They have also acted as restraint on executive and legislative power. That is precisely the reason that under Art, 13 (2), any law made by the State inconsistent with or violating Fundamental Rights will be portent void.

Commenting upon the necessity and relevance of the fundamental human rights, the Supreme Court has observed:

....“The Fundamental Rights are intended not only to protect individual’s rights but they are based on high public policy. Liberty of the individual and the protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution...This Court would refuse to circumscribe them or to curtail them except as provided by the Constitution”.

Secondly, the Court has broadened the scope of these rights by interpretative techniques. The Court has rightly observed:

.....“it must be remembered that Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to emasculated in their application by narrow and constricted judicial interpretation”.

Thirdly, the legitimacy of the Fundamental Rights springs from the fact that, constitutionally if the effect of any legislation is that it violates rights in Part III, the legislation would be unconstitutional; the motive of the legislature is of no consequence. Furthermore, even a Constitutional amendment that takes away or abridges basic/essential features of Part III (Fundamental Rights) will be void and unconstitutional. The Court has even legitimized the Directive Principles as providing support and content to the Fundamental Rights. Although, initially it ruled that Directive Principles were subservient to Fundamental Rights. However, over the years, it has followed a “collaborative and synergetic approach”, and has even ruled that harmony between Fundamental Rights and Directive Principles is one of the basic features of the Constitution. If need be, Part III rights may be given restricted interpretation in order to uphold Part IV rights. Indeed, if the social-welfare functions of the State is any indicator; one does not see any difficulty in accepting this thesis of reading Directive Principles of State Policy into the Fundamental Rights part. Of course, the State’s willingness and capacities to act as a social welfare agent and thus efficiently protect human rights and entitlements in the face of liberalization of economy and globalization remains doubtful.

10.3 Supreme Court and Fundamental Human Rights

The Indian judiciary has played an effective role in promoting and enforcing the culture of human rights. The Supreme Court being the ultimate interpreter of the

Constitution has displayed its concern for Fundamental Rights from time to time. The Court acts as the protector and guardian of these rights. Secondly, the Court as an interpreter of the Fundamental Rights has interpreted these rights in most liberal manner. It has shown highest judicial creativity in catalyzing human rights and fundamental freedoms in Indian Constitutionalism. The Courts have exercised judicial review most profitably in the area of Fundamental Rights.

Art.32 and Art.226 of the constitution are the pivotal provisions empowering Supreme Court and High Courts to enforce the Fundamental Rights. Article 32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights. The Supreme Court is also empowered to issue appropriate writs for the enforcement of the Fundamental Rights. The significance of Article 32 is further highlighted by the fact that this provision not only empowers the court to issue directions or orders or certain writs for the enforcement of Fundamental Rights, but it also provides a guaranteed remedy, as this enforcement right is itself made a Fundamental Right. This provision cannot even be suspended in respect of Articles 20 and 21.

Commenting upon the importance of Art.32 the chairman of the Drafting Committee B. R. Ambedkar has remarked:

“If I was asked to name any particular article in this constitution as the most important, an article without which this constitution will be nullity, I could not refer to any other article except this one. It is the very soul of the constitution, and the very heart of it and I am glad that the House has realized its importance”.

Apart from the powers being exercised by the Supreme Court under this article, the court also exercises appellate jurisdiction, and even has original jurisdiction in several matters. Art.226 of the Constitution empowers the High Courts to issue orders, directions or writs not only for the enforcement of Fundamental Rights but also for any other purposes.

These two articles combined form the citadel of judicial review under Indian constitution. These powers of the superior courts enable them to judicially review legislative actions, judicial, quasi-judicial decisions and administrative actions to examine whether they conform to the Constitutional provisions, including the Fundamental Rights in Part III. The scope and extent of power of judicial review has been the subject matter of several decisions. Despite several doubts over the way the superior courts particularly the Supreme Court has exercised the judicial

review, it is now a settled legal proposition that the Constitution confers powers on the superior courts to review not only legislations, but also the Constitutional amendments in order that they do not violate Fundamental Rights. It is also a settled legal proposition that judicial review is the basic feature of the Constitution, which cannot be taken away even by a constitutional amendment.

Judicial review has been resorted to, most profitably in the areas of protection of individual freedoms and human rights. The last two decades of working of the judicial review has demonstrated that Supreme Court and High Courts have enthusiastically entertained petitions relating to violation of human rights. The cases involving violation of human rights have come to the Supreme Court and High Courts not only as private litigations, but also under the banner of Public Interest Litigation (PIL). The Supreme Court has liberalized locus standi in PIL, and thus any public-spirited citizen having no private interest can approach the Supreme Court and High Courts for prosecuting violation of Fundamental Rights. The Court exercising its powers under the banner of public interest litigation has made an immense contribution to human rights jurisprudence in India by creating a new regime of human rights by expanding the meaning of Fundamental Right to equality, life and personal liberty; by fashioning new kinds of reliefs under the courts writ jurisdiction; and by judicial monitoring of State institutions, such as jails, women's protective homes, mental asylums and the like. Issues relating to human rights concerns relating to criminal justice administration alongside right to life and liberty are under deep watch.

Art.21 have been profusely dealt with the Fundamental Rights. The Court has asserted that in order to treat a right as a Fundamental Right, it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes occurring in the country may entail the recognition of new rights and the law in its eternal youth grows to meet social demands. Most significantly, custodial deaths, illegal detentions, prison administration, right to shelter, rehabilitation of mentally retarded and physically handicapped persons, rights of women and children, protection against exploitation, telephone tapping and other privacy rights, have been ably and legitimately dealt with by the Indian Supreme Court and High Courts. Simultaneously, the socio-economic rights have also been agitated before the courts and courts have not shied away from giving relief in these areas. Issues relating to bonded labour, better environmental

standards, consumer rights, rights against exposure to hazardous substances, inter-country adoptions fall in this area. The Courts have even taken up the subject matter of good governance of the country under the public interest litigation. Therefore, issues relating to public life, corruption, the criminal-politician nexus, allotment of plots, disinvestments of public sector undertakings, violation of building laws and byelaws have raked judicial attention.

The procedure followed by Supreme Court under Art.32 has given new dimension to the enforcement of human rights in India. Not only has it liberalized the locus-standi rule, to the extent of permitting any member of the public acting in a bona-fide manner to espouse the cause of human rights violations by the State. It has developed epistolary jurisdiction, hereunder any member can invoke court's jurisdiction by writing a simple letter or sending a telegram. The court has also permitted new forms of fact finding authorities such as socio-legal commissions of enquiry and even handed over the investigation to National Human Rights Commission or even Central Bureau of Investigation. It has also taken the help of lawyers, journalists, retired judges, District Judges, and others for ascertaining the facts of violations of human rights. It has also stated that the Supreme Court rules pertaining to private litigations may not be appropriate in such public interest litigations involving human rights violations of class or classes of people. It has been rightly argued that there are no limitations on the powers of Supreme Court and High Courts to award appropriate relief and remedy, except the ones that may be imposed by the Courts themselves. Consequently, in dealing with the cases of violations of human rights, the courts have fashioned newer kinds of relief. These reliefs stand in contrast to the reliefs available under private law and private litigations. These reliefs are preventive, curative, restitutive, rehabilitative and compensatory. The compensatory relief is essentially a relief based on the doctrine of constitutional tort applied in constitutional litigations in human rights litigations. This type of remedy is available in other legal jurisdictions also. The Supreme Court has heavily relied on this doctrine in legitimizing payment of compensation to the victims of human rights violations. This relief does not prevent the victim of human rights violation from claiming damages from a civil court.

10.4 Constitutional Tort and compensatory Relief

The liability of the State for tortuous acts of its servants has for some time posed immense difficulties. Even though the concept is recognized in all jurisdictions, yet

the doctrine of sovereign immunity was interposed to deny the liability of the state. However, in the event of state donning various activities for the welfare of its citizens, the immunity rule has been diluted by the judicial reasoning in upholding the liability of state for tortuous acts of its employees.

A tort is generally viewed as the breach of a duty owed to the public in general (as distinguished from a duty owed to an individual). In India we do not have a legislation which deals with the liability of State for tortuous liability of its servants. The vicarious liability of Union of India and the State Govt. for the tortuous acts of its employees is regulated by Article 300 of the Constitution of India. However, the Supreme Court has also enunciated the concept of 'constitutional tort'. A constitutional tort occurs, when an act or omission violates a constitutional right, particularly, a Fundamental Right. In cases of relief on account of Fundamental Right violations, the Courts applying 'constitutional tort' doctrine have done away with some of the doctrines generally applicable in law of torts that make liability dependent on fault. Some of these doctrines have created controversies" e.g. state liability for acts committed in the course of 'sovereign' functions. The Supreme Court of India has also accorded recognition to what may be called the 'tort of misfeasance' in public office, where Union Ministers were ordered to pay damages to the State for mala-fide official action amounting to abuse of power.

R.M Sahai, J., has finally laid down the entire concept of tortuous liability of state at rest in *N. Nagender Rao and Company v State of Andhra Pradesh*. The Court held

"....No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural changes in the society. No legal or political system today can place the state above the law.... From sincerity, efficiency and dignity of state as a juristic person, propounded in nineteenth century as sound sociological basis for state immunity the circle has gone round and the emphasis is now more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic state protection and place the state or the government on the path with any other juristic legal entity. Any watertight compartmentalization of the functions of the state as "sovereign and non sovereign" or "governmental of

nongovernmental” is not sound. It is contrary to modern jurisprudential thinking. The need of the state to have extra ordinary powers can't be doubted but with the conceptual change in the statutory powers being statutory duty for the sake of the society and the people the claim of the common man or ordinary citizen can't be thrown out merely because it was done by an officer of the state even though it was against law and negligent. Needs of the state, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare state is not shaken....In welfare State, functions of the State are not only defense of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign sand non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc which are among the primary and inalienable functions of a government, the State can't claim any immunity.”

10.5 Supreme Court and Award of Compensation

The Supreme Court by interpreting Art.32 of the Constitution has innovated new methods, techniques and strategies for purposes of securing the enforcement of Fundamental Rights of the individuals. The purpose of such an activist interpretation is to entrench rule of law and to secure the sacrosanct nature and inalienability of the fundamental human rights. However, as we shall see later, the Supreme Court and even the High Courts have put “ right to life and liberty” on a higher pedestal than other Fundamental Rights.

The powers under Art.32 are not subject to any limitations, except the ones self imposed by the Court. Judicial review has also been held to be part of the basic structure of the Constitution. The powers under the said article have been used by the Court for preventing as well as remedying the infringement of Fundamental Human Rights. The Court has evolved the award of monetary compensation as one of the means of remedying encroachment of Fundamental Rights as well as providing relief to the victims of said violation. This remedy, it may be mentioned is provided in the International Covenant on Civil and Political Rights that has been relied upon by the Court in some of its decisions, as we shall see later.

Before 1983 the Court refused to award such compensation under Art.32 for violation of Fundamental Rights. In such a scenario, the victim had to file a civil suit under the ordinary law of torts for claiming compensation, which by all means was dilatory and time consuming and subject to other statutory limitations. The Court for the first time in *Khatri v. State of Bihar* (infamously known as *Bhagalpur Blinding Case*) considered the issue of award of monetary compensation to the victim of violation of right to life and liberty by the State. Speaking for the Court, Bhagwati, J. stated:

“Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty?”

An important question considered by the Court in *Khatri's* case was, would the state be liable to pay compensation for the acts of its servants outside the scope of their power and authority affecting the life or personal liberty of a person and infringing Art.21 of the Constitution? The Court answered the question in the affirmative, saying that otherwise Art.21 would be reduced to a nullity, a mere rope of sand. This way if the officer of the State is acting according to law, there will be no violation of Art.21, and if he were acting without the authority of law, the State would be able to contend that it is not responsible for his actions and therefore there is no violation of Art. 21. This case also interposed new dimensions of the constituency of the right to life and personal liberty, which has over the years been continued by the Court.

Even though in *Khatri's* case the Court did not award compensation to the victims of violation, yet the Court upheld the doctrine that the Supreme Court under Art.32 and the High Courts under Art.226 can award compensation in the event of infringement of Fundamental Right to life and liberty. It is because of the reasons that the Supreme Court and High Courts under their writ jurisdiction have the powers to issue appropriate orders for remedying the situation.

Rudul Sah v. State of Bihar is a landmark decision in compensatory jurisprudence evolved by the Court. The State and its machinery illegally incarcerated the petitioner in jail for 14 years, even after his acquittal by a criminal court, demonstrating absolute administrative laxity and scant respect for life and liberty. The Court in a habeas corpus petition awarded damages against the State for breach of petitioners' right of personal liberty. The Court observed that the instant

case revealed “a sordid and disturbing state of affairs” for which the State was accountable. Taking an activist rather than a traditional approach, in which the Court would have released the petitioner with liberty to file a suit for compensation against the state, the Court awarded compensation in favor of the petitioner. The Court stated, “Not doing so would be doing a mere lip service to the Fundamental Right to liberty which the State Government has so grossly violated”. The Court further observed:

“One of the telling ways in which the violation of the right can reasonably be prevented and due compliance with the mandate of Art.21 secured, is to punish the violators in the payment of monetary compensation...The right to compensation is some palliative to the unlawful acts of the instrumentalities of the State which act in the name of public interest and which present for their protection the powers of the State as a shield...”

It is submitted that had the Court allowed legal technicalities to prevail; it would have amounted to surrendering its powers to State’s lawlessness, conveying indifference to the personal liberty of the peoples and their sufferings. It would also have conveyed a message that the gross violations of life and liberties go unpunished. Judicial response to human rights cannot be blunted by legal jugglery, as rightly stated by the Supreme Court.

Again in *Sebastian M. Hongray Vs. Union of India*, a habeas corpus petition was filed to produce the two missing persons before the Supreme Court. The persons having been taken away by army officers went missing mysteriously. The Government failed to produce them and asserted that they left the military camp alive. The Court found this assertion untenable and incorrect. It came to a conclusion that they were not alive and had met an unnatural death. The Supreme Court keeping in view the torture, agony and mental oppression, through which the wives of these persons had to pass, directed the Government to pay Rupees One Lakh as a measure of exemplary cost to each of the two women. It also directed that a complaint should be filed under Cr. P.C. to take actions against persons responsible for what prima facie appeared to be a case of murder. The Court used the term exemplary costs and not the term exemplary damages. The award of exemplary costs is permissible in such cases. The Court also did not cite any precedents nor did it support its findings on any jurisprudential doctrines. The

object of awarding such costs, in our opinion is reflecting both a deterrent policy and a relief to the victims of such gross violations of life and liberty of persons.

Case *Bhim Singh Vs. State of J&K* involved illegal detention of the petitioner, who was a member of legislative assembly of Jammu and Kashmir. The police officers obtained remand orders from the executive magistrate and the sub-judge without production of the petitioner before them. The law required such production before the magistrate. He was detained with malicious intent, and thus deprived of his right to attend the session of the Assembly. The Court found that there was gross violation of the petitioner's constitutional rights under Article 21 & 22 of the Constitution. The Court opined that the deprivation of constitutional rights might not be washed away by mere release of the petitioner. It further observed that in appropriate cases the Court has the power to compensate the victim by awarding suitable monetary compensation. It directed the State of J&K to pay the petitioner a sum of Rupees 50,000. It may be noted here that unlike *Rudul Shah* where the compensation was an interim measure and in the form of exemplary costs, in *Bhim Singh* the award was to compensate the victim, even though in the form of exemplary costs. It is to be noted that the Court relied on *Rudul Shah* and *Sebastian* to substantiate its order of award of compensation.

Case *Nilabati Behera v. State of Orissa* seems to have firmly settled the issue of award of compensation as a measure of enforcement of Fundamental Rights. This case involved the death in public custody. It is for the first time that the Court acknowledged the award of compensation as a remedy under public law in contradistinction to private law claim. It also held that the concept of sovereign immunity is not applicable in cases of violation of the right to life and liberty guaranteed by Art.21 of the Constitution. The Court observed:

"The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation as exemplary damages, in proceedings under Art.32 by this Court or under Art.226 by the High Courts, for established infringement of indefeasible right guaranteed under Art.21 of the Constitution, is a remedy available under public law and is based upon strict liability for contravention of the guaranteed basic and indefeasible rights of the citizens. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system, which aims to protect their interest and preserve their rights. Therefore when the Court moulds the relief by

granting “compensation” in proceedings under Arts.32 or 226 of the Constitution seeking enforcement or protection of Fundamental Rights, it does so under the public law by way of penalizing the wrong doer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the Fundamental Rights of the citizens. The payment of compensation is to be understood in the broader sense of providing relief by an order of making “amends” under the public law for the wrong done due to breach of public duty, of not protecting the Fundamental Rights of the citizen. The compensation is in the nature of “exemplary damages” awarded against the wrongdoer for the breach of its public law duty, and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law”.

It is for the first time that a clear principle and philosophy underlying the doctrine of award of compensation for violation of Fundamental Right to life can be discerned. The distinction between the remedy of damages under the private law, where sovereign immunity is available, and the public law of compensation, where it is not available, indicates the basis of award of compensation as a remedy. The Court introduced strict liability in public law claims pertaining to Fundamental Rights and particularly the right to life and liberty.

The doctrine of sovereign immunity was again relied on by the State in denying its liability of payment of compensation to the victim of violation of Fundamental Right of life and liberty. In the case of State of Andhra Pradesh v. Challa Ramakrishna Reddy where the respondents were in judicial custody, some persons entered the jail premises and hurled bombs, thus killing one of them. The suit for damages of the respondents was decreed by the High Court. The State argued in the appeal before the Supreme Court that the suit for compensation was not maintainable, as the establishment and maintenance of prisons was a sovereign function. The Court speaking through Sagir Ahmad, J. observed: “that right to life is one of the basic human rights of a prisoner, be he a convict or an under trial or a detenu does not cease to be a human being. Claiming sovereign immunity cannot defeat a prisoner’s Fundamental Right”. The Court dismissed the appeal and upheld the decree of the High Court awarding compensation to the dependants of the deceased. It is significant to note here that the Court in exercise of its appellate

jurisdiction discussed, considered and relied upon the cases of award of compensation under public law remedy under Art.32 of the Constitution.

In case *D. K. Basu Vs. State of West Bengal*, compensatory jurisprudence was firmly approved as a measure relevant to the protection of human rights in India. It also invoked reimbursement of the compensation money from the erring State officials who were found guilty of the violation of human rights. The Court discussed extensively the law pertaining to claim of compensation against the State for the wrong of police officers depriving citizen's rights under Art.21 of the Constitution. The Court examined in detail the issues relating to torture, custodial violence and deaths in lock ups, along with the liability of State to compensate the victims of such wrongs. It also discussed the accountability of police officers to reimburse the State. A.S. Anand, C.J. speaking for the Court issued mandatory guidelines for the police officers and other investigating officials in all cases of arrest and detention till legal provisions are made on that behalf by the competent legislature. With reference to the vicarious liability of the State he discussed the punitive provisions of Indian Penal Code, 1860 and lamented the inadequacy of these provisions to repair the wrong done to the victim. He further observed:

"... That a mere prosecution of the police officers or declaration of his action being invalid does not by itself provide any meaningful remedy to a person whose Fundamental Rights to life have been infringed. According to him, the civil action for damages is a long drawn and cumbersome judicial process. Hence, where the infringement of Fundamental Rights is established the Court must proceed further and give compensatory relief to the victim. The compensation shall not be by way of damages as in a civil action but by way of compensation under the public law jurisdiction, wherein the State is made liable to pay compensation as it has committed a breach of public duty of protecting the Fundamental Right to life of citizen.... the claim of the citizens for compensation is based on the principle of strict liability, to which the defense of sovereign immunity is not available...the citizens must receive the compensation from the State, which in turn shall be indemnified by the wrong doer."

The Court reiterated that the award of compensation for established invasion of Fundamental Rights of citizens under public law jurisdiction, in addition to traditional remedy under the law of tort. Secondly, The Court did not accept the

reservation, which the Govt. of India had attached to Art.9 (5) of International Covenant on Civil and Political Covenant (1966).

Once the Court firmly established the award of compensation as a measure of enforcement of Fundamental Right to life and liberty, it did apply this measure to violations of other Fundamental Rights also. Thus in *Common Cause v. Union of India*, the Court while referring to the law in England, stated:

“There is therefore, not much of a difference between the powers of the Court exercised here in this country under Art.32 or Art.226 and those exercised in England for judicial review. Public law remedies are available in both the countries and the courts can award damages against public authorities to compensate for the loss or injury caused to the plaintiff/petitioner, provided the case involves, in this country, the violation of Fundamental Rights by the government or other public authorities or their action was wholly arbitrary or oppressive in violation of Art.14 or in breach of statutory duty and is not purely a private matter directed against a private individual.”

Reiterating the same theme in *Chairman, Railway Board and Ors, v. Chandrima Das and others*, the Supreme Court held that the public law remedies have also been extended to the realm of tort. It was a case of gang rape of a Bangladeshi national by the employees of the Indian Railways in a room at Yatri Niwas at Howrah Station. These employees managed the Yatri Niwas. The Government contended that it could not be held liable under the law of torts, as the offence was not committed during the course of official duty. However, the Court did not accept this argument and stated as under:

“The employees of the Union of India, who are deputed to run the railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees”.

This case is noteworthy for two important reasons; firstly the Court stated the need of reading the principles of international covenants into the domestic jurisprudence for purposes of effective implementation of human rights. Secondly, the Court held

that even a non-citizen could claim compensation for violation of Art.21 of the Constitution. The Court ruled:

“Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens...As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Government employees who outraged her modesty. The right available to her under Art.21 was thus violated. Consequently, the State was under a constitutional liability to pay compensation to her”.

It would appear that the Court has extended the compensatory principles to violations of any Fundamental Right and entitling the victim to compensation. However, this has not been accepted in later formulations of the Court. Thus in *Hindustan Paper Corporation Ltd. v. Ananta Bhattacharjee* the Court stated:

“Public law remedy for the purpose of grant of compensation can be resorted to only when the Fundamental Right of a citizen under Art.21 of the Constitution is violated and not otherwise. It is not every violation of the provisions of the Constitution or a statute, which would enable the court to direct grant of compensation. The power of Court of judicial review to grant compensation in public law remedy is limited”.

A perusal of the Apex Court decisions discussed above reflects that the relief of compensation is a judicial innovation in the inherent powers of the Court. Since the award of compensation by the Court is not consistent, it follows that the remedy is discretionary in nature, as we noted earlier. Considering this, it cannot be stated with firmness that the right to claim compensation in India has settled as a Fundamental remedial right. However, it has a cascading effect in greater evolution of human rights protections at the level of judiciary. Moreover, as seen above the Court has awarded compensation, when the violation occurred under Art.21 concerning rights to life and liberty. The Court has thus impressed upon the State to take these rights seriously and seizing any opportunity to pronounce itself upon such violations of rights to life and liberty. As a matter of fact, post emergency, the Court has truthfully and courageously embarked upon a journey towards sensitizing Indian legal order towards greater Human Rights protection programs. However, in our submission, the Indian legal order has still to go a long

way in assuring each individual about the sanctity of his individual Human Rights, despite bolder attempts by the Indian Supreme Court.

10.6 Summary

Over the years, it has become clear that Courts are heavily relying on the Constitution, Bill of rights, and even international norms to protect and enforce rule of law. They are equally using their powers and new strategies and tools to restrict parliamentary and executive autonomy, so that it conforms to constitutional norms, particularly relating to fundamental human rights. The interdependence between judicial conscience and reasoning has equally led to greater concerns being shown about rights by the Courts. The Supreme Court of India is not an exception to this legal compass.

The Supreme Court has enlarged the scope and protection of the fundamental human rights guaranteed under the Constitution, as analyzed above. It has devised new tools to promote a right-based administration. The Public Interest Litigation has been an important strategy towards increasing access of people to the Court. It has also helped the Court to address violations of fundamental human rights in India and give appropriate relief. The Court has visualized the award of compensation as an important methodology not only to redress the violation but also as a deterrent. Consequently, it has awarded compensation to the victims of violation of Fundamental Right to life and liberty. This is so even though the Constitution of India does not expressly provide for a right to compensation unlike other legal systems. Nor is there any legislation, which deals with such compensatory relief in case of infringement of Fundamental Rights, unlike other common law and continental jurisdictions. Despite this the Court has awarded compensation, exercising its inherent power to do complete justice and awarding appropriate relief under Art.32. In the initial phase of evolution of compensatory relief, the Court did not offer any firm jurisprudential basis for such a remedy. It used different terminology like exemplary costs, and exemplary damages. However, the Court later relied on Constitutional tort theory to justify the award of compensation. The Supreme Court has taken a view that a claim in public law for compensation is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of Fundamental Rights. The Court has also relied on Art.9 (5) of international Covenant on Civil and Political Rights, 1966, while justifying the award of compensation under Art.32 of the

Constitution. This is despite India having put a reservation to Art.9 of the Covenant, stating that the reservation has lost its importance.

In a welfare state the State must strive to establish just relations between the rights of the individual and the responsibilities of the state. The award of compensation as a remedial measure has been established by interpretative techniques of the Supreme Court, even though the Court has not been consistent in awarding the same. The award of compensation by the Court has evolved as a discretionary relief, even though it has emphasized justifications for such a relief. In our submission, the compensatory relief serves both deterrent as well as recitative purposes. It is pertinent to note that despite many objections to the Courts awarding compensation as a remedy for violation of fundamental human rights, the Courts have leaned in favor of compensating the individuals for injuries suffered at the hands of State and its employees. It is submitted that preventing and remedying injury to an individual is the bedrock of many constitutional protections. Also the Court's attention is focused towards establishing constitutional rights so that individuals are protected from State lawlessness. Such an approach is warranted for establishment of astute constitutionalism and rights conscious and accountable executive. . Indeed, such individual protection would have been considerably enhanced, had this right to compensation been made an enforceable right in India also.

10.7 Some Useful Books

1. Constitutional Law of India by Dr. J. N Pandey, Central Law Agency .
2. The Constitutional of India by P.M Bakshi, Universal Law Publishing Co.
3. Dr. B.L Babel , Human rights, Central Law Agency
4. Human Rights, by Adil-ul-Yasin , Archana Upadhyay, Book Code : 002919, ISBN : 8187606479, Publication Year : 2004
5. Human Rights and Terrorism, by A. Subbian, Book Code : 003547, ISBN : 8176297097 Publication Year : 2005
6. The Future of Human Rights, by Upendra Baxi, Book Code : 003717, ISBN : 0195677064, Publication Year : 2006, Edition:II
7. Teaching Human Rights, by Harry Dhand, Book Code : 004182, ISBN : 8172732066, Publication Year : 2005, Edition: First
8. Teaching of Human Rights, by Jagannath Mohanty, Book Code : 005214 ISBN : 8176296481, Publication Year : 2005

9. Introducing Human Rights, Book Code : 005450, ISBN : 0195681479, Publication Year : 2006
10. International Human Rights Documents. by P R Gandhi, Book Code : 006599, ISBN : 817534152X, Publication Year : 2001, Edition: First

10.8 Check your Progress

(A) Which of the following Statements are true?

- I. The methodology for implementation of human rights at both national and international levels are free from difficulties
- II. The human rights are catalogued in the constitution
- III. Part IV of constitution of India deals with fundamental duties
- IV. Indian Judiciary has played an effective role in promoting and enforcing human rights
- V. Dr. B.R Ambedkar was the chairman of drafting committee of constitution
- VI. The Supreme court has liberalized locus standi in PIL
- VII. A tort is a civil wrong which is not breach of trust
- VIII. The constitution of India expressly provides for a right to compensation.

(B) Fill in the Blanks-

- I. The making of Indian's constitution also demonstrates the greatest concern for fundamental human rights and..... of India.
- II. Article 32 and Article 226 of the constitution are the pivotal provisions Empowering Supreme court and High courts to enforce the.....
- III. Nilabati Behera v/s State of Orissa case involved the death in.....
- IV. Fundamental Rights are constitutional

10.9 Answer to check your Progress:

(A)

- I. False
- II. True
- III. False
- IV. True

- V. True
- VI. True
- VII. True
- VIII. False

(B)

- I. Freedoms for people
- II. Fundamental rights
- III. Reasonability
- IV. guarantees

10.9 Terminal questions:

- 1 Discuss in detail the fundamental rights enshrined in part III of constitution.
- 2 Discuss the role of Supreme Court in awarding compensatory relief.