CHAPTER – II

CONCEPTUAL ANALYSIS OF HUMAN RIGHTS: MEANING AND DIMENSIONS

The Concept of human rights as it is understood today has evolved over the centuries. Though the expression "Human Rights" seems to have the modern face, human rights are old as human civilization. It is the crystallization of values that are common heritage of mankind. The issue of human rights has assumed importance globally during past few decades and has an international significance as every country is subject to the international scrutiny by the world body which indicts members States for violation. It has been a subject of discourses, deliberations, negotiations and transactions and has been a subject of interpretation in every religious, political, social and economic ideologies as well as a subject of study in all academic disciplines.

The awareness to protect human rights has grown to such an extent that today it is being used as a yardstick to measure the civilization of societies, States, regimes and positive laws. It being used as a criteria for making value judgments, both by the individuals and Governments. It is being used as limitations on the governments and authorities as well as is being used as a vehicle of development in every international monetary and humanitarian aid. Protection and promotion of human rights ensures prevalence of freedom, justice, peace and order in each society. It ensures recognition of worth of individual an equal basis. It ensures that every human being fulfills a quality, life based- equality, dignity, respect and concern.

Observance of human rights is very essential and vital for every society to live in peace, harmony and brotherhood. But the observance of human rights is a complex one, more so in this multi-cultural, multi-religious, multi-lingual society like ours. Yet it is possible through co-operation of all sectors of society, political

parties, leaders, lawyers, judges, social workers, non-governmental organizations, teachers, public officials, media persons and others. The concept of human rights, it has been argued, falls within the framework of Constitutional law and International law. For this purpose, it has been identified to defend by institutionalized means the right of human beings against the abuses of power committed by the organs of the State and at the same time to promote the establishment of human living conditions and multi- dimensional development of human personality.[1]

The expression "Human Rights" denotes all those rights, which are inherent in our nature without which we cannot live as human beings. Human Rights being eternal part of the nature of human beings are essential for individuals to develop their personality, their human qualities, intelligence, talent and conscience and to satisfy their spiritual and other higher needs. Further it is described that the rights, which are natural and inherent for the life and happiness of every individual are called human rights. These rights are indispensable for the maintenance of human dignity and the individual enjoys these rights form birth to death. In fact human rights are the very essence of a meaningful life, the purpose of securing human rights as such is to provide protection to these rights against the abuse of power committed by the organs of the State; to establish institutions for the promotion of living conditions of human beings and for the development of their personality; and at the same time, to provide effective remedial measures for obtaining redress when these rights are violated.

2.1 Meaning and Definitions of Human Rights:

Human rights are those minimal rights which are considered as inalienable "Rights of Man", which require a person to be treated as equal and protected against all injustices and inhuman acts of the State public authorities as also the fellow persons. Therefore, human rights constitute those rights which ought to be enjoyed by all human beings of the universe irrespective of their biological, social, economic and political status.

The most striking feature of the concept of human rights is that they may be difficult to define but are impossible to ignore. However, it is quite a challenge to define a complex concept of human rights, yet there are common agreements on certain inalienable rights without which no man can lead a civilized life. Man as a member of human society has some rights in order to survive, sustain and nourish his best potentials some of the human rights thinkers have tried their best to define the human rights in order to make its meaning clear.

According to J. Donnely "Human Rights are those held simply by virtue of being a person. To have a human right one need not do anything special, other than to be born as human being"[2] R.J. Vincet argued human rights are founded in the human nature. He said, "they are the rights that everyone has, and everyone equally, by virtue of their very humanity. They are grounded in our appeal to human nature"[3]. According to David Selby, "human rights pertain to all persons and are possessed by everybody in the world because they are human beings, they are not earned, bought or inherited, nor are they created by any contractual undertaking. "On the other hand, A.A. Said define human rights as those rights that are concerned with the dignity of individual, the level of self-esteem that secures personal identity and promote human community."[4]

A well known scholar says, Human rights is twentieth century name for what has been traditionally known as Natural Rights or, in a more exhilarating phrase, the rights of man."[5] In the words of Subash C. Kashyap, "the fundamental norms governing the concept of human rights is that of the respect for human personality and its absolute worth. Human rights may be said to be those fundamental rights to which every man or woman inhibiting any part of the world should be deemed to be entitled merely by virtue of having been born a human being."[6]

The above mentioned definitions talk about the nature and significance of human rights and it is now proved that there is no precise and universally agreed definition of human rights. But Edward Lawson's definition can be considered as

the most comprehensive and appealing. He in the 'Encyclopedia of Human Rights' says, human rights are the universally accepted principles and rules that support morality and that make it possible for each member of the human family to realise his or her full potential and live life in an atmosphere of freedom, justice and peace.[7]

2.1.1 Human Rights: Indian Scenario

Section 2(d) of The Protection of Human Rights Act, 1993 defines 'Human Rights' as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the Courts in India. A unique feature of the Indian Constitution is that a large part of human rights are named Fundamental Rights, and right to enforce fundamental rights itself has been made a Fundamental Right. The Fundamental Rights in the Indian Constitution constitute the 'Magna Carta' of individual's liberty and Human rights.

Even before the Indian Independence; the framers of the Indian Constitution, while drafting it had taken note of the basic human rights of all human beings and embodied them in the Preamble and Part III of the Constitution. Besides the right to justice, social, economic and political; liberty of thought, expression and belief; equality of status and opportunity and fraternity ensuring dignity of individuals; freedom of speech, expression etc. have also been incorporated as fundamental rights of the citizens of India.[8] These are considered as founding pillars of Indian democracy which the people of India are solemnly resolved to follow. The basic purpose of the Preamble is to ensure protection of rights and freedoms of all citizens without any discrimination whatsoever. The Supreme Court of India, in its historic judgment in *Maneka Gandhi* vs. *Union of India*,[9] observed that fundamental rights represent the basic values cherished by people of India and ensure to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They are the "pattern of guarantee" on the basic structure of human rights

and impose negative obligations on the State not to encroach upon individuals liberty in its various dimensions. Among all species of human rights, right to life receives precedence and is a *sine qua non* for the enjoyment of other rights - which only supplements and extends complete meaning and content to the right to life. Therefore, right to life has been given paramount importance by our Constitution and the Courts. For in the event of any invasion to right to life, other rights - which are subsidiary to this right become meaningless, since the entire edifice of human rights jurisprudence is raised on the bedrock of right to life.[10] Right to life and personal liberty is the most precious, sacrosanct, inalienable and fundamental of all the fundamental rights of citizens.[11] Right to life includes protection against torture or cruel, in human and degrading treatment in any form.[12]

2.2 Human Rights in Historical Perspective:

2.2.1 Origin and development

The history of human rights is contemporaneous to the development and evolution of early man. The concept of human rights as it is understood today has evolved over the centuries. Though the expression "Human Rights" seems to have modern face, human rights are as old as human civilization. Human rights have existed in however, nascent a form, ever since man, as a gregarious animal, has lived in communities, family, clan, tribe village, town or nation and now in an independent world community.[13] Looking at the concept of human rights from a historical perspective, it would be seen that it is neither entirely western nor so modern, rather it is the crystallization of values that are common heritage of mankind.

Kautilya in his famous and immortal work "Arthasastra" has defined and described the human rights of war prisoners. The human rights were reformed to as civil rights, political rights, personal rights, legal rights, natural or divine rights, economic and social rights in ancient period. Hence, there is a variety of expression, like 'inherent rights, 'natural rights', 'inalienable rights', 'basic fundamental rights', which are interchangeable terms to express the rights that a human being possess.

While introducing the concept of human rights a well-known scholar says, "Human rights are twentieth century name or what has been traditionally known as natural rights or in more exhilarating phrase, the rights of man."[14] The concept of human rights was first, reflected in ancient Greece and Rome, where it was closely tied to Pre-modern natural law doctrine of Greek stoicism. The Greek idea of divine law and freedom and the practice of Roman law are at the heart of today's ideas of human rights. During the 18th Century, the so called Age of Enlightenment, a growing confidence of human reason and of course, the perfection of human affairs led it to become more comprehensive one. John Locke in England, Montesquieu Voltaire and Jean Jacques Rousseau in France and others supported human reason and also tried to prove the superiority of natural law. Locke's 'theory of natural right' and Rousseau's idea of 'Man is borne, but everywhere is in Chain's and other such ideas established the idea of universal rights'.

The doctrine of natural rights influenced the English, French and American Revolutions. The practical examples of England's glorious revolution 1688 and resulting Bill of Rights on 1689 as well provided rationale for the wave of revolutionary agitation which influenced the West, most notably in North America and France. Certain historic texts like Pennsylvania Declaration (1776) American Declaration (1787) French Declaration (1789) reflected the intellectual milieu of the contemporary socio-political situations spawning the struggle against political absolutism. In the words of Maurice Cranston, a leading human rights scholar, it is evident that these struggles took place because the absolutism promoted men to claim their rights which were denied to them.[15] All those revolutions laid the foundation of human rights. In fact, Henry David Thoreau was first philosopher to have used the term "human rights" in his treatise; civil disobedience, which influenced Leo Tolstoy, Mahatma Gandhi and Martin Luther King to develop and propagate the concept of non-violent resistance to unethical governmental actions. Mahatma Gandhi said: "respect of oneself, equally applies to the whole universe. All mankind in essence are alike, what is therefore possible for one is possible for everybody."[16]

The horrors of the Second World War led to the birth and recognition of the modern human rights movement in the international sphere. President Roosevelt's proclamation in 1941 the four freedoms -of speech and expression, of belief, freedom from fear and want- as universally acceptable set of standards, along with the works of NGO's were some of the significant developments in this directions. But it was the establishment of the United Nations in 1945, and the subsequent international concern for the commitment of human rights that widened the scope of this movement. A cornerstone of this post war human rights regime was the Universal Declaration of Human Rights (UDHR) which was adopted on 10th December, 1948, which is commonly known as "Human Rights Day". The sources of this Declaration owe much to the English Revolution, American Revolution, and French Revolution. The post-war era heralded the adoption of equality, liberty and social justice as the cardinal principles of human rights. The first documentary use of the expression of human rights took place in UDHR and two other international covenants - International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 which came into force in 1976 with the consent and approval of the United Nations.

Global recognition for the human rights movement grew during the 1970s, when Amnesty International gained permanent observer status as an NGO at the United Nations. Its reports and Statement, and press releases about basic human rights received respectful attention around the world. The U.N. Declaration 1948 caught the attention of civil society organization and Individuals in the third world to fight precious rights. Hence numerous civil society organization (Human Rights Watch, Amenity International) emerged in Asia, Africa and Latin America fighting against oppressive State and basic human rights; be it the right to life, right to free expression, right to work & better working condition and host of similar rights. At last we can say, Amnesty and many of its sister organizations inspired a shape the later course of civil liberties movements all over the world. The Amnesty International was awarded Nobel Peace Prize for its contribution to the cause of human rights.

Thus the historical perspective highlighted the realities of man's struggle for rights being as old as the history of mankind itself. The concept of human rights was in a rudimentary form in the ancient times, in formative stage in middle ages and had fully grown in the 20th Century with the formation of United Nations.[17]

The first documentary use of the expression 'human rights' is to be found in the Charter of the United Nations, which was adopted after Second World War at San Francisco on June 25, 1945. The Preamble of this Charter, which was drawn up to prevent a recurrence of the destruction and suffering caused by the Second World War, by setting up the international organization called the United Nations, declared that the United Nations shall have for its object, inter alia, "to reaffirm faith in fundamental human rights..." and Article 1 thereafter stated that the 'purposes' of the United Nations shall be, among others,

> "to achieve International co-operation in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language or religion....."

The U.N. Charter, however, was not a binding instrument, and merely stated the ideal which was to be later developed by different agencies and organs. The first concrete step by way of formulating the various human rights was taken by the U.N. General Assembly in December, 1948, by adopting the Universal Declaration of Human Rights. It was intended to be followed by an International Bill of Rights which could be legally binding on the Covenanting Parties. After all, Universal Declaration operated merely as a Statement of ideals which was not of the nature of a legally binding covenant and had no machinery for its enforcement. That deficiency was sought to be removed by the U.N. General Assembly by adopting in December, 1966, two Covenants for the observance of human rights:

a. The Covenant on Civil and Political rights.
b. The Covenant on Economic, Social and Cultural Rights.

While the former formulated legally enforceable rights of the individual, the later was addressed to the States to implement them by legislation.[18]

The European Court of Human Rights, has immensely contributed towards affirming and implementing Human Rights in a large variety of cases including: Detention and pre-detention trial, fair trial; freedom of expression, freedom of Association; Against degrading treatment, Respect for Private Life; Right to Life; abolition of capital punishment and many more areas of its application. The increasing impact of European Convention of Human rights has helped the development of law as the subject, much in U.K. and appreciably at the International levels.[19]

2.2.2 Indian Perspective on Human Rights

If we look at the concept of human rights from Indian point of view we find that the concept of human rights is not alien to the Indian Political thinkers and philosophers. They have expressed concern to secure human rights and fundamental freedoms for all human beings everywhere since the very early times of Vedic age. The Indian philosophy characterizes the foundation of Human rights in ancient conception of Dharma and Danda which regulated the governance of State and its citizens. The Concept of Sanatan Dharma which laid down the foundation of human rights in ancient civilization is 2000 years older than western Christianity with a central theoretical doctrine. It laid down the foundation of same society in ancient Indian civilization encompassing a moral code, righteousness and responsibilities. It was certainly wider and broader than the concept of religion as used in western historiography. It was on the basis of those existing principles that detailed rules were laid down for the guidance, of the King. It was his duty to uphold the law and he was as much subject to law as any other person (equality before law and equal protection of law can be deduced from that practice). One of his chief duties was the administration of justice according to the laws of religions texts, local customs and usages and written codes. It was obligatory for him to enforce not only the sacred laws of the existing texts but also the customary laws (rights and claims) of the subjects. There was possibly the human rights enforcement situation in its embryonic stage. The guiding principles for the kings were taken mainly from species of dharmic texts like Vedas and Vedanta under the

genus, Sanatan Dharam which exnshrines ‘Truth is one’ and God resides in every human being.' Upanishads, emphasizing the individual self and its truth say that “there is nothing high than the person”. Mahabharata also emphasises the point that "without ethical and moral principles, there is no true happiness and a society cannot hold together; the principles such as truth, self-control asceticism, generosity, non-violence constancy in virtue should serve as the means of one's success."[20]

However, even at the individual’s level, there were some significant contributions by the religious prophets with regard to the basis of human rights. Mahavir, the founder of Jainism said that the foundation of human freedom in its deepest sense, advocated that the truth known as Anekantavad which demonstrated the idea of the relative pluralism and many sides of truth. This attitude towards truth gives profound implications for various aspects of human life- personal and social.

During the Chandra Gupta Maurya's regime, Kautilya in his Arthashastra, which depicted political, social economic Codes of Conduct, laid down certain principles of the law of punishment as the foundation of social existence. These principles then became the basis of law against, interalia, illegal arrests and detention, custodial death, ill-treatment of women such as rape, inequality of gender, corrupt judicial system etc.[21] The legendary King Ashoka in the post-Kalinga regime had sown the seeds of a humanitarian society and made various provision to ensure equality, fraternity and happiness for all his subjects. In a way Ashoka was the most important architect of civil liberties in Ancient India.[22]

Akbar, the great Mughal ruler brought about the basic changes in the style of Mughal Administration, particularly the judicial administration which contained all the basic elements of modern doctrine of due process of law, fair trial and independent judiciary. He adopted a policy of tolerance and non-discrimination and saw himself that no injustice is committed in his realm.

The modern version of human rights jurisprudence took a firm root during the British rule in India. While the human rights struggle were mainly against the exploitative and oppressive rule by colonial power the movement was meant to restore the lost Dharma of glorious past through internal reforms of Indian Society. When the religious bias was introduced to the judicial system in India by Britishers (British Rule) by the Act 1827, Raja Ram Mohan Roy 'The great social reformer of Modern India" opposed the provisions of that Act. The provisions of the Act were that natives, either Hindus or Muslims, are subject to judicial trial by Christians, either European or native, while Christians are exempted from being tried either by a Hindu or Muslim juror". His forsighting thought and meaningful actions made a valuable contribution to improve the civil liberties of the native of that time. The reformist movement of human rights and dignity from Bengal slowly but spread steadily, over to other parts of India. For instance, In Maharashtra, Mahadev Govind Ranade, who was one of the founding members of Indian National Congress, set up an all India Organizations, the Indian Social Conference in 1887, to campaign against human rights abuses. Ranade was such a visionary that he could be able to see the interdependence and indivisibility of what is now known as two generations of human rights - civil and Political right, and economic social and cultural rights. He made a very passionate plea that "you cannot have a good social system when you find yourself low in the scale of political rights nor can you be fit to exercise political rights and privileges, unless your social system is based on reason and justice. You cannot have a good economic system when your social arrangements are imperfect. If your religious ideas are low and grounding, you cannot succeed in the social, economic and political spheres. This interdependence is not an accident but is the law of nature." What Ranade thoughts hundred years back, has finally found its expression in the provisions of Universal Declaration of Human Rights in 1948.[23]

The Muslim reform movements, such as Aligarh Movement led by Sir Syed Ahmed Khan, and the Ahmediya movement founded by Mirza Ghulam Ahmed

made important contributions in emphasizing the universalism and humanitarianism of Islam and the national awakening of the Muslims.

2.3 Freedom Movement and the Human Rights:

The entire history of freedom movement in India can be aptly called as the history of Human rights struggles. The resistance to British rule was manifested in the form of demand for fundamental freedoms and civil and political rights for the people of India. There was no fundamental law guaranteeing the subjects right and liberties and they were humiliated and discriminated against in many ways, in their own country. After witnessing the colonial rule every Indian was of the firm opinion that the recognition, protection and implementation of human rights are not only basic but also inalienable for them for leading a civilized life.

To revive the philosophy of human rights in modern sense, concrete efforts were made by the Indian National Congress which demanded basic human rights in the Constitution of India Bill, 1895. Constant resistance to the foreign rule manifested in the form of demand for fundamental freedom, civil and political rights for the people. The rights like freedom of expression, right to equality before law and inviolability one's home, figured in this Bill. The congress in the resolution of 1917 and 1919 asserted demand of civil rights and equal status with the English men. The resolution called for equal terms and conditions in bearing areas, for a wider application of the system of trial by jury and for the right of Indian to claim that no less than one half of the jurors should be their own countrymen.[24] The Madras Session of the Congress was held in May 1928 which passed a resolution, embodying a Declaration of Fundamental Rights in any future Constitutional frameworks. A Committee under the Motilal Nehru was appointed to prepare a blueprint of civil and political rights or the people of India. The Committee's report known as Nehru report - contained an explanation of its draft Constitution that speaks for itself. The Fundamental Rights incorporated in the Nehru Report, were reminiscent of those of the American and Post-war European

Constitutions, and were in several cases taken word per word from the rights listed in the Commonwealth of India Bill, 1925.

The Nehru Report declared that the first concern of the Indians was, to secure the Fundamental Rights,' that have been denied to them. In writing a Constitution the report continued:

> "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances...."

The Nehru Report came out with nineteen rights such as personal liberty freedom of conscience, freedom of expression of opinion, equality for all citizens before the law and host of similar freedoms incidentally; the Constitution of India in 1950 incorporated ten out of nineteen rights from the Nehru Report.[25]

Another landmark in the development of the recognition of fundamental rights was the Karachi Resolution adopted by the Congress Session held in Mandi, 1931. It adopt a detailed resolution "Fundamental Rights and duties and economic and Social Change". Subsequently, the Sapru Committee under the chairmanship of Sir Tej Bhadur Sapru, in 1945, stressed for written code of fundamental rights and Constitutional Assembly and raised a forceful demand for the inclusion of human rights in the Constitution. Finally the Constituent Assembly after serious debate and elaborate proceedings incorporated Natural law rights named Fundamental Rights and Directive Principles in the most comprehensive manner.

The British Cabinet Mission in 1946 recognized the need for a written guarantee of fundamental rights in the Constitution of India and envisaged a Constituent Assembly for framing the Constitution of India. It recommended the setting up of an Advisory Committee for reporting to the Assembly inter-alia on fundamental Rights. The first meeting of India's Constituent Assembly was held an 9th December, 1946 at New Delhi, and was attended by 296 of its members elected through provincial legislatures to fulfill the long cherished hope of Indian people. The great significance of this meeting was the framing of free India's Constitution

without outside interference or pressure. The Constitutional Assembly formed the Advisory Committee on 24 January, 1947 with the chairmanship of Sardar Patel. The duty of this committee was to report to the Assembly on the list of fundamental rights. Advisory Committee in turn set up sub-committee on Fundamental Rights with the chairmanship of Acharya Kriplani. The draft list of rights was prepared by **B.N.** Rau, K.T.Shah, K.M.Munshi, B.R.Ambedkar, Harnam Singh and the congress expert committee, as well as miscellaneous notes and memoranda on various aspects of rights.

The Sub-Committee made fundamental rights justifiable and included within the rights the legal methods by which they could be secured to do this. They adopted the English device of prerogative writs or directions in the form of writs Munshi, Ambedkar and Ayyar strongly and actively favoured the inclusion of the rights to Constitutional remedies and the other members of sub-committee agreed with them. Thus the assembly passed fundamental rights which are divided into seven parts having close resemblance with human rights enshrined in various international human rights documents.[26]

At last, we can say that Indian perception of human right does not emanate from the theory of a priori or natural rights doctrine of the west, rather it has its own base in Ancient Indian culture and civilization.

2.4 Constitutional & Conventional Contours of Human Rights:

The Constitutional Assembly accomplished the Herculean task of drafting the Constitution which was enacted and adopted by the People of India on 26 January, 1950. The genesis of the vision, need recognition, protection and enforcement of human rights which lies in the freedom struggle of Indians for more than a century, culminated in the form of Fundamental Rights and Directive Principles of State Policy in which mammoth structure of Indian Republic stands today. The aspirations of the people of India found expression in the Indian Constitution which enacted a nearly complete catalogue of human rights around the time when international scene was witnessing the framing of Universal

Declaration of Human Rights. The human rights content of the Indian Constitution is a complex amalgam of Civil and Political Rights along with the economic social, religious and minority rights.

Even prior to the framing of the Constitution for free India, Mahatma Gandhi had announced before the Second Round Table Conference that his aim was to establish a political society in India in which there would be no distinction between high class and low class people, that women should enjoy the same rights as men; and dignity and justice, social, economic and political, would be ensured to the teeming millions of India. This was one of the objects which inspire Pandit Jawaharlal Nehru in drafting the historic Objectives Resolution in the Constituent Assembly, and which was adopted on January 22, 1947. Clause (5) of this Resolution[27] Stated:

> 'This constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent sovereign Republic and to draw up for her future governance a Constitution: (5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law, freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and morality..."

This ideal of the objectives Resolution was reflected in the Preamble of the Constitution which was adopted in November, 1949, with the specific mention of dignity of the individual.

The Preamble, Fundamental Rights, Directive Principles of State Policy are important Constitutional provisions from the human rights point of view. Now the concept of human rights is no longer a philosophical conception, it has become a functional reality. The study of human rights with reference to Indian Constitution reveals that the Constitution enshrines almost all the human rights provided in the various international Conventions, Covenants and treaties, such as Universal Declaration of the Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic Social and

Cultural Rights, 1966 etc. The rights guaranteed and provided in the Constitution of India are required to be in conformity with the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in view of the fact that India has become a part to these Covenants by ratifying them. Many rights enshrined in the Covenants on Civil and Political Rights have been recognized specifically in the Indian Constitution as Fundamental Rights under Part III and made them justiciable i.e., judicially enforceable fundamental rights while Rights stipulated in the Covenant Economic, Social and Cultural Rights are enshrined in part IV of the Constitution which lay down the Directive Principles of State Policy and made them non-justiciable (judicially non-enforceable rights).

2.4.1 Civil and Political Rights *vis-a-vis* Fundamental Rights

The rights cherished in the Covenant on Civil and Political Rights have been duly protected under part III of the Indian Constitution as Fundamental Rights. These rights include right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and right to Constitutional remedies.[28]

There are certain other rights, which have been protected by International Covenant on Civil and Political Rights which are not specified in the part III of the Constitution as fundamental rights. However, they have been regarded as fundamental rights by the Hon'ble Supreme Court by enlarging the meaning and scope of the fundamental rights. Article 21 of the Constitution, guarantees life and personal liberty but it has been interpreted to include right to privacy, right against solitary confinement and inhuman treatment in prison, right to free legal aid, right to speedy trial, right against hand cuffing, right against delayed execution, right against custodial violence, right against public hanging, right to shelter, right to live with human dignity, right to livelihood etc.[29]

It is very important to mention here that our Constitution makers having incorporated a long list of fundamental rights, have also provided effective remedies for the enforcement of these rights. Articles 32 and 226 of the

Constitution of India have adequate provisions for the enforcement of fundamental as well as other rights of the individuals by way of orders, directions and various writs such Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo Warranto. The Supreme Court as well as State High Courts exercises their power under the head of 'the right to Constitutional remedies' in case of violations of the above mentioned fundamental rights. In this way these Articles are novel provisions in the Constitution of India and have no parallel in the Constitution of any other country.[30]

In *Maneka Gandhi* v. *Union of India,*[31] Bhagwati J. has said that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute personal liberty of man and they have raised to the status of distinct fundamental rights. In *Unni Krishnan J.P.* v *State of Andhra Pradesh,*[32] the Supreme Court held that 'personal liberty takes all the rights of man' Hence it has the widest ambit and scope and is co-extensive of Article 21 which includes bothsubstantive right to personal liberty and procedural safeguard to be observed for its deprivation. Again, the Supreme Court in *S.R. Bommai* v. *Union of India*[33] case had held that Preamble of the Constitution is an integral part of the Constitution. Hence 'personal liberty' guaranteed under Article 21 must be interpreted in the light of personal liberty and dignity promised in the Preamble. The Convention and the Constitution stand on equal footing for the protection and promotion of these basic and fundamental rights.

No narration of the Constitution in the last sixty three years can be complete without reference to *A.K. Gapalan*,[34] *Maneka Gandhi,*[35] *Golaknath*[36] and *Kesavananda Bharti*[37] cases. The doctrine that the basic Structure of the Constitution cannot be altered by amendment is a fundamental original doctrine evolved by the Indian Judiciary. It is a singular contribution made by the court for the protection of human rights in this country.

2.4.2 Economic and Social Rights *vis-a-vis* Directive Principles of State Policy

In India much importance has been given to civil and political rights but not economic and social rights. However, in real sense the realization of the civil and political rights is impossible without the enjoyment of economic rights. P.N. Bhaghwati, J. rightly said that civil and political rights become a practical reality for the people of the State only on the achievement of economic and social rights. Thus the Economic and social rights are the medium to achieve civil and political rights. Otherwise civil and political rights will remain merely a leasing illusion and a simple promise. The rights postulated under the International Covenant on Economic and Social Rights are incorporated in the Directive Principles of State Policy under part IV of the Constitution of India. Though Part IV contain directives to the State, it is intended to guarantee certain basic economic and social rights to the citizens by the State.[38]

Judicially non-enforceable rights in part IV of the Constitution are chiefly those economic and social in character. However, Article 37 makes it clear; their judicial non-enforceability does not weaken the duty of the State to apply them in making laws, since they are nevertheless fundamental in the governance of the country. Additionally, the innovative jurisprudence of the Supreme Court has now read into Article 21 (the right to life and personal liberty) many of these principles and made them enforceable.[39]

The idealism of the makers of our Constitution is proclaimed in the Preamble which aims at creating a country where justice - social economic and political - will prevail, where there will be liberty of thought, expression belief, faith and worship; equality of status and of opportunity and fraternity assuring the dignity of the individual. Part III gives a practical shape to this vision by safeguarding the human rights and the civil and political values proclaimed in the Preamble through justiciable fundamental rights. Economic and social rights which require policy initiatives from the State for their realisation are part of the Directive Principle of State policy. The entire human rights jurisprudence of this

country is founded in these provisions. If we examine the functioning of the Constitution in the last 63 years in the area of human rights, we find that the human rights jurisprudence has also been deeply influenced in interpreting these two parts of the Constitution by the international human rights norms set out by the United Nations in the Universal Declaration of Human Rights in 1948 and other international Covenants, treaties and conventions.[40]

These human rights and freedoms which we enjoy under the Constitution form the very essence of the civilized life of a person. Knowing how fragile and nascent this freedom is, we have to be constantly vigilant to see that our Constitutional structure is not eroded and we are ever vigilant to protect our freedoms and our basic human rights. The spirit of liberty is an eternal flame which we must keep burning with every means at our command if we are going to create the kind of social, economic and political structure that was envisaged by our founding fathers.[41]

2.5 Protection of Human Rights Act: An Overview

In pursuant to the direction enshrined in Article 51 of the Constitution as well as in response to the United Nations recommendations for setting up of national institutions for the better protection, promotion and realization of human rights, the Government of India, enacted The Protection of Human Rights Act, 1993. This enactment has paved a new era of concern for preventing human rights violations. It is a comprehensive piece of legislation consisting forty three sections, arranged under eight chapters. The Act gives a very wide and comprehensive definition to Human Rights[42] as "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India." The Act envisages setting up of three tier machinery for the protection and enforcement of Human Rights, i.e., National Human Rights Commission, State Human rights Commission in States and Human Rights Courts at District level for better protection of Human rights and for the matters connected therewith or incidental thereto.

The very idea of creating a Commission was for the purpose of providing practical shape to the entire gamut of Human Rights philosophy by executing the intention of the legislators manifested in different laws, in the light of social objectives under the Act, extensive powers of investigation and enquiry has been given to the Human Rights Commissions. The most important power is that, the Commission can inquire *suo motu* or on a petition by a victim or any person on his behalf, into the complaints of violation of Human Rights or abetment thereof and negligence by public servant in the prevention of such violation. The other functions include the power to visit jail or any other institution under intimation, recommend measures for effective implementation of Human Rights, determine remedial measures, study international instruments on Human Rights and make recommendations for their implementation, conduct research in the field of Human Rights, spread Human Rights literacy and encourage the efforts of NGO's.[43] It has all the powers of a Civil court trying a suit under the Code of Civil Procedure, 1908, for summoning and enforcing the attendance of witnesses, examining them on oath, receive evidence on affidavits, requisition from any public record from any court or office and issue commissions for the examination of witnesses or documents, to conduct investigations by utilizing the services of any central or State Government investigating agencies.[44] After such investigation or inquiry it can recommend to the concerned Government to initiate proceedings for prosecution or approach the Supreme Court or the High Court for such directions, orders or writs and recommend for grant of immediate relief to the victims or the members of the family. The concerned Government is bound to submit compliance report to the Commission within one month.[45] In nutshell, it may be stated, that by enacting The Protection of Human Rights Act, 1993, India has, once again, re-affirmed its strong commitment to protect and promote Human rights of its people.

To infuse public accountability, the National Human Rights Commission under Section 19 (3) is required to publish its report alongwith recommendations and action taken by the Government on the recommendations. Under Section 20 of the Act the commission is under an obligation to submit an annual report to

Central Government as well to State Government concerned. The Central Government and the State Government as the case may be shall lay down the reports submitted by the Commission before each House of Parliament or State Legislature respectively alongwith a memorandum of action taken or proposed to be taken on the recommendation of the commission and the reasons for non-acceptance of the recommendations if any. In this way the Act ensures parliamentary supervision of the implementations of human rights by the Commission.

The Protection of Human Rights Act, 1993 has established Human Rights Machinery with the name of National Human Rights Commission to function with all over India Jurisdiction. The Act Provides for the Constitution of the National Human Rights Commission consisting of:

a. chairman who has been a Chief Justice of the Supreme Court;
b. one member who is, or has been a Judge of the Supreme Court;
c. one member who is, or has been, the Chief Justice of a High Court; and
d. Two members to be appointed from amongst persons having knowledge of, or practical experience in matters relating to human rights.

The Act of 1993 further says that the chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes, the National Commission for the scheduled tribes and the National Commission for Women shall be deemed to be members of the Commission for the discharge of function specified in clauses (b) to (j) of section 12.[46] In order to draw the working of these Commission together, chairperson of these Commissions are members of the National Human Rights Commissions. Thus the of Act, 1993, embodies the detailed provisions regarding the establishment of State Human Rights Commissions all over India to supplement the efforts of National Human Rights Commission. Thus, the Act imposes the responsibility on individual States to protect and promote human rights of their subjects.

To make coordination in the working areas between State Commissions and National Commission of Human Rights and to avoid confusion between them, Section 21(5) of the Act, 1993, provide that a State Commission, 'may enquire in to the violation of human rights only in respect of matters relatable to any of the entries enumerated in the list II and List III in the Seventh Schedule to the Constitution."[47] Further the above Act, states that NHRC shall not inquire into any matter which is pending before a State Commission or any other commission duly "constituted under any law for the time being in force. In other words, this section provides that National & State Commission shall not inquire into matters which are subjudice, vague, anonymous or frivolous. The commission shall not entertain complaints in regard to matter which are more than one year old from the data of complaint. The discretion to condone delay for just cause has not been given to the Commission.[48] However, in deciding the matters referred by Supreme Court, National Human Rights Commission is given a free hand and is not circumscribed by any conditions. Therefore, the jurisdiction exercised by National Human Rights Commission in these matters is of a special nature not covered by any enactment or law, and thus acts *Sui generis*.[49] Holding that the powers of Supreme Court, in all cases are to protect Human Rights, the court observed: "The power and jurisdiction of Supreme Court under Article 32 of the Constitution cannot be curtailed by any Statutory limitation including those contained in Sec.36(2) of the Act. If Supreme Court can exercise that power unaffected by the prohibition contained in Sec. 36(2) there is no reason why the Commission at the request of Supreme Court, cannot investigate or look into the violations of human rights even though the period of limitation indicated in Sec. 36(2) might have expired".[50]

As far as the association of NGO's with the Human rights machinery are concerned, Section 12 (i) lays down that the NHRC shall encourage the efforts of Non-Governmental Organizations and institutions working in the field of human rights and it is suggested that NHRC should seek their co-operation to bring in the light and curbing, as far as possible, the violations of human rights in the country.

2.6 Dimensions of Human Rights Jurisprudence:

The social philosophy of the Indian Constitution resides in its Preamble and two chapters, one is related to Fundamental Rights the other is Directive Principles of State Policy. This philosophy is primarily aimed at ensuring Social and Economic justice to all with special focus on the deprived, marginalized, weak and exploited- another name for human rights for all. The concept of human rights is a changing one with the time and the analysis of the historical development of the human rights reveals that there is a continuous expansion in the scope and content of human rights. Any system that is not keeping pace with the changing society cannot survive for a long time. Indeed, Indian Judiciary has realized the changing situation and has shed the garb of traditional method of administering justice by evolving a new kind of jurisprudence known as "Judicial Activism". The Supreme Court of India, in order to protect human rights of the persons revolutionised the criminal justice system, and it has liberalized, various doctrines and technicalities, invented new methods and techniques; gave expansive interpretation to provisions in the Constitution such as Article 21; invented new means to make executive accountable. Of course, this needed combination of courage and judicial craftsman skill on the part of judges.

In India, Supreme Court and High Courts enjoy vast powers including the powers to overturn actions both legislative as well executive. The Apex Court, invented the "Doctrine of Basic Structure" in the famous Kesavananda Bharti.[51] Case and said that, even Constitutional amendment could be struck down by the Courts as violative of the ‘basic structure'. Thus the power of the judiciary to interprete laws including the provisions of the Constitutions clubbed with the power of judicial review and the growing acceptance of Judicial laws sometimes judicial policy-making puts judiciary in unequally important position for translating human rights rhetoric in to reality. But as justice Bhagwati has pointed out, a judiciary which is, strong and independent; immune from pressures or influences; committed to the cause of human rights; alert to repel gross or subtle attacks against these rights; capable of rising above concealed political

preferences, ambitions and other such weakness and fearless of executive reaction alone can discharge this heavy responsibility.[52]

By putting strenuous efforts, the Courts are trying to translate the Constitutional philosophy of human rights jurisprudence into reality. The judiciary has been rendering historic judgments which are in tune and temper with legislative intent while keeping pace with time and jealously protecting and developing the dimensions of fundamental human rights of the citizen so as to make them meaningful and realistic.

By giving a liberal and comprehensive meaning to life and personal liberty, the Courts have formulated and established a plethora of rights, such as, right to privacy, right to travel, right to livelihood, right to medical care, right to live with human dignity, right to speedy trial, right to free legal aid, right against in human, cruel and degrading treatment, right against solitary confinement, right against handcuffing, bar-fetters, right to live in unpolluted environment etc., the latest judicial trend reveals that Indian Courts are quite enthusiastic in using the laws as a tool of social revolution.

2.6.1 Judicial Activism and Human Rights

The role of judiciary in giving concrete shape to the human rights through its activism cannot be ignored. The enforcement of human rights by the judiciary has now become an integral part of Indian judicial system. The Supreme Court and High Courts, by virtue of Articles 32 and 226, have greatly extended the ambit of judicial review and devised new methods and strategies for throwing open the door of justice to the poors and downtrodden through liberalized public interest legislation. Under the emerging and expanding concept of 'Public Interest Integration' the traditional rule of Locus Standi, that a petition under Article 32 of the Constitution can only be filed by a person whose fundamental right is infringed, has now been considerably relaxed. A plethora of judicial decisions reveal that Hon'ble Supreme Court has used PIL (Public Interest Litigation) build up its own jurisprudence, a jurisprudence with social relevance compelling the governments and other instrumentalities to discharge their Constitutional duties of

protecting the poor, downtrodden, exploited and victimised categories of people including prisoners, under trials, women and children against social and economic injustices and ensuring the realisation of basic human rights. It may be submitted that Indian Judiciary through the intervention of PIL and broadened view of social justice has given much ahead in structuring, expanding, protecting and promoting the human rights.

The power of the Supreme Court for the protection of the Constitutional rights of citizens are of the widest amplitude and there is no reason why the Court should not adopt activist approach similar to Courts in America and issue to the stable directions which may involve taking of positive action with a view to securing enforcement of fundamental rights. The judiciary has been assigned this active role under the Constitution. They are not expected to sit in an ivory tower like an Olympian closing their eyes uncaring for the problems faced by the society. They have to exercise their judicial powers for protecting the fundamental rights and liberties of citizens of the country. Therefore, in order to achieve this mission, the judiciary has to exercise and evolve its jurisdiction with courage, creativity and circumstances and with vision vigilance and practical wisdom. Judicial activism and self-restraint are the facets of that courageous creativity and pragmatic wisdom.[53]

In a country like India, where we want to bring about social and economic change and to improve the life conditions of the people and make basic human rights available to them, it is necessary for a judge to adopt an activist approach. Imparting justice to the people is great responsibility of the judiciary and it has to discharge it with due care and caution so that people do not lose their traditional faith in it. Law must not only speak justice but also do justice. It must also become a source of strength and comfort to the deprived and vulnerable sections of the community and an active dispenser of social justice. The justice system has, therefore, to reorient itself to inspire confidence in the poor and disadvantaged section of the community.[54] Thus the task of a judge in human rights area is acute rather than deferential; creative rather than mechanical; evolutionary rather than status-quoits; humanist rather than formalist.

We can take criminal jurisprudence as an illustration of how creative and human rights approach of the judiciary has brought structural as well as institutional reforms. An instance of literal and narrow interpretation of a vital fundamental right namely right to life & personal liberty under Article 21 of the Constitution of India is an early decision of Supreme Court in the case of *A.K. Gopalan*.[55] Briefly the facts of the case are that, the petitioner, A. K. Gopalan, a communist leader was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of his detention under the Act on the ground, That it was violative of his right to freedom of movement under Article 19(l)(d) which is the very essence of personal liberty guaranteed by Article 21 of the Constitution. He argued that the words 'personal liberty' include the freedom of movement also and therefore, the Preventive Detention Act, 1950 must also satisfy the requirement of Article 19(5). In other words, the restriction imposed by the detention law on the freedom of movement must be reasonable under Article 19(5) of the Constitution. It was argued that Article 19(1) and Article 21 should be read together because Article 19(1) dealt with substantive rights and Article 21 dealt with procedural rights. It was also said that reference in Article 21 to "procedure established by law" meant "due process of law" of the American Constitution which includes the principles of natural justice and since the impugned law does not satisfy the requirement of due process it is invalid. Supreme Court, Rejected both the contentions, and by majority held that the 'personal liberty' in Article 21 means nothing more than the liberty of the physical body, that is freedom from arrest and detention without the authority of law. This was the definition of the phrase 'personal liberty' given by Prof Dicey. According to whom personal liberty means freedom from physical restraint and coercion which is not authorized by law. The word 'liberty' is a very comprehensive word and if interpreted it is capable of including the rights mentioned in Article 19. But by qualifying the word 'liberty' the Court said, the import of the word 'personal liberty' is narrowed down to the meaning given in English law to the expression 'liberty of the person'. The majority took the view that Articles 19 and 21 deal with different aspects of 'liberty'. Article 21 is a guarantee against deprivation (total loss) of personal liberty

while Article 19 affords protection against unreasonable restrictions (which is partial control) on the right of movement. Freedom guaranteed under Article 19 can be enjoyed by a citizen only when he is a freeman and not if his personal liberty is deprived under a valid law.

In the above case, Supreme Court interpreted the 'law' as 'State made law' and rejected the plea that by the term 'law' in Article 21 meant not the State made law but *jus naturale* or the principles of natural justice. Thus Court refused to infuse the procedure with the principles of natural justice and concentrated solely upon the existence of enacted law.

Justice S.R. Das in his judgment gave an illustration that if a law provided that the Cook of the Bishop of Rochester be boiled in oil; it would be valid under Article 21. This view stood for more than 27 years until it came to be overruled in *Maneka Gandhi's* case.[56] Thus, Supreme Court has not only overruled *Gopalan's* case but also has widened the scope of the words ‘personal liberty’ considerably. Bhagwati J. (as he then was) observed:

The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19. He further said: the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction".[57] In this case the Court held that the "procedure contemplated by Article 21 must answer the test of reasonableness. The procedure must satisfy the requirement of natural justice, i.e., it must be just, fair and reasonable, and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, Article 21 assumed new dimension and the creative judicial approach led to the introduction of procedural due process in the Indian Constitutional jurisprudence with much positive impact on evolving human rights jurisprudence".

Since the day of Maneka Gandhi's Case the Apex Court has done a lot of judicial activism and expanded the scope of all the fundamental rights by reading the human rights in the express provision of the Constitution. Virtually every aspect, which affects the quality of life and personal liberty has been covered under Article 21 of the Constitution. In fact, there are thousands of cases which speaks about the judicial activism delivered by the Apex Court of India adopting the creative approach with human touch. Few of them are being discussed here:

The most significant instance of expansive interpretation of a fundamental right and powerful endorsement of social and economic rights is the decision in *Francis Coralie Mullan's* case,[58] the Court said '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 limbs 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 at that goes alongwith it, namely, the bare necessities of life such as, adequate nutrition, clothing, shelter and facilities for reading, writing and expressing ourselves in diverse forms freely moving about and mixing and communicating with fellow human being.

'Right to speedy trial' is a fundamental right as implicit in the guarantee of life and personal liberty enshrined in Article 21 of Constitution. A procedure whereby undertrials remained in jails for periods longer than the maximum term for which they could have been sentenced if considered was not a fair, just and reasonable procedure. It was held in *Hussainara Khatoon's* case[59] that in such cases Article 21 was violated and several undertrials were ordered to be released. Again the Apex Court cited in *M.H. Hoskot* case[60], that a procedure that does not make legal service available to an accused who is poor and who cannot afford a lawyer and would, therefore, go through the trial without the legal assistance cannot be regarded as reasonable, fair and just. Regarding the right to free legal aid Krishna Iyer, J., declared, "This is the State's duty and not Government Charity." If a prisoner is unable to exercise his Constitutional and Statutory right of appeal including Special leave to appeal for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, the

power to assign the counsel to the prisoner provided he does not object to the lawyer named by the Court. Equally, is an implication that the State which sets the law in motion must pay the lawyer an amount fixed by the Court.

Another case in which the Supreme Court has given strong evidences of using its power creatively is its concern for women rights. The Supreme Court in *Vishaka's* case,[61] case held that regard must be paid to International Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in domestic law. The Court in this case protected the rights of working women against sexual harassment in workplaces relying on provisions of the Convention on the Elimination of all Forms of Discrimination against women (CEDAW).

Another significant aspect of judicial approach has been the evolution of compensatory jurisprudence. Although Indian Constitution contains no provision for awarding compensation for infringement of person's fundamental rights, the Supreme Court has, in some cases ordered compensation by the State. It has rightly been said that rights without remedies are useless.[62] In *Nilabati Behra* vs. *State of Orissa*,[63] the Court created an obligation on the part of the State to compensate to the victim and relatives of the one whose death occurs in the custody of police. This approach represents the finest example not only of judicial craftsmanship but also of responsiveness and sensitivity to the cause of human rights. The Supreme Court in the case of ***People's Union for Civil Liberties*** v. ***Union of India***,[64] which is related with 'fake Encounter' by police held that the provision of Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which says "anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation," for enforcing fundamental rights, arc enforceable.

Much of the concern of human rights activism has been on the victims of police atrocities committed in the name of maintaining law and order. Supreme Court in a catena of cases not only condemned police atrocities but has gone on providing compensation to the victims of police atrocities. In *Khatri* v. *State of*

Bihar,[65] popularly known as *Bhagalpur Blinding Case* the Supreme Court imposed a liability upon the State to pay compensation to the victims of violation of their personal liberties under Article 21.

In *Kishore Singh's* case,[66] the Supreme Court held that the use of 'third degree' method by police is violative of Article 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for human person. Similarly, torture and ill-treatment of women suspects in police lockups has been held to be violative of Article 21 of the Constitution. The Court directed I.G. prisons and State Board of Legal Aid Advice Committee to provide legal assistance to the poor and indigent accused (male and female) whether they are undertrials or convicted prisoners.[67] The Supreme Court in *D.K. Basu* case[68] has termed the death in police custody as the worst and most heinous crime. The Court has stressed time and again that police torture is disastrous to our Human Rights awareness and humanist Court order. In *Raghubir Singh* v. *State of Haryana*,[69] Supreme Court made the following observations: "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberties are under a new peril. When the guardian of law gore human rights to death the Court has squarely placed the responsibility to remedy the situation on the State. The States at the highest Administrative and Political levels, we hope, will organize special strategies to prevent and punish brutality by police methodology".

No less momentous has been the use by the Indian Supreme Court of the expression "Power to issue directions or orders..... in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari" in clause (2) of Article 32. By virtue of these words, the Court has not only inflated the English prerogative writs beyond their technical and artificial bounds, and made declaratory orders, but even issued positive directions wherever they are called for, not only for reinforcement of the fundamental rights, but also for "actualising social justice" in the absence of which human rights would be meaningless or hollow to the mute millions, or the vulnerable sections of humanity in this country.[70]

2.7 Human Rights of Accused: International Charter, Covenants and Conventions:

In order to provide certain basic rights to an accused person for the purposes of restoring the dignity of a human being and protecting him from inhuman behaviour when he is taken into custody, the following two important and noteworthy declarations were made at international level:

(1) Universal Declaration of Human Rights, 1948,

(2) International Covenant on Civil and Political Rights 1966.

In addition to above mentioned declarations, several other International instruments were made at different levels from time to time which substantiated and strengthened the basic principles laid down by these two documents. Out of these following are noteworthy:

(1) United Nations Standard Minimum Rules for the treatment of Prisoners, 1955

(2) European Convention on Human Rights and Fundamental Freedoms, 1950

(3) American Convention of Human Rights, 1969

(4) African Charter on Human and Peoples Rights, 1981

(5) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

2.7.1 Universal Declaration of Human Rights, 1948 and the Rights of Accused

The Universal Declaration of Human Rights, 1948 (hereinafter referred to as the Declaration) besides providing in general certain rights in restoring the dignity of every human beings like, the rights of personal liberty, equality before laws and the right against any discrimination to every human being; also contained a few provisions pertaining to the right of an accused person.

Article 3 of the Declaration provides that "Everyone has the right to life, liberty and security of person." Likewise Article 5 of the Declaration Provides that,

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This Article is directly related to the rights of an accused against custodial violence, either during the custody of police or judicial custody.

Similarly Article 7 of the Declaration speaks about that "All are equal before the law and are entitled without any discrimination to equal protection of the law."Article 9 of the Declaration provides that "No one shall be subjected to arbitrary arrest, detention or exile."

Article 10 of the Declaration provides that an accused has the right of fair and Public Trial and also a right to be heard by impartial tribunal, in the determination of his rights, and of any criminal charges against him.

Article 11(1) of the Declaration provides that, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence." Article 11(2) further provides that, "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under National or International law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

On the basis of the above mentioned provisions of the Universal Declaration of Human rights, 1948, the various rights of an accused person recognized under it can be classified thus as follows:

a. Right of accused to equality before law;
b. Right of accused to life, liberty and security;
c. Right of accused against torture or inhuman punishment;
d. Right of accused to have a fair and public trial;
e. Right to accused to be protected against ex-post facto laws; and
f. Right of accused to be presumed innocent.

The above mentioned provisions of the Declaration regarding the rights of an accused person have been followed by almost all the countries of the world in

their criminal justice system. Although, it may be said that being an accused, a person cannot enjoy all the human rights but it is also necessary that he should not be deprived of the minimum personal liberties. Thus, a proper balance is to be maintained while imposing restriction on his freedom and on the exercise of his right of personal liberty.

2.7.2 International Covenant on Civil and Political Rights, 1966 and Rights of Accused

Part III of the International Covenant on Civil and Political Rights. 1966, (hereinafter referred to as "the Covenant") contains the various provisions granting various human rights to accused. While Article 6 of the Covenant deals with the inherent right to life of every human being; Article 7 of the Covenant protects a person from 'torture or to cruel, inhuman or degrading treatment or punishment' and also from 'medical or scientific experimentation without his consent'; Article 9 of the Covenant provides every person a 'right to liberty and security' and makes various rules to be followed at the time of arrest and Article 14 of the Covenant prescribes various procedures with a view to protect an accused. Out of 21 Articles of Part III, Article 9 and Article 14 of the Covenant deal with the rights of accused directly and have also formed the basis of various provisions of the Constitution of India and also judicial decisions. Article 9 of the Covenant provides that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons or his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before the judge or other office authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It may not be a general rule that

persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a Court in order that that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation,

Article 14 of the Covenant provides, inter alia, for the following procedural safeguards:

1. (a) All persons shall be equal before the Courts and tribunals;

   (b) Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

   (c) The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society or when the interest of the private lives of the parties so require;

   (d) Any judgment rendered in a criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with the counsel of his own choice.

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case, if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in Court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation;

5. Everyone convicted of a crime shall have the right of his conviction and sentence being reviewed by a higher tribunal according to law;

6. When a person has been finally convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15 "No one shall be held guilty of any offence on account of any act or mission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

No heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

Article 26 of the Covenant is also worth mentioning which provides that:

> "All persons are equal before the law and are entitled to equal protection of the law…… the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

2.7.3 United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 and the Rights of Accused

In addition to the Universal Declaration of Human Rights, 1948, and the International Covenant on Civil and Political Rights, 1 966, the United Nations had adopted in the year 1955 *The Standard Minimum Rules for the Treatment of Prisoners, 1955"* (referred hereinafter to as 'Standard Minimum Rules') for providing certain rights to 'prisoners under arrest' or 'prisoners awaiting trial'. In these Rules though the word "Accused" was not used, certain rights were provided in the Rules to the 'prisoners under arrest' or 'prisoners awaiting trial' which are naturally covered under the term "accused".

Rule 84(1) of the Standard Minimum Rules, provides that: 'persons who are not convicted and are kept in police custody or detention and waiting for trial shall be known as 'untried prisoners'. It is the right of unconvinced and untried prisoners, that they shall be treated as innocent persons. *Rule 84(1) of the Standard*

Minimum Rules provides that 'Unconvicted person shall be presumed to be innocent until the charges has been proved'.

Rule 85 of the Standard Minimum Rules provides that: 'untried prisoners' should not be kept with convicted prisoners' According to *Rule 86 & of the Standard Minimum Rules.* Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate."

Rule 87 of the Standard Minimum Rules, recognizing the right of untried prisoner to procure their food at their own expense states that: "Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food".

Rule 84(1) of the Standard Minimum Rules provides for rights of untried prisoners relating to their dress. While Clause (1) of the said Rule provides that: "An untried Prisoner shall be allowed to wear his own clothing if it is clean and suitable", clause (2) provides that, "If the untried prisoner is so poor that he cannot arrange his dress material, then it shall be the duty of that institution to provide to untried prisoners a dress different from the dress provided to the convicted prisoners."

Rule 89 of the Standard Minimum Rules ensures the untried prisoner the right to work. It states that: "An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it."

By *Rule of 90 of the Standard Minimum Rules*, 'An untried prisoner has been allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interest of the administration of justice and security and good order of the Institution.' Further *Rule 91 of the Standard Minimum Rules* provides that: "An untried prisoner shall be allowed to be visited and treated by his own

doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred".

Right of an untried prisoner to communicate and to be communicated has been recognized by *Rule 92 of the Standard Minimum Rule* which States that: "An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interest of the security and good order of the institution." According to *Rule 42 of the Standard Minimum Rules*, "so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination".

Right to 'apply for free legal aid has been recognised to an untried prisoner by *Rule 93 of the Standard Minimal Rules* which provides that: "For the purpose of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal advisor with a view to his defence and to prepare and hand over to him confidential instructions. For this purposes, he shall, if he so desires, be supplied with writing material. Interview between the prisoner and his legal advisor may be within the hearing of a police or Institution's official."

2.7.4 European Convention on Human Rights and Fundamental Freedoms, 1950 (ECHR)

Article 6 (2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means lo pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.

Article 7 (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

2.7.5 American Convention on Human Rights, 1969 (ACHR)

Article 8(2) provides that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or Court;

(b) prior notification in detail to the accused of the charges against him;

(c) adequate time and means for the preparation of his defence

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

(f) the right of the defence to examine witnesses present in the Court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty; and

(h) the right to appeal the judgment to a higher court.

(3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

(4) An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

Similarly Article 9 provides that no one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Likewise Article 10 provides that every person has the right to be compensated in accordance with the law in the event where he has been sentenced by a final judgment through a miscarriage of justice.

2.7.6 African Charter on Human Rights and People's Rights, 1981 (AFCHPR)

Article 7(1) provides that every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws etc. in force

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

(2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

The above mentioned various provisions of the Charters, Covenants and Conventions recognised the various valuable and important rights of accused person and provide adequate safeguard against inhuman behaviour to the accused including a female accused also who is under arrest or awaiting trial is kept under custody. Most of the above mentioned provisions have found place either in the Indian Constitution or in the Indian Statutes regulating Criminal justice administration or in both.

NOTES & REFERENCES:

1. Dr. Bhanwar Lal Harsh, Human Rights Law in India, Regal Publications, N. Delhi, 2008, at p. 2, 3.
2. Radhanath Tripathy, "Understanding Human Rights", in Noorjahan Bava (ed.), Human Rights and Criminal Justice Administration in India, N. Delhi: Uppal Publishing House, (2000) P. 92.
3. Id at 93.
4. Id.
5. Maurice Cranston, What are human rights? 1963, at p.1.
6. Supra note 2.
7. Id at 93.
8. Preamble of Indian Constitution as well as Article 19 (1).
9. AIR 1978 SC 597 at P. 619.
10. Article 21, Constitution of India; *Kehar Singh* v. *Union of India*. (1989) I SCC, 204.
11. *M.C. Mehta v. Union of India,* AIR 1986 SC1086.
12. *Francis Coralie v. Union Territory of Delhi* AIR 1981 SC 746.
13. *Lalit Dadwal,* (Position of Human Rights: An Indian Profile) Civil & Military Law Journal vol. 39 Oct-Dec. 2009. No. 4 at 221.
14. *Supra* note 5.
15. *Supra* note 1.
16. G.S. Bajwa, *Human Rights in India: Implementation and violation,* Anmol Publications, N. Delhi (1995) at p. 45.
17. *Supra* note. 1 at p.31.
18. D.D. Basu's Human Rights in Constitutional law, 3rd Edition 2008 p. 9.
19. Id p.10.
20. *Supra* Note 1, at p. 33.

21. Id. at p. 33.
22. Dr. Tapan Biswal, *Human Rights Gender and Environment*, Viva Books Private Ltd. N. Delhi 2006, p. 185.
23. id. at p. 187.
24. *Supra* Note 1 at p. 36.
25. Id. 38.
26. Id. 44.
27. *Supra* note 18 at p. 16.
28. Articles 12-35 of Indian Constitution.
29. Dr. Sreenisvasulu N.S., *Human Rights many sides to a coin*. Regal Publications, N. Delhi, p.21.
30. Civil & Military Law Journal, vol. 39 Oct-Dec., 2009 No A p.226.
31. AIR 1978 SC 597.
32. (1993)1 SCC 645.
33. AIR 1994 SC 1918 Para 183.
34. *A.K. Gopalan* v**.** *State of Madras*, AIR 1950 SC27.
35. *Maneka Gandhi* v. *Union. of India*, 1978 SC 1643.
36. *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.
37. *Kesavanand Bharti* v. *State of Kerala*, AIR 1973 SC 1461.
38. *Supra* note 29 at p. 24.
39. *Supra* note 1 at p.10.
40. Id. at P. 206.
41. Id. at p. 212.
42. Section 2(d) *Protection of Human Rights Act*, 1993.
43. Id., section 12.
44. Id., section 13.
45. Id., sections 18.
46. Id., section 3.
47. Id., section 21.
48. Id section 36.

49. *Supra* note 18 at p. 17.
50. Id.
51. *Supra* note 37 at p. 143.
52. *Supra* note 1 at p. 143.
53. J.N. Pandey, *Constitutional Law of India, Central Law Agency,* Allahabad 41st Edition. 2004 at Page, 340.
54. *Supra* note 1 at p. 142.
55. *Supra* note 34.
56. *Supra* note 35.
57. *Supra* note 53 at p. 213-214.
58. *Supra* note 12.
59. *Husainara Khatoon (No.1)* v. *Home Secretary,* State of Bihar, AIR 1979, SC 1360.
60. *M.H. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548.
61. *Vishaka* v. *State of Rajasthan,* AIR 1997. SC.3011.
62. *Chairman Railway Board v. Chandrimadas,* AIR 2000 S.C. 988.
63. A.I.R. 1993 S.C. 1960.
64. A.I.R. 1997 S.C. 1203.
65. A.I.R. 1981 S.C. 1068.
66. *Kishore Singh* v. *State of Rajasthan,* AIR 1981 S.C. 625.
67. *Sheela Barse* v. *State of Maharashtra,* (1983) 2 SCC 96.
68. *D.K. Basu* v. *State of West Bengal,* A.I.R. 1997 S.C. 610.
69. A.I.R. 1980 S.C. 1087.
70. *Supra* Note 18 at p. 39.