

**HUMAN**

**RIGHTS**

**Theory and Practice**

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**3rd Revised Edition**

**Barrister Zafarullah Khan**

# Human Rights

Theory and Practice

3<sup>rd</sup> Revised Edition

Zafarullah Khan

PAKISTAN LAW HOUSE  
2013

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**Why you have enslaved the people when they  
were born by their mothers free.**

**(Omar-bin-Khattab)**

**Man is born free but everywhere he is found in  
chains.**

**(Rousseau)**



## Preface to the 3rd Edition

The General Assembly of the UN has replaced the Commission on Human Rights by Human Rights Council in 2006. The Council has reviewed the human rights enforcement procedures. It has necessitated the revision of the Chapter Three 'United Nations Enforcement System'. Similarly, the 18<sup>th</sup> Amendment in the Constitution of Pakistan, made in 2010, has added three new Fundamental Rights i.e. right to a fair trial, right to information and right to education; hence, Chapter Eighteen on 'Fundamental Rights in Pakistan' has been revised accordingly.

Three new Chapters have also been added i.e. (i) Chapter Seven on 'Convention Against Torture'; (ii) Chapter Thirteen on the 'International Labour Standards' and Chapter Seventeen on the 'Cairo Declaration of Human Rights in Islam'. These new Chapters have been added due to the growing consciousness about the protection of human beings from torture, cruel and degrading treatment and the decent conditions of work and social protection of the labour. I wanted to write a new book on the Human Rights in Islam but it is being delayed and there was a lot of pressure on me from various interested quarters to add a Chapter on it; so it has been done.

The Chapter on the Rights of the Children has also been re-organized to harmonize it with other Chapters. In addition to these changes, the order of the Chapters in the Book has also been changed keeping in view the addition of the three new Chapters.

Availing this opportunity, I must express my gratitude to Mr. Kamran Noorani, of Pakistan Law House, who welcomed the idea of these additions. I express my thanks to Ms. Humaira Saeed Kundi for assisting me in the research and Mr. Abdul Sattar Malik for formatting the

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Book. My special thanks to an old and learned friend, Mr. Tariq Mahmood Khan, for his valuable semantic suggestions.

**Zafarullah Khan**  
Barrister-at-Law

Islamabad  
April 2013



## **Preface to the 2nd Edition**

The Book has been well received by the academicians, press and activists of Human Rights. The prestigious Daily DAWN twice reviewed the Book: on July 7, 2002 and November 3, 2002 and remarked: "The Human Rights" is a useful resource that will particularly interest students of law, journalists and lawyers".

Almost all the Universities, Law Colleges and Human Rights Centers in Pakistan have prescribed the Book as a textbook.

In the 2<sup>nd</sup> edition, some useful additions have been made. In Chapter 1, new headings 'International Law' and 'Application of International law' have been added. This was required because the whole book details various International Conventions, therefore, readers should know how these should be interpreted or whether these are directly applicable in our country or not. Furthermore, it is also important to tell about the origin and sources of International Law and interpretation of International Law.

Certain amendments have also been made in the Chapter 10 in the light of 17<sup>th</sup> amendment in the Constitution of Pakistan, 1973. A new Chapter 11 has been added on Child Rights in the light of the UN Convention on the Rights of Child. Furthermore, in Chapter 12, additions have been made focusing on Bonded and Forced Labour.

I express my gratitude to all those who helped me in the preparation of this Second Revised and Enlarged Edition of the book.

**Barrister Zafarullah Khan**

**Islamabad**  
January 2007

## Preface to the First Edition

The ideals of Human Rights have fascinated me since my childhood. In agrarian environment where I was born, the society was strictly hierarchal. The children of land owners, like me, had to maintain a distance from the children of the tenants. Even the elder tenants or servants were treated like 'subjects'. However, my father taught me different norms. He inculcated in my tender mind the respect for and equality of human beings. He always used to quote this famous Persian exhortation: 'whatever you don't like for yourself, do not like for others.' This seed of respect for human rights has been germinating since then and have fully bloomed during my Lincoln Inn days. Moreover, the first ever-intellectual endeavor I have pursued since my graduation from the Inn is this book on Human Rights.

The Human Rights movement is relatively a new phenomenon but its ideals have become a part of modern consciousness, a universal discourse, a potent rhetoric and aspiration.

This book presents a broad analysis of Human Rights concepts, processes, institutions and the Human Rights system. It critically examines the Human Rights movement's achievements and future prospects that now form part of national and international legal, political and moral landscape. The central object of the book is to have an introductory course on Human Rights that could educate readers to see the larger picture. The focus is on legal material exploring intricate relationship among Law, Politics and Morals. The book discusses case Law because the courts' role is important in resolving Human Rights disputes and developing Human Rights ideals. It also relies

on resolutions, debates, reports, decisions and other acts of inter-governmental assemblies, commissions and committees as well as of non-governmental organisations.

Part I of the book starts with the historical background of the Human Rights. At the same time, it sheds some light on the allied philosophical, political and cultural issues and develops basic ideas about International Law.

Part II explores the Universal Declaration of Human Rights and UN Enforcement System and its relationship with NGOs. Subsequently it elaborates International Covenants on Civil, Political and Economic, Social and Cultural Rights in the light of UN reports and the judicial decisions.

Part III deals with special interests. It examines issues in women empowerment and modern-day slavery and a new concept called, right to development. It also touches upon the role of International Non-Governmental Organisations, which champion the cause of human rights.

Part IV concentrates on the Fundamental Rights and the Principles of Policy enshrined in 1973 Constitution of Islamic Republic of Pakistan. These Rights and Principles have been discussed in the light of famous judicial cases decided by the superior judiciary without entering into any polemics.

I gratefully acknowledge the services of Farooq Malik and Yousaf Khan Khosa for providing me research material. I am personally indebted to Tariq Mahmood Khan for painstaking proof reading of the manuscript. I express my thanks to Afzal, Faqir Muhammad and Dr. Nasir Javid for helping me in typing the book. Anjum Khurshid and Kashif also deserve my thanks for providing IT services.

**Zafarullah Khan**

**Lahore**

August 2001

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**Part I**

**GENERAL**



## Chapter One

### INTRODUCTION

#### 1. Historical Context

The term 'human rights' has come into vogue in the wake of World War II and founding of the United Nations. It replaced the expression 'natural rights' or the 'rights of man' but why do we have a human rights rather than human duties movement? Is human rights movement a historical contingency or a product of liberal political cultures?

The historical origins of the concept of human rights go back to ancient Greece and Rome where it was discussed with reference to pre-modern natural law doctrines of Greek stoicism (school of philosophy founded by Zeno of Citium, which held that a universal working force pervades all creations and that human conduct, therefore, should be judged according to, and brought into harmony with the law of nature). The Roman law under the influence of Hellenic Stoicism allowed for the existence of a natural law and pursuant to the *jus gentium* (law of nations) admitted certain universal rights that extended beyond the rights of citizenship. In Greco-Roman and medieval times, natural law doctrines taught mainly the duty. Moreover these doctrines recognized the legitimacy of slavery and serfdom.

The metamorphosis of Western society from 13<sup>th</sup> century to the Peace of Westphalia (1648), during the Renaissance and the decline of feudalism led to liberal

#### 4 *Introduction*

notions of freedom and equality, and laid foundations of modern day concepts of human rights. The teachings of Aquinas (1274) and Hugo Grotius (1645) and the Magna Carta (1215), the Petition of Rights (1628) and the English Bill of Rights (1689) testified that human beings are endowed with certain eternal and inalienable rights.

The discoveries of Galileo and Newton, the materialism of Hobbes, the rationalism of Descartes, the empiricism of Bacon and Locke and growing confidence in human reason during the Age of Enlightenment led to the concept of perfectibility of human affairs. Philosophers like Locke, Montesquieu, Voltaire and Rousseau argued that certain rights self-evidently belonged to individuals as human beings during the 'state of nature' and upon entering civil society (pursuant to social contract) mankind surrendered to the state only the right to enforce these natural rights, not the rights themselves and the state's failure to enforce these natural rights gives rise to a popular revolution. They vigorously attacked religious and scientific dogmatism, intolerance, censorship, and socio-economic restraints. Their theory of the 'inalienable right of man' became their fundamental ethical and social gospel.

This liberal intellectual fervour together with the practical example of England's Glorious Revolution of 1688 and the resulting Bill of Rights provided the rationale for the wave of revolutionary agitation that swept North America and France.

Thomas Jefferson proclaimed that his countrymen were a 'free people claiming their rights as derived from the laws of nature and not as the gift of their Chief Magistrate'. The poetic Declaration of Independence proclaimed by the 13 American Colonies on July 4, 1776 said: 'We hold these truths to be self-evident, that all men

are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty, and the Pursuit of Happiness'. And The French Declaration of the Rights of Man and of the Citizen of August 26, 1789 imitates the pronouncements of the English and American revolutions.<sup>1</sup>

This doctrine of natural rights came under severe philosophical attack from both the right and the left but it had a powerful influence in the development of the political self-consciousness of modern Western society. The idea of natural rights became a challenge to all established and authoritarian political systems.<sup>2</sup>

It has to be admitted that all rights arise in specific historical contexts. They are claims made, conceded or granted by people who are themselves historically shaped. Objectively speaking they are neither eternal nor inalienable, neither prior to societies nor independent of them. Their success is dependent on endorsement by a legal system or widespread sentiment or an international order. They are no longer tied to belief in God or natural law but still claim a form of endorsement that pretends to transcend specific historical institutions, legal systems or communities and claim on their own behalf a moral and logical priority.<sup>3</sup>

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<sup>1</sup> Burns Weston, 'Human Rights' 20 *New Encyclopaedia Britannica*, 15<sup>th</sup>, 1992 at 656.

<sup>2</sup> David Sidorsky, 'Contemporary Reinterpretations of the Concept of Human Rights, Sidorsky (ed) in *Essays on Human Rights* 88 (1979) at 89

<sup>3</sup> Eugene Kamenka, *Human Rights, Peoples' Rights*, in James Crawford (ed) 'The Rights of Peoples' (1988), at 127



## 2. Nature and Content

Regardless of different views as to the origin, nature and contents of human rights, there are certain postulates that may assist defining them.

- (1) Human rights are understood to represent individual and group demands for the sharing of power, wealth, enlightenment and other cherished values.
- (2) Basic values imply claims against persons and institutions that impede realization and standards for judging the legitimacy of laws and traditions. In nutshell, human rights limit state power.
- (3) Human rights refer to a wide continuum of value claims ranging from justifiable to aspirational. They include both the moral (ought) and the legal (is) orders.
- (4) Human rights are essentially general or universal in character- equally possessed by all human beings everywhere. They extend to every person on Earth without discriminations irrelevant to merit.
- (5) Most human rights are qualified as much as necessary to secure the comparable rights of others and the aggregate common interest.
- (6) Human rights commonly refer to 'fundamental' as distinct from 'nonessential' claims.

The Western legal tradition accords a special position to what are called 'personal' rights and give individuals or groups within society the power to set limits on the actions of that society. The American legal philosopher, Ronald Dworkin uses an image from the game of bridge to explain this principle: the point is that if any attempt is made to inhibit my freedom, I can play my 'trump' card and have the decision revoked in a court of law. This legal system is different from a system where a fundamental law restricts

some decisions but where there are no personal rights. The fundamental law might prohibit others from killing someone, imprisoning someone, etc without giving him the right to life, liberty, free speech etc.

The system of personal rights thus has two effects: (a) it places limits on the actions of governments; (b) it offers individuals and specific groups the right to seek redress.

Now certain rights are claimed on behalf of communities. The 17<sup>th</sup> century Natural law has a strictly atomistic view of society. The modern Romanticism considers man as a cultural being who develops his humanity through a language and the body of knowledge expressed in the form of art, music, literature, or family and political traditions, etc. Because languages and cultures are the property of certain communities, so rights to be claimed have to be attributed to the community. The right of peoples to self-determination is claimed by communities to determine their political destiny in the interests of full self-expression.<sup>1</sup>

Some skeptics of the human rights movement argue that human freedom can also be invaded or denied by non-governmental forms of power e.g. social discrimination on the basis of class, race, colour, gender, religion etc. The advocates of the movement reply that it requires to establish arrangements in all social contexts to realize freedom, in all aspects of life, committed to human dignity, self-realization and equality by a deep transformation not only of governmental but also of non-state institutions and

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<sup>1</sup> Charles Taylor, *Human Rights: The Legal Culture in UNESCO*, in 'Philosophical Foundations of Human Rights' (1986) at 49

practices that are left untouched by conventional human rights doctrine.<sup>1</sup>

### 3. Generations of Rights

Human rights tradition is a product of time and cumulative experience. In this context French jurist Karel Vasak has advanced a simplified concept of 'three generations' of human rights. Inspired by three themes of the French Revolution, these are the first generation of civil and political rights (*liberte'*); the second generation of economic social and cultural rights (*egalite'*); and the third generation of solidarity rights (*fraternite'*).

The first generations of civil and political rights are derived primarily from 17<sup>th</sup> and 18<sup>th</sup> century reformist theories associated with the English, American and French Revolutions. Based on liberal individualism and *laissez-faire*, it advocated human rights more in negative (freedom from) than positive (right to) terms.

The second generation of rights finds its origins primarily in the 19<sup>th</sup> century socialist traditions and was prompted by revolutionary struggles and welfare movements ever since in response to abuses and misuses of capitalism and unlimited individual liberty. The internationalization of these rights has been somewhat slow but with the ascendancy of the Third world on the global stage, these rights have begun to come of age. These are more in positive (right to) terms requiring the intervention of state to assure equality. Examples are the rights set forth in Articles 22-27 of the Universal Declaration of Human Rights- such as the right to social security, the right to work

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<sup>1</sup> Karl Klare, 'Legal Theory and Democratic Reconstruction' 25 U. of Brit. L. Rev. 69, (1991) at 97

and protection against unemployment, the right to rest and leisure, the right to a standard of living adequate for the health and well-being of self and family, the right to education, the right to the protection of one's scientific, literary and artistic productions etc.

The Third generation of rights while drawing upon the two earlier generations of rights, are the product of both the rise and the decline of the nation-state in the last half of the 20<sup>th</sup> century. These rights include: (i) the right to political, economic, social and cultural self-determination; (ii) the right to economic and social development; (iii) the right to participate in and benefit from 'the common heritage of mankind' (Earth/ Space resources, scientific and technological progress and cultural traditions/sites etc); (iv) the right to peace; (v) the right to healthy and balanced environment; and (vi) the right to humanitarian disaster relief. The first three reflect the emergence of the Third world whereas the other three suggest the impotence/ inefficiency of the nation-state.

#### **4. Universal v Relative**

There is debate in the human rights movement in respect of the 'universal' or 'relative' character relating to the 'absolute' or 'contingent' character of the rights. The advocates of universality claim that international human rights like equal protection or physical security or freedom of speech, religion and association are and must be the same everywhere. On the other hand, the proponents of cultural relativism claim that rights depend on a broad cultural context that includes political, religious ideologies and institutional structures. Hence, concepts of rights differ throughout the World because cultures differ.

The international human rights instruments are on the 'Universalistic' side of the debate: 'everyone has the

right to liberty' 'all persons are entitled to equal protection' etc. The text of these basic instruments makes no explicit concession to cultural relativity. The relativists call it arrogance or 'cultural imperialism' of the West. They further argue that it will destroy diversity of cultures leading to homogenization in the world.

These debates were dominantly between the Communist world and the Western democracies. The West accused the Communist world of negating many civil and political rights (first generation rights) whereas the Socialist countries accused the West of ignoring many economic and social rights (second generation rights). The West argued that egalitarian claims are not possible without a severe decline in liberty and quality. The Socialists argued that the first generation rights are insufficiently attentive to material human needs and are used to legitimize unjust social orders-hence constitute a 'bourgeois illusion'.

The harsher critics say that ethical relativism has commitment to the status quo that helps oppressors throughout the world. Instead of leaving cultures as they are, as museum pieces, we should help to bring about change<sup>1</sup>

The American Anthropological Association submitted in 1947 to Commission on Human Rights that was considering Universal Declaration of Human Rights that the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America.

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<sup>1</sup> Elvin Hatch, 'Culture and Morality'= The Relativity of Values in Anthropology, 1983

The Declaration must be based on recognition of the fact that the personality of the individual can develop only in terms of the culture of his society which shapes his behaviour, very thoughts, hopes, aspirations and moral values. The colonialists Doctrines of the 'white man's burden' or 'primitive mentality' are marked by demoralization of human personality and disintegration of human rights among the peoples over whom hegemony has been established.<sup>1</sup>

The Association then proposed three fundamental guidelines essential in drawing up a Bill of Human Rights in terms of existing knowledge:

- (1) The individual realizes his personality through his culture; hence, respect for individual differences entails a respect for cultural differences.
- (2) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered.
- (3) Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.<sup>2</sup>

### **5. The Assumptions**

The edifice of modern human rights movement and Declaration of Human Rights rests on some assumption, such as: -

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<sup>1</sup>

<sup>2</sup> Statement of human Rights, 49 Amer. Anthropologist No. 4, 539 (1947)

## 12 *Introduction*

- (1) There is a universal human nature common to all peoples.
- (2) The human nature is knowable.
- (3) The human nature is known by means of an equally universal organ of knowledge i.e. reason.
- (4) Man is the master of himself and the universe.
- (5) Man is a dignified being.
- (6) Human rights defend the dignity of the individual vis-à-vis society, and the state in particular.
- (7) Man is autonomous and world Human Rights defend the autonomy of the human individual.
- (8) Society is based on a democratic social order wherein 'free' individuals are organized to achieve otherwise unreachable goods.<sup>1</sup>

Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as subjects of colonialists they were not members of the United Nations. When they participated in the formulation of subsequent instruments, they did so on the basis of an established framework and philosophical assumptions adopted in their absence. The Third World countries argue that these instruments favoured individual civil and political rights over collective rights such as right to development.<sup>2</sup>

The human rights improvement intends to uphold and preserve the dignity of man. Human dignity appears in the Preamble of the Charter of the United Nations as an ideal that 'we the peoples of the United Nations

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<sup>1</sup> Panikar, 'Is the Notion of Human Rights a Western concept? 120  
Diogenes 75 (1982)

<sup>2</sup> Abdullh Ahmad An-Na'im, 'Human Rights in the Muslim World' 3  
Harv. Hum. Rts. J. 13 (1990)

determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person....”

The term is also included in the Preamble and Article 1 of the Universal Declaration of Human Rights: “whereas recognition of the inherent dignity of all members of the human family (Preamble); ‘All human beings are born free and equal in dignity and rights’(Article 1). Reference to this is also made in the Helsinki Accord in Principle VII.

Dignity is derived from the Latin word ‘dignitas’ which means worth. One lexical meaning of dignity is ‘intrinsic worth’. It means that individuals are not to be treated merely as instruments or objects of the will of others. It purports that a high priority should be accorded in political, social and legal arrangements to individual choices in matters of beliefs, ways of life, attitudes, and the conduct of public affairs.

The belief that human rights are derived from the dignity of the person has two corollaries. The first is the idea that basic rights are not given by authority and, therefore, can not be taken away; the second is that they are rights of the person, every person.

The lengthening catalogue of rights and freedoms in International human rights now en-compasses such matters as pay, work conditions, trade unions, standard of living, rest and leisure, welfare and social security, women’s and children’s rights, and the environment. The temptations to link economic concerns with human rights will certainly rise if economic strains increase.

Some Asian Governments claim that their societies place a higher value on the community than in the West. The communitarian argument is advanced as an instance of the general proposition that rights are culture specific. Sometimes it is based on false assumption that the states



are 'the community'. The most dreadful aspect of this argument is the extensive arming of the state apparatus with the claims of harmonious society. The pervasive use of draconian legislation like administrative detention, disestablishment of societies, press censorship belies respect for consensus<sup>1</sup>

It is interesting to note that largely Westernized economic and political elite that has long since left traditional cultures behind far, too often makes arguments of cultural relativism. These leaders sing the praises of traditional communities while they wield arbitrary powers antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. This is a cynical manipulation of tradition occurring everywhere.<sup>2</sup>

#### iii. **Withering State Sovereignty**

Modern nation state is supposed to be autonomous and sovereign with full domestic jurisdiction. How it can be subject to the norms of International Human Rights? There are two approaches to the issue. On the one hand, the doctrine of Victoria advocates the binding force of International Law and an organic conception of the International Community of States. On the other hand, the Vattel doctrine emphasizes the independence and political liberty of the states.

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<sup>1</sup> Yash Ghai, 'Human Rights and Governance= The Asia Debate, 15 Australia. Y. Int. L. J. (1994)

<sup>2</sup> Jack Donnelly, 'Universal Human Rights in Theory and Practice' (1989) at 118

Brownlie states that sovereignty and equality of states represent the basic constitutional doctrine of the law of nations. As states are equal and have legal personality, sovereignty is in a major aspect a relation to other states but describes the principal corollary of state sovereignty as the dependence of obligations arising from customary law and treaties on the consent of the obligor.<sup>1</sup>

International law still venerates sovereignty but it is the people's sovereignty rather than the sovereign's sovereignty. Under the older notions, International human rights were subject to domestic sovereignty but now no serious scholar will support the argument that internal human rights are essentially within the domestic jurisdiction of any state and hence immune from International law. International Law still protects sovereignty but the object of protection is not despots but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.<sup>2</sup>

Article 2(7) of the UN Charter provides: -

'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

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<sup>1</sup> Ian Brownlie, 'Principles of Public International Law' 4<sup>th</sup> ed, 1990, at 287

<sup>2</sup> W. M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law, 84 Amer. J. Int. L. 866 (1990) at 869

The member states have frequently invoked this Article to argue that the General Assembly is acting beyond its powers by debating certain issues falling within domestic jurisdiction. The General Assembly replies that Article 10 authorizes it to 'discuss any question or any matter within the scope of the present Charter' as well as to 'make recommendations' to member states on such matters and that Article 13 of the Charter authorizes it to initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms. The International Court of Justice has never ruled on this issue but the continuing practice of the political organs of the UN in overriding the claims of domestic jurisdiction may have created new law on the question, at least with respect to its meaning in Article 2(7).

### **7. International Law**

International Human Rights is a branch of International Law. The advocates, diplomats, scholars, and activists have a same general structure and invoke the same phenomenon and arguments relevant to other fields of International Law. We will briefly discuss processes, sources, and some basic political and jurisprudential assumptions as a background for the better understanding of International Law aspects of the human rights.

Article 38 of the Statute of the International Court of Justice now constitutes a traditional point of departure for examining basic characteristic of International Law. Article 38 (1) provides:

'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59 (stating that decisions of the Court have no binding force except between the parties to the case), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Treaties.* The Court is instructed to apply an International convention, whether general or particular, establishing rules expressly recognized by the contesting states. Thus treaties appear first on the list and have become primary and the most effective expression of International Law towards regulation of many contemporary problems and a principal means for development of human rights movement.

The terminology for this voluminous and diverse body of International Law varies. International agreements are interchangeably referred to as pacts, protocols, covenants, conventions, and charters, exchanges of notes and concordats as well as treaties. In domestic frame of work, some treaties resemble a private accord (agreement over boundaries); others are closer to private contracts or to domestic legislation (agreement over rules to navigation) but domestic legislation differs in several respects from the treaty. A domestic legislation is generally enacted by majority of the legislature and binds all members of the relevant society. The treaty, on the other hand, is a

consensual agreement. With few exceptions, such as Article 2(6) of the UN Charter, it purports to bind or benefit only parties and alteration of terms generally requires the consent of all. The treaty shares a contracts consensual basis and has preserved Roman law flavour, (*pacta sunt servanda*) i.e. pacts must be respected. Article 26 of the Vienna Convention on the law of Treaties says: 'every treaty in force is binding upon the parties to it and must be performed by accepting them in good faith'.

Under Article 2(1)(d) of the Vienna Convention, a party to a Treaty can make a unilateral statement accepting a Treaty 'whereby it purports to exclude, or vary the legal effect of certain provisions of Treaty in their application to a state'. In multilateral Treaties this poses serious problems. A Treaty's text may also permit some reservations. Article 19 of the Vienna Convention provides that a state can formulate reservation unless it is 'incompatible with the object and purpose of the treaty'. A state faced with reservations by another states must make its objections formally known if it is to prevent reservation from becoming effective as to it.

Article 31 of the Vienna Convention provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose'. Article 32 goes on to add that the recourse may be had to supplementary means if interpretation pursuant to Article 31 produces a meaning that is 'ambiguous, or obscure' or its outcome is 'manifestly absurd or unreasonable'. Sometimes, courts look into the legislative history or travaux preparatoires to achieve unambiguous and reasonable meaning.

*Custom.* Article 38(1)(b) states that the International Court of Justice shall apply 'international custom, as evidence of a general practice accepted as law'.

It is the oldest and original source of international law. It is indispensable to understand human rights law. It means conduct or conscious abstention of a state from certain conduct.

Hudson describes the character of the state practice that can become a customary rule of law: (a) concordant practice by a number of states relating a particular situation; (b) continuation of that practice over a considerable period of time; (c) a concept that the practice is required by or consistent with international law; and (d) general acquiescence in that practice by other states<sup>1</sup>

Section 102 of the Restatement (third), Foreign Relation Law of the United States provides in Clause (2) that Customary International Law results from a general and consistent practice of states followed by them from a sense of legal obligation. According to Brownlie duration, (less significant when there is generality and consistency) uniformity, generality of the practice and *opinio juris et necessitatis* (sense of legal obligation) are the basic elements of the custom.

*The General Principles of Law.* Article 38(1)(c) of the Statute says that the court can apply the general principles of law recognized by civilized nations. The following categories of general principles have been applied in discourses and cases:

1. The principles of municipal law 'recognized by civilized nations; e.g. domestic law rules applicable to such matters as individual rights, contractual remedies, liability in tort, restraint on use of

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<sup>1</sup> Working Paper on Art 24, Statute of the International Law Commission, March 1950

- common property are now applied in international law.
2. General principles of law, derived from the specific nature of the international community i.e. principals of co-existence, *pacta sunt servanda*, non-intervention, territorial integrity, self-defense and the legal equality of states.
  3. Principles 'intrinsic to the idea of law and basic to all legal systems'.
  4. Principles valid through all kinds of societies in relationships of hierarchy and coordination. The principles called *jus rationale* is valid in all human societies and is associated with natural law doctrine based on the presumption that human person is a rationale and social creator.
  5. Principles of justice founded on the very nature of man as a rational and social being. This is based on principle of natural justice, known in many municipal legal systems. It means minimum standards of decency and respect for individual human being.

*Judicial decisions.* Judicial decisions are subsidiary means as these are only evidence of the state of the law. The judicial decisions include the decisions of international courts/tribunals and the national courts.

The International Court of Justice only applies the law. Under Article 59 of the Statute of the Court, its decisions have no binding force except as between the parties and in respect of that particular case. However, its decisions have a role in the progressive development of the international law. The Court does not observe the doctrine of precedent but still it strives to maintain judicial consistency. The Court has referred to particular arbitral

awards on only four occasions but on other occasions has referred compendiously to the jurisprudence of international arbitration. The European Court of Justice has also decided many issues of general importance. The decisions of national courts have evidential value about the practice of states and the publicists normally refer to them.

*The Teachings of Publicists.* The Statute of the Court includes, among the subsidiary means for the determination of rules of law, 'the teachings of the most highly qualified publicists of the various nations'. They not only describe the law but also sometimes have a formative influence. The works of Gidel, Rousseau, Vattel, Grotious, Calvo, Hall etc. have left a great imprint on the development of international law.<sup>1</sup>

### **8. Application of International Law**

Can a citizen invoke International Law (Covenants) in municipal or national (domestic) courts? In simple words, can a citizen of Pakistan go to a local court and sue Government of Pakistan or an employer on the basis that the rights enshrined in the International Covenant on Economics, Social and Cultural Rights, 1976, have been denied to him? This issue is discussed in legal parlance as relationships between International Law and Municipal Law (domestic law of a country).

There are two opposing schools of thoughts in this regard (i) Dualism and (ii) Monism. Dualism believes that International Law would not as such form part of the International Law of a state. In particular instances, rules of International Law may apply within a state by virtue of

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<sup>1</sup> Brownlie , p 1-31 and Harris, p 23-66



their adoption/incorporation by the internal law of the state. On the other hand, Monists argue that the internal law is derived from the international legal system; so International Law can be regarded as incorporated in the Municipal Law.

The State practice varies. Some States consider International Law as part of their Municipal Law whereas certain states adopt International Law into Municipal Law by employing various procedures. The States treat customary International Law and Treaties differently. We would only deal with Treaties as International Law dealing with human rights as codified in International Covenants (treaties).

In United Kingdom, where a Treaty affects private rights or, generally, requires for the implementation of its obligations a modification of existing law, the necessary changes in the Law must be made by the Parliament. In other words, binding international Treaties cannot be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts except European Union law which is, to a great extent, directly applicable. The Parliament has to ratify a Treaty and subsequently amend the domestic legislation, if so required, accordingly.

In Austria, under Article 50 of the Constitution, the Treaties containing provisions modifying or completing existing Laws require for their validity the approval of the Parliament. In Belgium, Article 68 of the Constitution provides that the Treaties of commerce and Treaties which may impose obligation on the State or on individuals have effect only after the assent of the Parliament. Almost same is the position in Germany, France, Greece, Ireland, Italy, and Switzerland. The Netherlands has the different practice under Articles 93 and 94 of the Constitution and the provision of Treaties shall have effect when they are

published. In other words, the assent of Parliament is not required.

The Constitution of the United States (Article VI) provides that 'Treaties made under the Authority of the United States are part of the Supreme Law of the land binding on the Judges in every state, anything to the contrary in state constitutions or laws notwithstanding'. However, there is a distinction drawn by American Courts between 'self-executing' and 'non-self-executing' Treaties. A self-executing Treaty is one which does not in the view of American Courts expressly or by its nature require legislation to make it operative within the Municipal field, and the nature of the Treaty has to be determined by regard to the intention of the signatory Parties and to the surrounding circumstances. If a Treaty is within the terms of the Constitution, and it is self-executing within the meaning just referred to, then under the Constitution it is deemed to be operative as part of the Law of the United States, and will prevail, also over a customary rules of International Law. On the other hand, Treaties which are not self-executing, but require legislation, are not binding upon American Courts until the necessary legislation is enacted. In Pakistan, the Executive has the prerogative to sign any International Treaty but it needs adoption/incorporation into the domestic law by the Parliament for its enforcement through domestic courts.

There are various procedures for the Parliaments to adopt an International Treaty. Normally either Parliament passes an Act adopting words of the Treaty or make Treaty as a Schedule of an Act.



**Dedicated to**

**The Wretched of the Earth**



## **Part II**

# **INTERNATIONAL SYSTEMS**



## Chapter Two

# UNIVERSAL DECLARATION OF HUMAN RIGHTS

### 1. Context

The Universal Human Rights system consists of several national and regional instruments. The more significant among them are the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Social and Political Rights (ICCPR, 1976) and the International Covenant on Economic Social and Cultural Rights (ICESCR, 1976). Among the regional instruments the important one are: The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention of Human Rights and African Charter on Human and Peoples Rights.

The UN Charter does not say anything directly about human rights. It contains some promotional provisions such as 'increasing respect for human rights', 'associating in realization of human rights', 'promote -- universal respect for observance of human rights.' Furthermore, it radically transforms the laws of war concerning *jus ad bellum* (justice and legality of waging of war) whereas the earlier body of law had been discussing exclusively *jus in bello* (the rules regulating the conduct of warfare).

Article 2(4) provides that the UN members shall refrain in their international relations from the threat or use of force against the territorial integrity or political



independence of any state but this rule shall not impair the inherent right of individual or collective self defence if an armed attack occurs against the member <sup>1</sup> In 1946, the economic and social council of the UN established the Commission on Human Rights (known as the UN Commission).

The Commission first met in its present form in 1947, its members including such distinguished founders of the human rights movement as Rene Cassin of France, Charles Malik of Lebanon, and Eleana Roosevelt of the United States. Some representatives argued that the draft bill of rights under preparation should take the form of a Declaration that would exert a moral and political influence on states rather than constitute a legally binding instrument. Other representatives urged the Commission to prepare a draft Convention containing a bill of rights that would be submitted to the states for their ratification. The first path was followed.

In 1948, the UN Commission adopted draft Declaration that in turn was adopted by the General Assembly that year as the Universal Declaration of Human Rights, with 48 states voting in favour of and 8 abstaining. (It should be noted that at that time the total UN membership stood as 56 states). This Declaration became the springboard for the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1976. This 28 years delay was due to the ideological conflicts during the cold war. These Covenants with the UDHR form the international bill of rights.

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<sup>1</sup> Article 51 of UN Charter

## **2. Basic Principles**

The Preamble of the Declaration highlights the following principles, which permeate the rights and duties, enshrined in the Declaration.

1. All the members of the human family have the inherent dignity and equal and inalienable rights.
2. Recognition of the inherent dignity and of the equal and inalienable rights is the foundation of freedom, justice and peace in the world.
3. Disregard and contempt for human rights result in barbarous acts, which outrage the conscience of mankind.
4. Freedom of speech and belief and freedom from fear and want is the highest aspiration of the common people.
5. Human rights should be protected by the rule of law, if man is not compelled to have recourse to rebellion against tyranny and oppression.

The General Assembly proclaimed this Universal Declaration of Human Rights as a common standard of achievement for all the peoples and all nations to the end that:

- (a) every individual and every organ of society shall strive by teaching and education to promote respect for the rights and freedoms and
- (b) all should try, by progressive measures, to secure their universal and effective recognition and observance

Because the peoples of United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person.

## **3. Overview**

The Declaration consists of 30 Articles.

### 30 *Universal Declaration of Human Rights*

- Article 1 is declaratory in nature i.e. it declares that all human beings are born free and equal in dignity and rights and that they are endowed with reason and conscience. It also exhorts them to act towards one another in a spirit of brotherhood.
- Article 2 declares that the rights have to be exercised without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Article 30 prohibits states, groups or persons from engaging in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

#### **4. Limitations**

Article 29 imposes on every one, duties to the community in which the free and full development of his personality is possible. In case of exercise of his rights and freedoms, everyone shall be subject only to such limitations as are:

- (a) determined by law, solely for the purpose of securing due recognition and respect for the right of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (b) these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

#### **5. Rights guaranteed**

Articles 3-28 confer or declare the rights and freedoms. We enumerate these here as an overview.

1. Right to life, liberty and security (Article .3)
2. Freedom from slavery and servitude (Article. 4)

3. Freedom from torture, or degrading treatment (Article. 5)
4. Right to recognition as a person before the law (Article. 6)
5. Right to equality before the law and to equal protection of the law (Article 7)
6. Right to an effective remedy, if rights are violated (Article .8)
7. Freedom from arbitrary arrest, detention or exile (Article. 9)
8. Right to a fair and public hearing by an independent tribunal (Article. 10)
9. Right to be presumed innocent until proven guilty and protection against retro-activity of the criminal law (Article. 11)
10. Right to respect for privacy, family, home or correspondence and honour (Article. 12)
11. Right of freedom of movement and residence (Article. 13)
12. Right to seek and enjoy asylum from persecution (Article 14)
13. Right to nationality (Article. 15)
14. Right to marry and to found a family.(Article .16)
15. Right to own property (Article. 17)
16. Right to freedom of thought , conscience and religion (Article .18)
17. Right to freedom of opinion and expression (Article 19)
18. Right to freedom of peaceful assembly and association (Article .20)
19. Right to take part in the Government (Article. 21)
20. Right to social security (Article. 22)

21. Right to work and free choice of employment (Article. 23)
22. Right to rest and leisure (Article. 24)
23. Right to a standard of living , adequate for health and well being (Article .25)
24. Right to education (Article. 26)
25. Right to participate in the cultural life (Article .27)
26. Right to a facilitating social and international order (Article .28)

### **1) Right to life**

Everyone has the right to life, liberty and security of person. The right is non-derogable. This seems straightforward-governments and individuals are enjoined to refrain from the wanton killing of their subjects and fellow beings- but in fact aside from that aspect, it is in fact hard to determine what a right to determine what these rights encompass. However, this Article suggests:

- (I) the public authorities, groups or individuals should refrain from acts and omissions which directly endanger life, liberty and security of a person;
- (II) There is a positive obligation on the part of the states, groups and individuals to take reasonable steps in order to prevent the deprivation of life, liberty and security of persons.

This Article does not create exceptions. However, the corresponding Article 2 of European Convention of Human Rights (hereinafter called ECHR) enumerates these exceptions which are aimed mainly at the unintentional deprivation of life:

- (a) life can be deprived by a well defined due process of law;

- (b) life can be deprived when it results from the use of force which is not more than absolutely necessary:
  - (i) in defence of any person from unlawful violence;
  - (ii) in order to effect a lawful arrest or to prevent the  
Escape of a person lawfully detained;
  - (iii) In action lawfully taken from the purpose of quelling a riot or insurrection.

Article 5 of ECHR explains exceptions in respect of the right to liberty. We must keep them in mind while exercising this right. According to this no one shall be deprived of his liberty unless in the following cases:

- (a) the lawful detention after conviction by a competent court;
- (b) the lawful arrest or detention with the lawful order of a court;
- (c) the lawful arrest or detention to bring the person before a court on reasonable suspicion of having committed an offence;
- (d) The lawful detention for preventing the spread of infectious disease, of persons of unsound mind, addicts etc.

## **2) Freedom from slavery**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Slavery is antithesis of liberty and is the worst form of human degradation. We do not find now the most naked form of slavery, servitude or slave trade, but still it is practised in various forms in many parts of the world.<sup>1</sup>

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<sup>1</sup> Keeping in view the importance and invisibility of the issue, we have devoted a special chapter, 'Beyond Chains' to the issue.

### **3) Freedom from torture**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 3 of the ECHR and Article 7 of International Covenant on Civil and Political Rights (hereinafter called ICCPR) also deal with the same issue except that the word 'cruel' is missing from these Articles. This right is non-derogable and contains no exceptions. These four forms of treatment represent different levels of seriousness. The aim of the Article is to protect both the dignity and the integrity, physical and mental, of the individual. Now a special regime called Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987.

### **4) Recognition before law**

Every normal adult man or woman has the right to be recognised before the law. Minors also have this right to recognition. However, in certain cases they can not represent themselves rather they can be represented by their guardians or next friends, who can claim and receive what is due to them and can give what is due from them. This Article gives an equal protection to women as an equally competent legal person with the full capacity before civil as well as criminal law. In nutshell it means that every person, man or woman, is *sui generis*. However, Legislature can enact qualifications and protections for incapacitated persons i.e. mentally retarded, minors, unconscious, infirm, etc.

### **5) Equality before law**

According to Article 7, all persons are equal before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal

protection against any discrimination and violation of this Declaration and against any incitement to such discrimination.<sup>1</sup>

There is a subtle distinction between equality before law and equal protection of law. The former means that every citizen, whether man or woman, rich or poor, educated or illiterate, stands on an equal footing before the law, while the latter means that no citizen can be put beyond the pale of law and no bill of outlawry can be passed against him. Thus equality before law can have no content other than the one which is compatible with the due maintenance of the guarantee of equal protection of law.<sup>2</sup>

The rule of equality before the law was enunciated by Dicey as part of his thesis on the rule of law. By asserting equality under the rule of law, what he meant to convey was that all citizens were equally subject to the ordinary law of the land, administered by the ordinary courts and that the rule of law in this sense excluded the idea of any exception of officials or others from the duty of obedience to the law which governed the other citizens or from the jurisdiction of the ordinary tribunals.<sup>3</sup>

It is generally accepted that the doctrine of 'equal protection of law' permits classification, which in turn must be reasonable and be based on a defined criterion.<sup>4</sup>

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<sup>1</sup> Refer to Article 7 of ICCPR

<sup>2</sup> Brohi, A. K, 'The Fundamental Laws of Pakistan' Din Muhammad Press, Karachi, 1958 at 34

<sup>3</sup> Dicey, 'An Introduction to the Law of Constitution', Macmillan & Co, London, 10<sup>th</sup> ed, 1959, at 183

<sup>4</sup> Lord Rottschaefer, 'constitutional Law, quoted by Brohi ( opp. Cited) at 353



### **6) Effective remedy**

Everyone has the right to an effective remedy by the competent national tribunal for acts violating rights guaranteed by the Constitution or by the law. The remedial machinery may include courts, tribunals or any other possible forum. Remedy ought to be present even if persons acting in an official capacity have committed the violation.<sup>1</sup>

The remedy is required if the substantive rights or freedoms granted by the Constitution or by the law are in question. The Article 8 does not and can not connote a requirement that there should be domestic machinery in place to address any possible grievance.

### **7) Freedom from arbitrary arrest**

No one shall be subject to arbitrary arrest, detention or exile.<sup>2</sup> This exhortation was given a legal cover by Article 9 of the ICCPR which also explains other incidental rights. It says that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release. Furthermore, anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

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<sup>1</sup> Refer Article 13 of the ECHR

<sup>2</sup> Article 9, UDHR

### **8) Fair and public trial**

The Article 10 entitles in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him. The Article provides protection of a fair trial in the both civil and criminal matters.

This right was provided legal foundation and consequential details by Article 14 of the ICCPR which also says that that the press and public may be excluded from all or part of a trial for reasons of morals, public order or national security or when the interests of the private lives of the parties so require.

In criminal cases, everyone/ accused has right:

- (i) To be informed promptly and in detail in a language which he understands ,of the nature and cause of the charge against him;
- (ii) To have adequate time and facilities for the presentation of his defence by the counsel of his own choosing;
- (iii) To have trial without undue delay;
- (iv) To be tried in his presence;
- (v) To be allowed to defend himself in person or through legal assistance of his own choosing
- (vi) To examine or to have examined the witnesses against him;
- (vii) To obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (viii) To have a free interpreter if he can not understand or speak the language used in the court;
- (ix) Not to be compelled to testify against himself or to confess guilt;

- (x) To an appeal to a higher tribunal.

### 9) **Innocence and Retroactivity**

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any offence on account of any act or omission, which did not constitute a penal offence 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.<sup>1</sup>

The presumption of innocence is fundamental to the protection of human rights. By reason of this presumption, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. It is also a duty of all the public authorities to refrain from prejudging the outcome of the trial.

The principle governing the powers of a Legislature is that it can make all laws, including retrospective laws operating in the field of substantive laws and procedure. There is no fundamental difference between *ex post facto* and retrospective laws, except that the former is wider and also includes procedural legislation e.g. it can render a previous act criminal or increases the punishment for a crime retrospectively. The Article 11 of the Declaration prohibits *ex post facto* and retrospective laws and this principle has been codified under Article 14 of the ICCPR.

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<sup>1</sup> Refer Article 14 of ICCPR

### **10) Respect for privacy**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack.<sup>1</sup>

Article 8 of the ECHR says that the interference by a public authority with the exercise of the right can be only:

- (a) in accordance with the law and
- (b) when it is necessary in a democratic society in the interests of
  - (i) national security, public safety or
  - (ii) the economic well-being of the country;
  - (iii) for the protection of disorder or crime,
  - (iv) for protection of health or morals; or
  - (v) for the protection of the rights and freedoms of others.

An important aspect of privacy is that of control over personal information and there should be a procedure to weigh it up against a competing interest. Effective measures have to be taken by states to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive it.<sup>2</sup>

### **11) Freedom of movement**

Everyone has the right to freedom of movement and residence within the borders of each state. It means that everyone can move freely from one area to the other and can also change residence from one part of the country to

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<sup>1</sup> Article 12, UDHR

<sup>2</sup> Refer Article 8 of ECHR and Article 17 of ICCPR

the other. It is true with respect to the right to leave any country including his own and to return to his country.<sup>1</sup>

However, Article 12 of the ICCPR enumerates certain restrictions that can be imposed on the exercise of this right:

- (a) these ought to be provided by law and
- (b) are necessary to protect
  - (i) national security,
  - (ii) public order,
  - (iii) public health or morals or
  - (iv) the rights and freedoms of others; and
  - (v) should be consistent with the other rights recognised in the ICCPR.<sup>2</sup>

### **12) Right of asylum**

Under Article 14, everyone has the right to seek and enjoy in other countries asylum from persecution. However, this right may not be invoked in the cases of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

### **13) Right of nationality**

Everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality<sup>3</sup>. This right is meant to save persons from homelessness or statelessness. The right connotes three things that:

- (a) everyone has a right to a nationality. The article has not clarified the question of 'nationality of which

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<sup>1</sup> Refer Article 13, UDHR

<sup>2</sup> refer Article 2 and 3 of protocol No 4 of ECHR

<sup>3</sup> Article 15, UDHR

country'? It will depend on the principle of 'effective and genuine link' i.e. a person will have a right to get the nationality of the country with which he/she has effective and genuine link/connection.

- (b) a person can be deprived of his nationality only with due process of law and that too in accordance with the constitution or law and
- (c) everyone is free to change his nationality if so desires and deserves in accordance with the established norms of law of the land or international law.

#### **14) Marriage and family**

Men and women of full age have the right to marry and to found a family. They can exercise this fundamental right without any limitation due to race nationality or religion. They are entitled to equal rights as to marriage and during marriage and at its dissolution. Furthermore, marriage shall be entered into with free and full consent of the intending spouses. <sup>1</sup> These rights are based on the belief that the family is the natural and fundamental group unit of the society and is entitled to protection by the society and the state. Under Article 12 of ECHR, this right will be exercised in accordance with national law. <sup>2</sup>

The right to family implies the possibility to procreate and live together; hence family planning should be consistent with this right. During the marriage, equality extends to all matters arising from their relationship. This right also implies that states can establish a specific marriageable age to enable each of them to free and full consent.

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<sup>1</sup> Article 16, UDHR

<sup>2</sup> Refer Article 12 of ICCPR

### **15) Right of property**

Article 17 declares that every one has the right to own property, alone as well in association with others and no one shall be arbitrarily deprived of his property. This right is codified in Article 1 of the Protocol No. 1 of the ECHR. This right includes three things:

- a) every person (man, woman, minor) has right to own property as his legally vested right. Right to own includes, right to acquire, hold and dispose;
- b) this right can be exercised alone or jointly with others; and
- c) deprivation of the property can only take place in accordance with the laws.

The term property includes interest in property, like that of a mortgage, lease, patents, copyrights and every other 'thing' of exchangeable value. The right to acquire, hold and dispose property can be subject to reasonable and justiciable restriction in the public interest.

### **16) Freedom of thought**

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to:

- a) change his religion or belief and
- b) manifest his religion, in public or private ,in teaching, practice , worship and observance. <sup>1</sup>

Article 9(2) of the ECHR explains limitations on the exercise of this right. The limitations are valid only if:

- (a) prescribed by law and
- (b) are necessary in a democratic society in the interest of

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<sup>1</sup> Article 18, UDHR

- (i) public safety;
- (i) protection of public order
- (ii) protection of health or morals or
- (iii) protection of the rights and freedoms of others

The ICCPR added further dimensions to the exercise of this right:

- a) there should be no coercion which would impart the freedom of the person to have or to adopt a religion or belief of his choice;
- b) The state shall undertake that the parents and legal guardians will have the right to ensure the religious, moral education of their children in conformity with their own convictions.<sup>1</sup>

### **17) Freedom of expression**

Everyone has the right to freedom of opinion and expression. The right includes to:

- (a) hold opinion without interference ; and
- (b) seek, receive and impart information and ideas through any media, regardless of frontiers.

The ECHR makes it clear that this right can be subject to such conditions, formalities, restrictions or penalties as are

- (a) prescribed by law and
- (b) are necessary in a democratic society in the interest of
  - (i) national security,
  - (ii) territorial integrity;

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<sup>1</sup> Article 18 of ICCPR



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- (iii) public safety; and
- (iv) for the prevention of disorder and crime,
- (v) the disclosure of information received in confidence;
- (vi) and for the protection of health or morals, and
- (vii) for the protection of reputation or rights of others; and
- (viii) For maintaining the authority and impartiality of judiciary <sup>1</sup>

However the ICCPR reduces the limitations to the following:

- a) for respect of the rights and reputation of others and
- b) for the protection of national security or public order, public health or morals. <sup>2</sup>

#### **18) Freedom of assembly**

Everyone has the right to freedom of peaceful assembly and association but no one may be compelled to belong to an association. <sup>3</sup> The ECHR extends this right to form and to join trade union for the protection of his interests. <sup>4</sup>

The Article 11 of the ECHR and Article 22 of the ICCPR describe the limitations that can be imposed on the exercise of this right by saying that:

- (a) only those restrictions can be imposed which are prescribed by law; and

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<sup>1</sup> Article 10 of ECHR

<sup>2</sup> Article 19 of ICCPR

<sup>3</sup> Article 20, UDHR

<sup>4</sup> Article 20 of ECHR

- (b) which are necessary in a democratic society in the interest of
  - (i) national security
  - (ii) public safety
  - (iii) public order
  - (iv) protection of public health or morals or
  - (v) Protection of rights and freedoms of others.

The addition of word 'peaceful' has restricted the scope of assembly. 'Association' need not be assigned notional meaning. It means voluntary association, not a professional organisation established by the government. However, the freedom of association also implies protection against compulsory membership of an association.

### **19) Public rights**

Everyone has the right to take part in the government of his country. This right can be exercised directly or through chosen representatives. Furthermore, everyone has the right to equal access to public service in his country. The authority of the government should be based on the will of the people and this should be expressed by:

- (a) free and genuine elections;
- (b) the election shall be conducted on universal and equal suffrage; and
- (c) the elections shall be held by secret ballot. <sup>1</sup>

The ICCPR has codified this right but claims that it should be exercised:

- (a) without distinction of any kind, such as race, colour, language, religion, political or other opinion,

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<sup>1</sup> Article 21, UDHR

- national or social origin, property, birth or other status; and  
(b) reasonable restrictions can be imposed on this right.

### **20) Social security**

Everyone has the right to social security and is entitled to realisation of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. However, this right is subject to the organisation and resources of each state.<sup>2</sup>

### **21) Work and employment**

Everyone has the right to work and employment.

The right to work and employment means:

- (i) free choice of employment;
- (ii) just and favourable conditions of work;
- (iii) protection against unemployment;
- (iv) equal pay for equal work;
- (v) just and favourable remuneration that can ensure for himself and his family an existence worthy of human dignity;
- (vi) remuneration shall be supplemented, if necessary, by the means of social protection; and
- (vii) the right to form and to join Trade Union for the protection of his interests.<sup>3</sup>

### **22) Rest and leisure**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.<sup>4</sup> The right to rest and leisure has been

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<sup>1</sup> Refer Article 25 of ICCPR

<sup>2</sup> Article 22, UDHR

<sup>3</sup> Article 23, UDHR; also refer to Article 7 of the ICCPR

<sup>4</sup> Article 24, UDHR

considered as a basic right because it is necessary for the social and cultural actualisation of his personality.

### **23) Standard of living**

Everyone has the right to:

- (i) a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services; and
- (ii) the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (iii) Motherhood and childhood are also entitled to special care.<sup>1</sup>

The right to a standard of living is accepted to preserve and promote the inherent dignity and worth of the human beings otherwise it would be very difficult for the weak and the infirm to survive or to make both ends meet.<sup>2</sup>

### **24) Right to education**

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made equally accessible and the higher education shall be equally accessible to all on the basis of merit. Parents have the right to choose the kind of education that shall be given to their children.

Education shall be directed to the following objectives:

- (a) the full development of the human personality;

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<sup>1</sup> Article 25, UDHR

<sup>2</sup> Refer Article 11 of the ICESCR

- (b) strengthening of respect for human rights and fundamental freedoms;
- (c) promoting understanding, tolerance and friendship among all nations, racial or religious groups and
- (d) furthering the activities of the United Nations for the maintenance of peace.<sup>1</sup>

### **25) Right to cultural life**

Everyone has the right freely to participate in the cultural life of the country, to enjoy the arts and to share in scientific advancements and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>2</sup>

### **26) Social order**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.<sup>3</sup> This right, though still in ambiguous terms, was accepted under the influence of lobbying by the third world and socialist countries.<sup>4</sup>

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<sup>1</sup> Article 26, UDHR; also refer to Article 13 of the ICESCR

<sup>2</sup> Article 27 of UDHR; also refer to Article 15 of the ICESCR

<sup>3</sup> Article 28, UDHR

<sup>4</sup> For details see chapter, 'Right to Development'

## Chapter Three

# UNITED NATIONS ENFORCEMENT SYSTEM

### 1. Introduction

The protection and effectiveness of human rights, evolved from within the UN system, to a great degree, depends on UN's ability to enforce these rights but the very concept of 'enforcement' in the UN Charter relates only to the enforcement of the decisions of the Security Council<sup>1</sup> and no such specific enforcement mechanism (use of force or sanctions etc.) is available to enforce the human rights.

'Enforcement' means use of all means intended and proper to induce respect for human rights.<sup>2</sup> The monitoring and enforcement arrangements of the UN Human Rights (Human Rights originating from UN instruments) have a 'two-track' approach:

- (1) Charter-based organs including those (a) whose creation is directly mandated by the UN Charter, such as the General Assembly and the Human Rights Council (as the successor to the Commission on Human Rights and which have been authorized by one of those bodies, such as the Sub-Commission on the Promotion and Protection of

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<sup>1</sup> Article 45 of UN Charter

<sup>2</sup> Rudolf Bernhardt. "General Report in Bernhardt and Jolowioz (eds), International Enforcement of Human Rights (1985), at page 5

Human Rights, and the Commission on the Status of Women; and

- (2) Treaty-based organs such as the Human Rights Committee formed under the International Covenant under Civil Political Rights, referred to in this book as the 'ICCPR Committee'. It is different from the UN Human Rights Council that is identified as the 'UN Council', which has been created for a range of other human rights Treaties originating in UN processes. These organs are intended to monitor compliance by states with their obligations under those Treaties.

## **2. Charter Organs**

Charter organs and institutions are of two types: (i) organs created by Charter itself; and (ii) institutions constituted by organs created by Charter.

The 'Principal Organs' created by the Charter of UN (1945) are (i) Security Council; (ii) General Assembly; (iii) Economic and Social Council (ECOSOC); (iv) Trusteeship Council; (v) The Secretariat; and (vi) The International Court of Justice.

The Trusteeship Council suspended its work in 1994 after completing the Post-World War-II decolonization process. The ECOSOC in the past has played a role as an intermediary between the General Assembly and the Commission on Human Rights but now its role has been bypassed by the creation in 2006 of the UN Human Rights Council and this Council directly reports to the General Assembly.

The role of the Security Council with reference to protection of human rights has expanded in the wake of end of the cold war. Increasingly, it is playing a significant role in matters such as inclusion of provisions related to the

human rights in peace agreements, eliminating the use of children in armed conflicts etc. and it is moving toward concept of "responsibility to protect". The role of Security Council in the elimination of apartheid in South Africa is very positive but it failed in stopping the genocide in Bosnia and especially in Rwanda where 800,000 people were killed in about 100 days, one of the most abhorrent events of the human history. However, the whole system of the Security Council is paralyzed by the veto power held by five Permanent Members (USA, UK, France, Russia and China) out of total fifteen members.

The International Court of Justice has recently given a series of important judgments contributing to the proper understanding of various aspects of international human rights regime. The Secretariat is headed by the Secretary General, who has been resultantly championing the causes of human rights and increasingly involved in the mainstreaming of human rights.

Amongst the institutions constituted by organs created by Charter is the High Commissioner for Human Rights (UNHCHR). It is the principal UN officer dealing with Human Rights. He works under the Security Council. (Details later)

Similarly, the Commission on the Status of Women was established in 1947 and it reports to the ECOSOC. Its mandate is to promote rights of women in the political, economic, civil, social and educational fields. It has 45 members who are representatives of governments. It is a very active Commission and among others has drafted, Convention on Elimination of all forms of Discrimination against Women, 1979.

There is a Permanent Forum of Indigenous People. The Forum discusses the economic, social, cultural,



environmental, human rights issue etc. of the indigenous people. It advises the ECOSOC and other UN agencies.

The Sub-Commission on the Promotion and Protection of the Human Rights consists of independent experts elected on the basis of nominations of governments. It has various working Groups on different issues of human rights.

The Charter-organs and institutions are primarily political organs or institutions and have a broader mandate to promote awareness and respect for human rights and to prevent violations of human rights

### **3. Methods for Responding to Violations**

The Human Rights Council is a new organization, setup in 2006, to remedy the perceived deficiencies of the Human Rights Commission. The Council has practically, with some amendments, followed the technique used by the Commission for responding to various violations of the Human Rights. The procedures of the Commission and Council include:

#### **1) Fact-finding:**

Most of the UN procedures depend on fact finding. It means ascertaining a given situation and to report about it to the relevant body in the light of international human right standards. The credibility of the fact-finding depends on many factors i.e. thoroughness, objectivity, procedural fairness etc. in the ascertainment of facts. There are also great difficulties in the way of fact-findings i.e. denial of government about violations/ exaggeration of situations by the interested groups.

The Special Rapporteurs and other Independent Experts of the Commission on Human Rights adopted in 1997 their

own Terms of Reference and agreed that during fact finding missions, the Special Rapporteurs or Representatives, Experts etc. of the Commission on Human Rights, as well as United Nations staff accompanying them, should be given the following guarantees and facilities, among others, by the Government that invited them to visit its country:

- a) Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;
- b) Freedom of inquiry, in particular as regards:
  - i. Access to all prisons, detention centres and places of interrogation;
  - ii. Contacts with central and local authorities of all branches of government;
  - iii. Contacts with representatives of non-governmental organizations, other private institutions and the media;
  - iv. Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty; and
  - v. Full access to all documentary material relevant to the mandate;
- c) Assurance by the government that no persons, officials or private individuals who have been in contact with the Special Rapporteurs/Representative in relation to the mandate will for this reason suffer threats, harassment or punishment or subjected to judicial proceedings;
- d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above.<sup>1</sup>

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<sup>1</sup> UN Doc. No. E/CN.4/1998/45, Appendix V

## 2) The 1503 Procedure

This Procedure is named due to ECOSOC Resolution 1503 (1970) <sup>1</sup> which authorized the Human Rights Commission to establish a procedure for the examination of complaints (normally called communication) pertaining to 'situations which appear to reveal a consistent pattern of gross and reliably attested violation of human rights and all fundamental freedoms occurring in any part of the world and under any circumstances'.

The Procedure was time-consuming, difficult and lengthy so that states are not lightly accused of violations. Individual matters were not entertained but 'situations' were considered. Approximately, on average 500000 complaints were received per year. From 1997 to 2005, about 86 states had been subject of scrutiny—27 of Africa, 27 of Asia, 16 of Latin America, 10 of Eastern Europe and 6 of the Western Europe. The newly established Human Rights Council has amended this Procedure.

On 18 June 2007, the Human Rights Council adopted a new 'Complaint Procedure' in compliance with the mandate entrusted by General Assembly which mandated Council 'to review and, where necessary, improve and rationalize, within one year after the holding of its first session, all mandates, mechanisms, functions and responsibilities of the former Commission on Human Rights, including the 1503 procedure, in order to maintain a system of special procedures, expert advice and a complaint procedure'. <sup>2</sup>

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<sup>1</sup> Resolution 1503 (XLVIII)

<sup>2</sup> Resolution 60/251 of 15 March 2006

The Procedure retains its confidential nature, with a view to enhancing cooperation with the State concerned. Two separate working groups, (i) the Working Group on Communications and (ii) the Working Group on Situations, are established with the mandate to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms. Manifestly ill-founded and anonymous communications are screened out by the Chairperson of the Working Group on Communications, based on the admissibility criteria detailed below. Communications not rejected in the initial screening are transmitted to the State concerned to obtain its views on the allegations of violations.

The Advisory Committee of the Human Rights Council, from among its members, constitutes the Working Group on Communications (WGC) for a term of three years. It consists of five independent and highly qualified experts geographically representative of the five regional groups. The WGC meets to assess the admissibility and the merits of a communication. All admissible communications and recommendations thereon are transmitted to the Working Group on Situations.

The Working Group on Situations (WGS) comprises five members appointed by the regional groups from among the States member of the Council for the period of one year. It examines the communications transferred to it by the WGC, including the replies of States thereon, as well as the situations, which the Council is already seized of under the complaint procedure. The WGS, on the basis of the information and recommendations provided by the WGC, presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take. The Council then

decides on each situation.

The Council or the WGC admits all communication related to a violation of human rights and fundamental freedoms unless:

- i. It has manifestly political motivations; or
- ii. Its object is not consistent with the UN Charter, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; or
- iii. It does not contain a factual description of the alleged violations, including the rights which are alleged to have been violated; or
- iv. Its language is abusive but such communication may be considered after deletion of the abusive language; or
- v. It is not submitted by a person or a group of persons claiming to be the victim of violations of human rights and fundamental freedoms or by any person or group of persons, including NGOs acting in good faith in accordance with the principles of human rights and claiming to have direct and reliable knowledge of those violations; or
- vi. It is exclusively based on reports disseminated by mass media; or
- vii. It refers to a case that is already being dealt with by a United Nations or similar regional complaints procedure; or
- viii. The domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.<sup>1</sup>

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<sup>1</sup> A/HRC/3/CRP.3, A/HRC/4/CRP.6 and A/HRC/5/CRP.6.

### 3) The 1235 Procedure

This Procedure was established by Resolution No. 1235 of ESCOSOC and the Procedure allowed an annual public debate on the gross violations of human rights and fundamental freedoms including policies of racial discrimination, segregation and apartheid in all countries.<sup>1</sup> The Commission could examine the 'situations, which reveal a consistent pattern of violations of human rights' and report and make recommendations to the ECOSOC.

In other words, this Procedure authorized two things (a) holding of a public debate during annual session of the Commission wherein governments and NGO(s) are given opportunity to highlight country specific situation that merits the attention of the Commission; (b) studying and investigating particular situations (or individual cases) through techniques and methods considered appropriate by the Commission.

The broad range of outcomes of this Procedure may include:

- i. The mere mention of a situation in the debate might embarrass a country (sometimes referred to as the sanction of "shaming"), generate media coverage, or influence another country's foreign policy;
- ii. An NGO might use the occasion to pressure other governments to take up the issue on a bilateral or multilateral basis;
- iii. A draft resolution might be circulated, and then withdrawn, perhaps after a strong lobbying effort by the government concerned or in response to concessions offered by the government; or

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<sup>1</sup> Resolution 1235 (XLIII) 1967

- iv. The Chairperson of the Commission might issue a statement of exhortation, with the (either formal or de facto) approval of the Commission. If the Commission did take up the matter, it might:
- Decide that the country concerned should be provided with 'advisory services', thus avoiding condemnation but making its concern clear;
  - Adopt a resolution calling for all available information to be submitted to it with a view to considering the matter at a later session;
  - Call upon the State Party to respond to the allegations in detail and in writing before its next session;
  - Adopt a resolution criticizing the government and calling upon the government to take specific measures;
  - Appoint an independent expert to provide the country with 'technical assistance', which is essentially a face-saving way of appointing someone who acts very much like a Special Rapporteurs;
  - Appoint a Special Rapporteurs or other individual or group to examine the situation and submit a report to the Commission on the basis of a visit (if possible) to the country;
  - Call upon the Secretary General to appoint a Special Representative to perform a similar function; or
  - Call upon the Security Council to take up the issue, with a view to considering the adoption of sanctions or some other punitive measure.

#### **4) The Thematic Special Procedure**

These thematic special procedures are termed as the crown jewel of the UN Human Rights System<sup>1</sup>. These procedures are devoted to a particular theme instead of a country or a region. The first example was the 'Working Group on Disappearances' established in 1980. It was established for Argentina but the UN, not to single out Argentina, did not use its name.

With the passage of time, the thematic mechanisms have increased significantly. In 1985, there were only three whereas their numbers raised to more than 28 and in 2004, about 100 reports were submitted about 40 countries and 1300 communications were sent to 142 governments in respect of 4448 individual cases.

The 28 mandates deal with (1) disappearances, (2) extrajudicial executions, (3) torture; (4) freedom of religion or belief, (5) the sale of children, child prostitution and child pornography, (6) arbitrary detentions, (7) freedom of opinion and expression, (8) contemporary forms of racism, racial discrimination, xenophobia and related intolerance, (9) independence of judges and lawyers, (10) violence against women, (11) toxic and dangerous products and waste, (12) extreme poverty, (13) migrants; (14) foreign debt; (15) the right to education, (16) the right to food, (17) the right to housing, (18) human rights defenders, (19) indigenous peoples, (20) people of African descent, (21) the right to health, (22) internally displaced persons, (23) trafficking in persons, (24) mercenaries, (25) terrorism, (26) international solidarity, (27) transnational corporations, and (28) minority issues. Thus since the creation of the first mechanism, the Commission created an

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<sup>1</sup> Henry J. Steiner "International Human Rights In Context-Law Politics Morals", 3<sup>rd</sup> Ed. Kofi Annan, Secretary General of UN-2006, Oxford Publishers at page 765



average of slightly more than one new mechanism every year.

In the thematic procedures, sometimes, different nomenclature is used for different mandate holders e.g. 'Working Group', 'Special Rapporteurs', 'Independent Expert', 'Representative or Special Representative of Secretary General, but practically there is no difference. Their functions include:

- Act urgently on information that suggests that a human rights violation is about to happen, or is already occurring. Urgent action usually takes the form of direct contact with the foreign ministry of the country concerned, or through the release of a public statement;
- Respond to allegations that a violation has already taken place, through direct contact with the permanent mission of the country concerned in Geneva (or New York if necessary), or through a public statement.
- Undertake fact-finding missions to examine, at first hand, allegations of violations and provide detailed recommendations and advice to the government concerned;
- Examine the global phenomenon of a type of violation through studies in order to provide an understanding of the problem and its solutions;
- Clarify the applicable international legal framework to address a particular violation;
- Present annual reports to the Commission/Council (and in some cases interim reports to the General Assembly) documenting their activities, which can include a summary of communications with governments, mission

reports and mission follow up, studies and recommendations.<sup>1</sup>

The special procedures, as comments, Amnesty International, are at the core of the UN Human Rights machinery. They are independent and objective experts who can monitor and respond to situations and allegations of violations of human rights. They play a unique role in promoting and protecting human rights but they work haphazardly, lack proper funding, lack cooperation for states etc<sup>2</sup>.

#### **4. The UN Human Rights Council**

The Human Rights Council, by a Resolution of the General Assembly replaced, the UN Commission on Human Rights in 2006.<sup>3</sup> The dissatisfaction of various stakeholders like developing states, NGOs etc. led to the demise of the Commission and creation of the Council but as a result of yearlong and heavy negotiations on the principles, approaches, composition, functions, procedures etc. of the proposed Council.

The General Assembly Resolution decided that the work of the Council shall be guided by the principles of universality, impartiality, objectivity, non-selectivity, constructive international dialogue and cooperation with a view to enhancing the promotion and protection of all human rights including rights to development.

The Resolution gave the following mandate to the Council:

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<sup>1</sup> Amnesty International, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection* (2005), p.5

<sup>2</sup> Ibid

<sup>3</sup> UN Resolution No.60/151/ (2006)

- (a) Promote human rights education and learning as well as advisory services, technical assistance and capacity building;
- (b) Serve as a forum for dialogue on thematic issues on all human rights;
- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- (e) Undertake a Universal Periodic Review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States;
- (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
- (g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights;
- (h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;
- (i) Make recommendations with regard to the promotion and protection of human rights;
- (j) Submit an annual report to the General Assembly.

The Council consists of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly. The membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: (i) Group of African States, 13; (ii) Group of Asian States, 13; (iii) Group of Eastern European States, 06; (iv) Group of Latin American and Caribbean States, 08; and (v) Group of Western European and other States, 07. The members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms.

The Council shall be open to all Member States of the United Nations. When electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments towards human rights. The General Assembly, by a two-thirds majority of the members present and voting, may suspend the right of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.

### **5. Universal Periodic Review**

The General Assembly has on the insistence of developing countries decided in the same Resolution (No.60) that the Council would undertake a Universal Periodic Review (UPR) based on objective and reliable information of the fulfillment of the human rights obligations and comments of each state.

The UPR shall:<sup>1</sup>

- a) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
- b) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;
- c) Ensure universal coverage and equal treatment of all States;
- d) Be an intergovernmental process, UN Member-driven and action oriented;
- e) Fully involve the country under review;
- f) Complement and not duplicate other human rights mechanisms, thus representing an added value;
- g) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner;
- h) Not be overly burdensome to the concerned State or to the agenda of the HRC;
- i) Not be overly long; it should be realistic and not absorb a disproportionate amount of time or human and financial resources;
- j) Not diminish the HRC's capacity to respond to urgent human rights situations;
- k) Fully integrate a gender perspective
- l) Take into account the level of development and specificities of countries;
- m) Ensure the participation of all relevant stakeholders, including non-governmental organizations (NGOs) and national human rights institutions (NHRIs).

The objectives of the UPR include:

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<sup>1</sup> HRC Resolution 5/1 of 18 June 2007 and HRC decision 6/102 of 27 September 2007

- a) Improvement of the human rights situation on the ground;
- b) Fulfillment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state;
- c) Enhancement of the State's capacity and technical assistance;
- d) Sharing of best practices among states and other stakeholders in consultation with and with the consent of the state concerned;
- e) Support for cooperation in the promotion and protection of human rights;
- f) Encouragement of full cooperation and engagement with the Council, other human rights bodies and the OHCHR.

The first cycle of the UPR has to be completed in four years. In other words, about 50 countries will be considered in one year. The UPR shall be based on the (a) information prepared by the state concerned on a prescribed format on the basis of the guidelines provided by the Council; (b) information compiled by the office of the OHCHR; and (c) additional reliable information provided by other stakeholders.

The UPR will be conducted in a Working Group chaired by the President of the Council, comprising 47 members' states of the Council. Other stakeholders, observers and some Rapporteurs also attend the session. A report containing summary of proceedings of the Review process conducted by the Working Group, recommendations, conclusions and commitments shall be prepared in full cooperation with the country under UPR. The Report has to be implemented primarily by the state under review.

## 6. The Human Rights Commissioner for Human Rights

The proposal to establish the office of the High Commissioner for Human Rights was pending since long but it was approved in the Vienna World Conference on Human Rights in 1993. The General Assembly,<sup>1</sup> in its resolution on "High Commissioner For The Promotion And Protection Of All Human Rights" declared that the High Commissioner for Human Rights 'shall be a person of high moral standing and personal integrity and shall possess expertise and general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance of the duties'. He shall be appointed by the Secretary General of the UN and approved by the General Assembly with due regard to geographic nature and shall have a fixed term of five years.

HCHR is the UN official with principal responsibility for UN human rights activities under the direction and authority of the Secretary General with the overall competence of the General Assembly and ECOSOC and Human Rights Council.

The functions and the responsibilities of the HCHR shall include:

- a. To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;
- b. To carry out the tasks assigned to him/her by the competent bodies of the United Nations System in the field of human rights

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<sup>1</sup> Vide its Resolution No.48/141 (1993)

- and to make recommendations to them with a view to improving the promotion and protection of all human rights;
- c. To promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose;
  - d. To provide, through the Centre for Human Rights of the Secretariat and other appropriate institutions, advisory services and technical and financial assistance, at the request of the State concerned and, where appropriate, the regional human rights organizations, with a view to supporting actions and programs in the field of human rights;
  - e. To coordinate relevant United Nations education and public information programs in the field of human rights;
  - f. To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world;
  - g. To engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights;
  - h. To enhance international cooperation for the promotion and protection of all human rights;



- i. To coordinate the human rights promotion and protection activities throughout the United Nations System;
- j. To rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness.

### **7. The Treaty Bodies**

After considering the UN Charter based on systems and procedures (from 2 to 6 above), let us now focus on the structures, roles, functions and processes of international human rights bodies created by various treaties. The treaty bodies include:

- a) The ICCPR Committee is established under International Covenant on Civil and Political Rights. It has four main functions<sup>1</sup>: (i) consideration of state's reports; (ii) adoption of general comments; (3) examination of communications (complaints); and (4) an interstate complaints procedure.

The committee consists of eighteen members of the nationals of States Parties who 'shall be person of high moral character and recognized competence in the field of human right'. In the election of the Committee, consideration shall be given to the 'equitable geographical distribution of membership and to the representative of the different civilizations

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<sup>1</sup>Article 40 and 41 of International Covenant on Civil and Political Rights

- and principal legal systems<sup>1</sup>. The members shall be selected and serve in their personal capacity<sup>2</sup>.
- b) ICESR Committee is established under International Covenant on Economic, Social and Cultural Rights 1976.<sup>3</sup>
  - c) CEDAW Committee is established under the Convention on Elimination of all forms of Discrimination Against Women 1979;
  - d) CAT Committee is established under Convention Against Torture;
  - e) CERD Committee is established under International Convention on the Elimination of all Forms of Racial Discrimination;
  - f) CRC Committee is established under Convention on the Rights of the Child;
  - g) CMW Committee is established under Convention on the Protection of All Migrant Workers and Members of their Families;
  - h) CRPD Committee is established under the Convention on the Rights of Persons with Disabilities; and
  - i) CED committee is established under International Convention for the Protection of All forms of Enforced Disappearance.

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<sup>1</sup> Article 31

<sup>2</sup> Article 28

<sup>3</sup> All such committees are on the pattern of ICCPR Committee.

## Chapter Four

# UN AND NGOs PARTNERSHIP

### I. Introduction

Non-Governmental Organizations are a very important part of the broader human rights movement. They not only bring out the facts, but also contribute to standard setting as well as to the promotion and enforcement of human rights norms with speed and decisiveness. They normally call governments to account for and compel reconsideration of policies that disregard human rights.

The INGOs (International Non-Governmental Organizations) activities focus on the preparation of reports on country situations throughout the world. They distribute these reports, provide the information to media and advocate before national executives or legislatures and International Organizations. Sometimes, they initiate or join as *amicus curiae* (friend of the court) in litigation. Their other activities include drafting proposed legislation, human rights education, protests and demonstrations, letter-writing, monitoring and critiquing the works of governmental and inter-governmental human rights agencies, and working with and strengthening their local affiliates.

The First World INGOs like Amnesty International normally concentrate on individual cases involving violations of identifiable persons' rights to personal security. This stress on individual cases may blur the big picture, the systemic and structural issues that underline violations: land-holding pattern, ethnic and class discrimination, unrepresentative political formations, mal-

distribution of resources and power. The critics argue that economic and social rights must figure as parts of an integrated view of needs and rights in Third World Societies.

It is true to a great extent but the principal INGOs are more than the statisticians of violence. They refer to such factors as military control over civilian government, unequal power among ethnic groups, and concentration of economic resources in a small elite. Secondly, who will report facts if most NGOs did not? Thirdly, the immediate necessity for human rights groups is to stop violations. Fourthly, think tanks, academics, government policy makers do concentrate on broader social analysis.<sup>1</sup>

Article 71 of the UN Charters acknowledges the important role of NGOs. The Article reads: 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate with national organizations after consultations with the Members of the United Nations'.

The UN human right mechanisms rely heavily on NGOs for alternative information as well, as to heighten the external pressure on the delinquent states. On the other hand, the NGOs have only reluctantly been awarded lobbying 'rights'.

The existing consultative arrangements within the UN system are overloaded and unsustainable. The UNESCO Resolution 1296 enunciates the following principles to be applied in establishing consultative relations with NGOs:

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<sup>1</sup> Henry Steiner, *Diverse Partners: Non-Governmental Organizations in The Human Rights Movement*, 1991 at 19

## **2. The Principles**

The following principles shall be applied in establishing consultative relations with non-governmental organizations:<sup>1</sup>

- (1) The organization shall be concerned with matters falling within the competence of the Economic and Social Council with respect to human rights.
- (2) The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.
- (3) The organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities.
- (4) The organization shall be of representative character and of recognized international standing; it shall represent a substantial proportion, and express the views of major sections, of the population or of the organized persons within the particular field of its competence, covering, where possible, a substantial number of countries in different regions of the world. Where there exist a number of organizations with similar objectives, interests and basic views in a given field, they shall, for the purpose of consultation with the Council, form a joint committee or other body authorized to carry on such consultation for the group as a whole. It is understood that when a minority opinion develops on a particular point within such a committee, it shall be presented along with the opinion of the majority.

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<sup>1</sup> UN UNESCO Resolution 1296 (XLIV) (1968)

- (5) The organization shall have an established headquarters, [and] a democratically adopted constitution.
- (6) Subject to paragraph 9 below, the organization shall be international in its structure.
- (7) Any international organization, which is not established by inter-governmental agreement, shall be considered as a non-governmental organization for the purpose of these arrangements, including organizations, which accept members designated by governmental authorities if such membership does not interfere with the free expression of views of the organization.
- (8) The basic resources of the international organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. Any financial contribution or other support, direct or indirect, from a Government to the international organization shall be openly declared.
- (9) National organizations shall normally present their views through international non-governmental organizations to which they belong. National organizations, however, may be admitted after consultation with the Member State concerned in order to help achieve a balanced and effective representation of non-governmental organizations reflecting major interests of all regions and areas of the world, or where they have special experience upon which the Council may wish to draw.
- (10) The consultative status shall be suspended up to three years or withdrawn in the following cases:

- (a) If there exists substantiated evidence of secret governmental financial influence to induce an organization to undertake acts contrary to the purposes and principles of the Charter of the United Nations;
- (b) If the organization clearly abuses its consultative status by systematically engaging in unsubstantiated or politically motivated acts against States Members of the United Nations contrary to and incompatible with the principles of the Charter;
- (c) If, within the preceding three years, an organization had not made any positive or effective contribution to the work of the Council or its commissions or other subsidiary organs.

The current consultative arrangements pose two questions (1) does this consultative status provide NGOs effective access to the UN system and (2) how can the NGOs who do not have consultative status obtain effective access: Those who do not have consultative status may submit information to various thematic rapporteurs and treaty monitoring bodies.

The national governments are hostile towards the idea of more open participation by NGOs within the UN system. The final text of the Second World Conference on Human Rights in Vienna (1993) represents a setback for human rights advocates. It states that

'Non-governmental organizations genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights and the protection of the national law.... Non-governmental organizations should be free to carry out their human rights activities, without

interference, within the framework of national law and the Universal Declaration of Human Rights'.

The reference to national law undermines a fundamental premise of international human rights law; international standards are necessary precisely because national law so often offers inadequate protection.<sup>1</sup>

### **3. The categories of NGOs**

The ECOSOC has requested the General Assembly to examine the question of participation of NGOs in all areas of the UN. The Secretary General has submitted this report on 10 July 1998.

Keeping in view the UN's philosophy to further and strengthen the civil society (i.e. the sphere in which social movements organize themselves around objective, constituencies and the thematic interests) this Report provides a comprehensive overview of the present institutional arrangements which frame the relations between the UN and NGOs.

For nearly three decades, arrangements for consultation of the Economic and Social Council with NGOs were governed by Resolution 1296 (XLIV) of 23 May 1968. In 1996, after a thorough review, the Council adopted Resolution 1996/31, which established three categories of status for NGOs. General consultative status is for large, international NGOs whose area of work covers most of the issues on the Council's agenda. Special consultative status is for NGOs that have special competence in a few fields of the Council's activity. The third category, which is inclusion on the Roster, is for NGOs whose competence enables them to make occasional

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<sup>1</sup> Michael Posner and Candy Whittome, *The Status of Human Rights NGOs*, 25 *Colum. Hum. Rts. L. Rev.* 269 (1994), at 283



and useful contributions to the work of the United Nations and who are available for consultation upon request.

#### **4. The NGOs Committee**

The Committee on Non-Governmental Organizations is a standing committee of the ECOSOC. It was established by Economic and Social Council Resolution 3 of 1946. Its membership consists of: (a) five members from African States; (b) four members from Asian States; (c) two members from Eastern European States; (d) four members from Latin American and Caribbean States; (e) four members from Western European and other States.<sup>1</sup>

#### **5. Mandate**

The main tasks of the Committee are (a) the consideration of applications for consultative status and requests for reclassification submitted by NGOs; (b) the consideration of quadrennial reports submitted by NGOs in General and Special categories (c) the implementation of the provisions of Council resolution 1996/31 and the monitoring of the consultative relationship; and (d) any other issues which the ECOSOC may request the Committee to consider.<sup>2</sup>

#### **6. Applications**

In accordance with resolution 1996/31, the Committee considers applications for consultative status submitted by non-governmental organizations and requests for changes in status and makes recommendations to the

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<sup>1</sup> UN ECOSOC Resolution No. 3 (II) of 21 June 1946

<sup>2</sup> UN ECOSOC Resolution No. 1996/3

ECOSOC. At each session, which is held annually, the Committee considers applications received not later than 1 June of the preceding year.

#### **7. Quadrennial reports**

Organizations in consultative status in General and Special categories submit to the Committee on Non-Governmental Organizations, through the Secretary General, every fourth year a brief report of their activities in support of the work of the United Nations. Based its findings, the Committee may recommend to the ECOSOC a reclassification in status of the NGO concerned.

#### **8. NGOs Rights**

Those NGOs, which are granted consultative status, acquire certain rights and responsibilities. The provisional agenda of the Council is communicated to all of them and NGOs with general status have the right to place items on this agenda and that of the Council's subsidiary bodies. Organizations with general and special status may designate authorized representatives to sit as observers at public meetings of the Economic and Social Council and subsidiary bodies. NGOs on the roster may have representatives at such meetings concerned with matters within their field of competence. Organizations in general and special status may submit brief written statements which can be published as United Nations documents and circulated to members of the Council or subsidiary bodies. Organizations on the Roster may also be invited to submit written statements. Economic and Social Council resolution 1996/31 makes provision for oral presentations by organizations in general or special consultative status during certain meetings of the Council. NGOs in consultative status with the Economic and Social Council must report every four years on their activities.

The Secretary General is authorized to offer facilities to NGOs in consultative status, including:

- Prompt and efficient distribution of documents of the Economic and Social Council and its subsidiary bodies as appropriate;
- Access to United Nations press documentation services;
- Arrangement of informal discussions on matters of special interest to groups or organizations;
- Appropriate seating arrangements and facilities for obtaining documents during public meetings of the General Assembly that deal with matters in the economic, social and related fields.<sup>1</sup>

#### **9. Present Position**

There are now over 900 NGOs in consultative status. In recent years number of NGOs has increased dramatically – over 1500 were represented at the Vienna Conference alone. How situation can be remedied without overloading the system? In July 1993, ECOSOC established a working group consisting of representatives of all interested to undertake a general review with a view to updating, if necessary, Council Resolution 1296 as well as introducing coherence in the rules governing the participation of NGOs in international conference as convened by the United States.<sup>2</sup>

The Human Rights NGO community is asserting it in all relevant UN bodies. A huge number of such organizations are working alongside. The UN in more and

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<sup>1</sup> Report available on the official web site of UN in the section dealing with NGOs

<sup>2</sup> Michael Posner, *The Status of Human Rights NGOs*, 25 Colum. H. Rts. L. Rev. 269 (1994) at 283

more crises and this involvement have been acknowledged as indispensable to the UN's system NGOs of intending women's movement are perceiving the centrality of the UN system in a wide range of international political, economic and social issues.<sup>1</sup>

The majority of funds, agencies and programmes of the United Nations system have also received a clear mandate from their governing bodies to work with NGOs, and have developed a wide range of mechanisms in this field.

There also exist a number of constraints or potential difficulties that limit the scope of United Nations collaboration with NGOs. They lie principally in the sheer number of organizations and their diversity, their occasional organizational weaknesses, the fragility of certain grass-roots organizations and sometimes divergent positions among NGOs and between NGOs and Governments. Furthermore, over dependence on external financing can sometimes undermine the sustainability and even independence of NGOs. Nonetheless, the balance remains overwhelmingly favourable to a strengthened cooperation between the United Nations system and NGOs in operational matters, at Headquarters and in the field.

Owing to the unique capacity of NGOs to gather public support for and raise general awareness on a number of important subjects, joint advocacy campaigns with NGOs, at the international and national levels, have often met with considerable success. The Ottawa process, which led to the adoption, in December 1997, of the Convention banning anti-personnel landmines was a landmark in this regard, and is a striking example of effective partnership

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<sup>1</sup> Erskine Childers, *We the People*, in 'Renewing the United Nations System' 171 (1994) at 172

between intergovernmental, governmental and non-governmental actors. The process and the role played in it by the International Campaign to Ban Landmines, an umbrella group of NGOs active in this field, have shown that determined, knowledgeable and well-organized NGOs that are willing to form caucuses and alliances can achieve successes in advocacy and lend tremendous weight to International and United Nations-led campaigns.

Other examples include UNICEF's strong reliance on NGOs in its advocacy campaigns, such as those on the implementation of the recommendations of the United Nations report on the impact of armed conflicts on children, the "Child-friendly city initiative" or the subject of the sexual exploitation of children. NGOs' involvement in the latter was particularly important. The Conference on Sexual Exploitation of Children, held in Stockholm in 1996, was co-sponsored and organized on an equal footing by the Government of Sweden, UNICEF and the NGO called End Child Prostitution and Trafficking.

Similarly, the policy of UNHCR is to work with national NGOs whenever possible. While the primary objective of its strategy in support of national organizations is to ensure appropriate local capacity to meet the humanitarian assistance needs of refugee operations in the most effective manner, a secondary aim is to build the capacity of national organizations to work beyond the needs of a UNHCR operation and to contribute, in the longer term, to rehabilitation and development.

UNHCR supports national NGOs through the identification and assessment of their capacities followed by training and capacity-building programmes. UNHCR also encourages international NGOs to work directly with national NGOs, with a view to handing over activities when feasible. Similarly, in order to promote local NGO

participation and ensure long-term benefits of food aid assistance, WFP requests international NGOs to involve local partners in their activities. In some cases, this request has been included in the contract determining the modalities of collaboration with the international NGO.

Member States may also wish to consider the establishment of a trust fund for the purpose of facilitating the participation of NGOs from developing and least developed countries, and countries in transition, in activities of the Organization. This fund could serve to provide such NGOs with the means of retrieving important information from United Nations sources as well as attending important meetings or conferences of relevance to their work.<sup>1</sup>

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<sup>1</sup> UN Doc. A/49/215 (1994), at 12

## Chapter Five

# POLITICAL AND CIVIL RIGHTS

### 1. Introduction

International Covenant on Civil and Political Rights (ICCPR), along with International Covenant on Economic, Social and Cultural Rights (ICESCR) constitutes the bedrock of modern International human rights. It was approved by the General Assembly on 19 December 1966 and came into force on 23 March 1976.

### 2. Basic principles

The Preamble enunciates the following principles, which permeate the Convention:

- (a) There is an inherent dignity of human persons and all rights enshrined in the Convention spring from this fountain.
- (b) Freedom from fear and want is the ideal for which human beings should strive.
- (c) The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.
- (d) Every individual has duties to other individuals and to the community to which he belongs.
- (e) Every individual is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant

### 3. Overview

The Covenant describes/declares the following rights:

1. Right of self-determination (Article 1)
2. No discrimination in rights and effective remedy in violation (Article 2)
3. Equality of men and women (Article 3)
4. Only a few derogations possible in emergency (Article 4)
5. Derogation from and destruction of rights not permitted (Article 5)
6. Right to life (Article 6)
7. Freedom from torture and degradation (Article 7)
8. Freedom from slavery and servitude (Article 8)
9. Right to liberty and security of person (Article 9)
10. Humane treatment of detainees (Article 10)
11. No imprisonment in cases of contractual obligations (Article 11)
12. Freedom of movement and residence.(Article 12)
13. Rights of aliens (Article 13)
14. Equality before law and other procedural safeguards (Article 14)
15. Protection from retroactivity of laws (Article 15)
16. Right to recognition before law (Article 16)
17. Freedom from interference with his privacy, home etc. (Article 17)
18. Freedom of thought , conscience and religion (Article 18)
19. Freedom of opinion and expression (Article 19)
20. Propaganda of war and hatred prohibited (Article 20)
21. Right to peaceful assembly (Article 21)
22. Freedom of association (Article 22)
23. Protection of family rights (Article 23)
24. Rights of children (Article 24)
25. Right to public affairs (Article 25)
26. Equality before law (Article 26)



27. Rights of minorities (Article 27)

**First Optional Protocol**

Deals with Committee procedure.

**Second Optional Protocol**

Recommends abolition of death penalty.

The Covenant has 51 Articles. Articles 1-27 describe various rights whereas Articles 28-51 deal with enforcement, interpretation and general provisions. In this Chapter, we will only explain ten basic rights. Some very important rights have been omitted here because they have either been discussed under the Universal Declaration of Human Rights or will be explained under European Convention on Human Rights.

**1) Self Determination**

Article 1 examines one of the most influential, debated and contested provisions of this Covenant, the right of 'peoples' to 'self-determination'. A central question is the degree to which Article 1 addresses the issue of so-called 'external' self-determination, the right of a 'people' to independent statehood, as in the process of decolonization. Does it also address more general questions such as the form of government to which the population of a state is entitled in order to achieve 'internal' self-determination? The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this-provision as

article 1 apart from and before all of the other rights in the two Covenants.

## **2) Non-discrimination**

Articles 2, 3 and 26 deal with the principle of non-discrimination but the Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

While these Conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

The ICCPR Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.

### **3) Men and Women**

Article 3 of the Covenant requires, States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant.

This Article requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. Simply enacting laws cannot do this. Hence, in addition to purely legislative measures of protection, it is to be seen that what progress is being made or what factors or difficulties are being met in this regard.

### **4) Right to Life**

Article 6 addresses the right to life, a phrase as central to the human rights corpus as it is elliptic and open to a range of interpretations. It is the supreme right from which no derogation is permitted even in time of public emergency, which threatens the life of the nation.

The ICCPR Committee has noted that the right to life has been too often narrowly interpreted. The expression

'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life, which confront humanity today. Therefore, the Committee have expressed its growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all. Hence, the Committee is of the view that the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

### **5) Torture and Cruel Punishment**

Article 7 concerns torture and cruel or degrading treatment or punishment. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover,

the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In this connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

#### **6) Detention**

Article 10 applies to detained person. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material

resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and 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 (1982).

Lastly, under Article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation.

Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. IN that regard, States parties are invited to indicate whether they are

applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.<sup>1</sup>

### **7) Criminal Procedure**

Under Article 14 the presumption of innocence is fundamental to the protection of human rights. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The right to be informed of the charge 'promptly' requires that information be given in the manner described as soon as a competent authority first makes the charge.

### **8) Interference with Privacy**

Article 17 is meant to save people from arbitrary or unlawful interference with their privacy, family or correspondence, and unlawful attacks on their honour and reputation. The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized

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<sup>1</sup> Known as Beijing Rules, 1987

by law to receive process and use it, and is never used for purposes incompatible with the Covenant. In order to have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes, every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

#### **9) Protection of Family**

Article 23 concerns the protection of the family. The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.

During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.

The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. In this connection, the ICCPR Committee wishes to note that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant.



### **10) Children Rights**

Article 24 gives brief and general provision on children's rights. A treaty devoted to such issues was later drafted and is now in effect, The Convention on the Rights of the Child.

In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The ICCPR Committee notes that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural.

For example, every possible economic and social measures should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means. In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.

#### **4. UDHR and ICCPR**

1. The UDHR as a declaration by the General Assembly is aspirational and recommendatory rather than binding under international law. The Covenant, on the other hand, binds the state parties in accordance with its terms subject to reservations.
2. The UDHR does not create an international institution whereas the Covenant creates an ongoing

- institution: the human rights committee<sup>1</sup> which gives institution support to the Covenant norms.
3. The UDHR and ICCPR make justificatory statements, in their preambles, founded in moral and political thought.
  4. The provisions of the UDHR are in greater detail than the provisions of ICCPR.
  5. Collective rights are hinted at or asserted in the Covenant<sup>2</sup> whereas they are absent from the Declaration.
  6. The idea of rights dominates in both the instruments. Article 29(1) of the Declaration does provide that everyone has duty in the community in which alone the free and full development of his personality is possible, but the Covenant has no Article referring to individual duties.
  7. Article 17 of the Declaration 'on the right to own property' and protection against arbitrary deprivation does not have parallel provision in the Covenant. The ICCPR goes beyond the Declaration by requiring the state to provide remedial system in the event of violation of rights<sup>3</sup>
  8. The Covenant rights are not restricted to rights against governmental interference. The state is duty-bound to provide effective remedies against the interference by non-governmental or private actors as well.
  9. Article 5 of the Declaration bans 'cruel, inhuman or degrading' punishment but does not prohibit capital punishment whereas Article 1 of the Second Optional Protocol to the ICCPR Aiming at the

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<sup>1</sup> The ICCPR Committee

<sup>2</sup> Articles 1 and 27 of the ICCPR

<sup>3</sup> Article 2 of ICCPR

Abolition of the Death Penalty provides that 'no one within the jurisdiction of a State Party to the present Protocol shall be executed'. 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction'

### **5. The ICCPR Human Rights Committee**

The Commission on Human Rights (UN Commission) created under the UN Charter (hence a Charter organ) and discussed in Chapter 4 remains the most complex and interesting of the human rights organs. It differs in organization, functions, and powers from the six organs related to six universal human rights treaties. Each body has functions only with respect to the treaty creating it. In this chapter, we will discuss the Human Rights Committee (called ICCPR Committee) created by one of the World's two principal human rights treaties, The International Covenant on Civil and Political Rights.

Articles 8-45 of the First Optional Protocol of the Covenant describe the organization and dominant functions of the ICCPR Committee.

- (1) Article 40 requires state parties to submit reports on measures taken to give-effect to the undertaking of the Covenant. The Committee is to study these reports.
- (2) The same Article instructs the Committee to transmit such general comments, as it may consider appropriate, to these state parties.
- (3) The Optional Protocol authorizes the Committee to receive and consider 'communications' from individuals claiming to be victims of violations by states parties of the Covenant and to forward its 'views' about communications to the relevant individuals and states.

Article 28-31 of the Covenant provides information about the Committee's membership. The 18 members are to have 'high moral character and recognized competence in the field of human rights. Article 31(2) says that consideration in election 'shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and the principal legal systems'. All members are to be elected and shall serve in their personal capacity<sup>1</sup> whereas on UN Commission sit representative of the states.

The Committee meets for three sessions annually; each three weeks long, at UN headquarter in Geneva (twice) and New York. However, working groups meet for one week before the start of each session. Most meetings are public, are poorly attended by outsiders and get little press coverage in a stark contrast to the publicity and notoriety of the UN Commission.

Decision should formally be made by majority vote<sup>2</sup> but in fact all decisions to date have been taken by consensus.

The Committee, like the UN Commission, has witnessed vast changes in global politics. Though the earlier ideological disputes and North-South controversies have now become blunted, yet these have left a strong impact on the Committee.

## **6. Report system**

Under Article 40, member states are required to 'submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights'. Reports shall indicate factors and difficulties, if any, affecting the

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<sup>1</sup> Article 28(3) of ICCPR

<sup>2</sup> Article 39(2)

implementation of the present Covenant. The ICCPR Committee is to study the reports and transmit its general comments to the state parties. The states respond to comments. State party now presents reports every five years though Committee can request report at shorter intervals. The reports serve two purposes: -

- (1) Confront the state with facts derived from sources other than the report.
- (2) It provides an opportunity of 'constructive dialogue' with members.

It is encouraging to note that 50 years ago, it was nearly impossible that most of the world's states would periodically submit a report to an international Committee about the domestic matters and then participate in a discussion about that report but now submission of reports have become a familiar requirement.

#### **7. Recent developments**

The ICCPR Committee submitted to 1993 World Conference on Human Rights in Vienna a report on its work and plans. We summarized recent developments in Committee's approach to reports.

1. The Committee listed the several times it had requested states including Iraq, Peru etc to submit a report within three months about a new situation.
2. The Committee supported the Secretary General's proposal that human rights bodies may be allowed to bring massive human rights violations to the attention of the Security Council.
3. When the Committee is satisfied that no alternate way is available to obtain information, it can ask the state party concerned to receive a mission with a view to collect information which the Committee needs to carry out its functions under the Covenant.

## 8. Guidelines

The ICCPR Committee on several occasions has issued various guidelines/General Comments to help the states in filing reports under Article 40. These General Comments are issued to make this experience available for the benefit of all states in order to promote their further implementation of the Covenant, to suggest improvements in the supporting procedure and to stimulate the activities of the states and international organizations in the promotion and protection of human rights. Their summary is as under:

- (1) The reporting obligations should embrace not only the relevant laws and other norms relating to obligations under the Covenant but also practices and decisions of courts and other organizations of the state party, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.<sup>1</sup>
- (2) The State parties should provide more detailed information on the steps taken to ensure that equality before including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice and the States should specify the relevant Constitutional and legislative texts which can help understand it.<sup>2</sup>
- (3) States should explain laws and mechanisms to protect against unlawful and arbitrary interference. The report should also include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference. States should make clear the extent to which actual practice conforms to the law.<sup>3</sup>

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<sup>1</sup> 1981 Report

<sup>2</sup> 1984 Report

<sup>3</sup> 1988 Report

- (4) Reports by States parties should indicate how legislation and practice ensure that measures of protection aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.<sup>1</sup>
- (5) The Committee considers it useful that reports provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.<sup>2</sup>
- (6) The Committee wishes to know if there remain any problems of discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.<sup>3</sup>
- (7) States parties should include in their report information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman and degrading treatment, and how impartial supervision is ensured.<sup>4</sup>

### **9. Individual Communications**

Under First Optional Protocol of ICCPR, individuals who claim to be victims of a violation, by a

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<sup>1</sup> 1989 Report

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> 1992 Report

state party to the Protocol of, any of the rights set forth in the Covenant. After being notified of the Communication, the state party shall submit to the Committee written explanations or statements clarifying the matter. The Committee is to forward its views to the individual and state concerned.

Unlike the requirements for procedure 1235 and 1503 of the UN Commission on Human Rights, these Communications to the ICCPR Committee need not allege that violations are systemic. Here isolated violation suffices to found the Communication.

Here only written Communications can be made; no oral presentation or confrontation is allowed. Discussions are also 'closed'. In addition, no fact-finding missions are envisaged.

A Working Group of five Committee members meet a week before each three-week session to consider the admissibility of the communication. Only the Committee can decide that a communication is inadmissible. This First Optional Protocol is one of only three human rights treaties of universal applications (the two others being the Convention on Racial Discrimination and Convention on Torture) that provides an individual remedy at the international level.

However, under Article 5(2)(b) of the First Optional Protocol, an individual can only make communication when he has exhausted all available domestic remedies but this shall not be the rule where the application of the remedies is unreasonably prolonged.

In *Miango v Zaire*,<sup>1</sup> the author alleged the torture and killing by the military of the author's brother. The communication stated that in Zaire, only a military tribunal

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<sup>1</sup> Communication no. 194/1983



could deal with cases involving soldiers, and the author despaired of any hope that the case of his brother's death would be properly investigated. The Committee following its normal procedure transmitted the communication to the state and requested information. It received no submission from Zaire and then found the Communication admissible. The Committee observed that Article 6 and 7(1) of the ICCPR had been violated.

However, the Committee is not a court or tribunal but its duty is to ensure that state parties fulfill their obligations under the Covenant. It is an executive and guardian organ of the Covenant. It has a role as a promoter, monitor or supervisory body with respect to improve human rights performances.<sup>1</sup>

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<sup>1</sup> Dominic Mc Goldrick, *The Human Rights Committee*, 1991 at 54

## Chapter Six

# ECONOMIC AND SOCIAL RIGHTS

### 1. Context

The Universal Declaration of Human Rights (UDHR) entails two sets of human rights: civil and political rights, as well as, economic, social and cultural rights.

In translating the Declaration's poetic provisions into legally binding obligations, the United Nations adopted Covenant on Economic, Social and Cultural Rights, and Covenant on Civil and Political Rights, which taken together constitute the bedrock of the international normative regime in relation to human rights.

The recognition of economic and social rights has diffused historical origins. All the revealed religions exhort to care for those in need and those who cannot look after themselves. Other sources include philosophical analyses,<sup>1</sup> the political programmes of 19<sup>th</sup> century Fabian socialists in Great Britain, Chancellor Bismark in Germany,<sup>2</sup> and the New Dealers in the United States and Constitutional precedents such as the Mexican Constitution of 1917, the Soviet Constitution and the 1919 constitution of Weimer Republic.

The modern International human right laws start from International Labour Organization (ILO) which was established by the Treaty of Versailles in 1919 to abolish the 'injustice, hardship and privation' which workers suffered and to guarantee 'fair and humane conditions of

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<sup>1</sup> E.g. of Thomas Paine, Karl Marks, Immanuel Kant, John Rawls etc

<sup>2</sup> Bismark introduced social insurance schemes in the 1880s

labour'; it was conceived as the response of Western countries to the ideologies of Bolshevism and Socialism arising out of the Russian Revolution. The ILO adopted international minimum standards in relation to freedom of association and the right to organize trade unions, forced labour, minimum working age, hours of work, weekly rest, sickness protection, accident, invalidity and old-age insurance, and freedom from discrimination in employment.<sup>1</sup>

The Great Depression of 1930's and Lord Keynes emphasized the need for social protection of the unemployed. Member States made some proposals during drafting of the UN Charter for enshrining 'full employment' as a commitment. The United States strongly opposed it because it would lead to interference in the domestic affairs. Resultantly agreement was reached on Article 55(a) of the Charter, which calls on Member States to promote 'higher standards of living, full employment, and conditions of economic and social progress and development;

Interestingly in 1941, President Roosevelt nominated 'freedom from want' as one of the four freedoms that should characterize the future world order. This approach was reflected in a draft International Bill of Rights, completed in 1944 by a Committee appointed by the American Law Institute (ALI). All these proposals proved highly influential in the preparation of the Articles 22-28 of Universal Declaration of Human Rights (UDHR) and US was a strong supporter of these Articles proposed by Communist and Latin American countries. The

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<sup>1</sup> Philip Alston (ed) 'United Nations and Human Rights: A Critical Appraisal', 580, (1992)

Covenant on Economic, Social and Cultural right translated these pronouncements of rights into binding treaty obligations.

## **2. Raison detre**

According to United Nations Development Report 1991:

- (a) Over one billion people, out of a world population of 5.3 billions, live in absolute poverty.
- (b) Some 180 million children, one in three, suffer from serious malnutrition.
- (c) One and a half billion people are deprived of primary health care.
- (d) Nearly three million children die each year from immunizable diseases.
- (e) About half a million women die each year from causes related to pregnancy and childbirth.
- (f) About a billion adults cannot read or write.
- (g) Well over 100 million children of primary school age are in school.
- (h) Girls' primary enrolment rate are a little over two-thirds that of males.
- (i) Female literacy is still only two-thirds of males.
- (j) Over 100 million people live below poverty line in industrial market economies.

This is a state of affairs in 1990s, what will be state of affairs in 1940s. Definitely worse than that as the latter part of the 20<sup>th</sup> century has witnessed great efforts in development, poverty alleviation and better income distribution. It was this state of affairs which, coupled with a communist threat, convinced the world leaders especially the West to work for and approve the Covenant

### 3. Basic principles

The Preamble enunciates the following principles, (same as we have discussed in civil and political rights) which permeate the convention:

- (a) There is an inherent dignity of human persons and all rights enshrined in the Convention spring from this fountain.
- (b) Freedom from fear and want is the ideal for which human beings should strive.
- (c) The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.
- (d) Every individual has duties to other individuals and to the community to which he belongs.
- (e) Every individual is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

### 4. Overview

The Covenant was adopted by the General Assembly on 16 December 1966<sup>2</sup> and entered into force on 3 January 1976. It is divided into five parts:

- (a) Part I recognizes the right to self-determination;
- (b) Part II defines the general nature of states parties' obligations;
- (c) Part III enumerates the specific substantive rights;
- (d) Part IV deals with international implementation; and

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<sup>1</sup> The Preamble of the International Covenant on Economic, Social and Cultural Rights

<sup>2</sup> By UN General Assembly Resolution No. 2200 A (XXI)

(e) Part V contains typical final provisions of a legal nature.

The Covenant is essentially a 'promotional convention' stipulating objectives more than standards and requiring implementation over time rather than all at once. One obligation is, however, subject to immediate application: the prohibition of discrimination in the enjoyment of the rights enumerated on grounds of race, colour, sex, language, religion, or political or other opinion; national or social origin; property; birth or other status.

Also the international supervisory measures that apply to the Covenant oblige the state parties to report to the UN Economic and Social Council on the steps they have adopted and the progress they have made in achieving the realization of enumerated rights.

### **5. Right guaranteed**

The Covenant consists of 28 Articles. Articles 1-15 deal with rights and duties whereas Articles 16-28 deal with enforcement, interpretation and general provisions.

1. Right of self-determination (Article 1)
2. States to adopt all means to achieve realization of these rights. (Article 2)
3. Equality of men and women (Article 3)
4. Only legal and compatible limitations can be imposed on the rights (Article 4)
5. Derogation from and destruction of rights not permitted (Article 5)
6. Right to work and training (Article 6)
7. Right to just and favourable conditions of work (Article 7)
8. Right to form and join trade unions (Article 8)
9. Right to social security (Article 9)
10. Protection of and assistance to family (Article 10)
11. Right to an adequate standard of living (Article 11)

12. Right to physical and mental health ( Article 12)
13. Right to education ( Article 13)
14. State's duty to provide compulsory and free education (Article 14)
15. Right to cultural life and scientific development (Article 15)

**1) Right to work**

State parties have recognized that everyone has the right to work.<sup>1</sup> This right includes opportunity to gain his living by work, which he freely chooses or accepts. The Parties are enjoined to take all appropriate steps to safeguard this right. State parties are to provide technical and vocational guidance and introduce policies for full and productive employment.<sup>2</sup>

Under Article 7 state parties have recognized the right of every one to the enjoyment of just and favorable conditions of work. The right includes:

- (i) fair wages;
- (ii) equal remuneration for work of equal value without distinction of any kind;
- (iii) a decent living for worker and his family;
- (iv) safe and healthy working conditions;
- (v) opportunities for promotion to an appropriate higher level, subject to seniority and competence;
- (vi) rest and leisure;
- (vii) reasonable limitation of working hours;
- (viii) periodic holidays; and
- (ix) remuneration for public holidays.

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<sup>1</sup> We will discuss here only those rights which have not been discussed under UDHR or ICCPR

<sup>2</sup> Article 6 of ICESCR

## **2) Trade unions**

States have to ensure the right of every one to form trade unions and join the trade union of his choice for the promotion and protection of his economic and social interests. The right includes establishing national federations or confederations and to form and join international trade union organisations. It also includes right to strike but only in accordance with law.

However, it is not an absolute right. States can impose restrictions on the exercise of this right if:

- (a) the restrictions are prescribed by the law; and
- (b) are necessary in a democratic society in the interest of
  - (i) national security or (ii) public order or (ii) for the protection of rights and freedoms of others.<sup>1</sup>

## **3) Protection of family**

Family is regarded as the natural and fundamental group unit of society. Normal family life is must for the care and education and development of children. Special protection should be given to mothers during a reasonable period before and after childbirth. During such periods working mothers should be accorded paid leave or leave with adequate social security benefits.

Special measures of protection and assistance should be taken on behalf of all children and young persons. They should also be protected from economic and social exploitation. Their employment harmful to their morals, health, life or development shall be punishable by law. State should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.<sup>2</sup>

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<sup>1</sup> Article 8

<sup>2</sup> Article 10



#### **4) Standard of living**

The parties recognize the right of every one to an adequate standard of living for himself and his family. This includes adequate food, clothing and housing, and to the continuous improvement of living conditions. The states are bound to take appropriate steps to ensure the realization of this right.

The states, recognizing the fundamental right of every one to be free from hunger, have to take, individually and through international co-operation, the measures:

- a) To improve method of production, conservation and distribution of food by making full use of scientific knowledge and by developing or reforming agrarian systems for the optimal utilization of natural resources;
- b) Taking into account the problems of both food importing and food exporting countries, to ensure an equitable distribution of food supplies in relation to the need.<sup>1</sup>

#### **5) Physical and mental health**

The states recognised the right of every one to the enjoyment of the highest attainable standard of physical and mental health. The state parties should take steps for the realisation of this right. The steps should include that are necessary for:

- (a) the provision for the reduction of the still birth – rate and of infant mortality and for the healthy development of child;
- (b) the improvement of all aspects of environmental and industrial hygiene;

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<sup>1</sup> Article 11

- (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) the creation of conditions which would assure to all, medical service and medical attention in the event of sickness.<sup>1</sup>

**6) Right to education**

States recognize the right of everyone to education.

Article 13 describes the following objectives of the education:

- (i) full development of human personality and sense of its dignity;
- (ii) strengthening the respect for human rights and fundamental freedoms;
- (iii) enabling all persons to participate effectively in a free society;
- (iv) Promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and furthering the activities of the United Nations for the maintenance of peace.

With a view to achieving the full realization of his right, states recognize that:

- (i) the primary education shall be compulsory and available free to all;
- (ii) secondary education, including technical and vocational, shall be made generally available and accessible to all;
- (iii) higher education shall be made equally accessible to all;
- (iv) schools system should be developed at all levels;
- (v) Parents will have liberty to choose schools for education of their children.

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<sup>1</sup> Article 12

### 7) Cultural rights

Parties recognize the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is author.<sup>1</sup>

## 6. ICCPR and IESCR

Just as the ICCPR elaborates upon most of the civil and political rights enumerated in the UDHR, so the ICESCR elaborates upon most of the economic, social, and cultural rights set forth in the Universal Declaration.

The interdependence of the civil and political rights, and economic, social and cultural rights, is reflected in the preamble to the ICESCR, which says that 'in accordance with the Universal Declaration...the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.'

The terminology used in the ICESCR to describe the obligations of states varies in significant respects from that used in the ICCPR. Whereas the ICCPR contains terms such as 'everyone has the right to ..' or 'no one should be.'

The ICESCR employs the formula 'state parties..recognize the right of everyone to....'The principal exceptions are Article 3 (equal right of men and women) and article 8 (trade union related rights), under each of which the states 'undertake to ensure' the relevant rights;

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<sup>1</sup> Article 15

and Article 2(2) (non-discrimination) where the undertaking is 'to guarantee'.

Unlike ICCPR, this Covenant is not geared, with modest exception, to immediate implementation, the state parties having agreed only 'to take steps' towards 'achieving progressively the full realization of the rights in the Covenant' and then subject to 'maximum of their resources.'

- (a) Under Article 2(1) the ICESCR obligation of state parties is recognized subject to the availability of resources whereas there is no corresponding section in the ICCPR.
- (b) Under Article 2(2) of the ICESCR, the state parties have to undertake steps .... With a view to achieving progressively the full realization of the rights whereas, rights under the ICCPR require immediate realization.

### **7. Enforcement procedure**

The states are bound to submit reports on the 'measures, which they have adopted, the progress made in achieving the observance of the rights and factors and difficulties affecting the degree of fulfillment of obligations. Reports have to be submitted to the Secretary General of the United Nations who shall transmit copies to the Economic and Social Council and other relevant Specialized Agencies, and Commission on Human Rights for consideration. The parties and the Agencies may submit comments to the Council.<sup>1</sup>

The Council may submit reports from time to time to the General Assembly with recommendations of a general nature and summary of the information received

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<sup>1</sup> Articles 16-20

from the States and Agencies on the measures taken and the progress made in achieving the general observance of the rights. The Council may also bring to the attention of other organs of the United Nations, their subsidiary organs and Specialized Agencies concerned with furnishing technical assistance, any matter arising out of the reports which may assist such bodies in deciding on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

It is, therefore, clear that the Economic and Social Council is the keystone in the system of implementation of this Covenant. Nevertheless, two comments must be made:

- (a) the principle that the organ responsible for supervision should be independent was jettisoned since ECOSOC consists of representatives of governments and not independent individuals acting in their personal capacity;
- (b) The task conferred on ECOSOC by the Covenant is very extensive and the amount of paper work is formidable.

The solution adopted was to establish a Sessional Working Group in 1978 to assist it in its new task. It was not a success. In 1985, it was decided to make a fresh start. A UN Committee on Economic, Social and Cultural Rights was established in 1987. A 'rather constipated paper work' was replaced by a far more effective system.<sup>1</sup>

The Committee supervises the reporting procedure provided in the Covenant. It normally holds two sessions annually, each of three weeks. One day in each session is

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<sup>1</sup> Alston, *The Committee on Economic, Social and Cultural Rights*, in *The United Nations and Human Rights: A Critical Appraisal* Oxford, 1992 at 475

normally reserved for a general discussion on a specific issue in which NGOs and Specialized Agencies can participate. Since 1993, the Committee has also allowed NGOs to make oral representations. The Committee evaluates the reports submitted by the states and adopts 'Concluding Observations' on each report.

At present the Committee can only supervise the Covenant through reporting procedure, as there is no provision for individual communications. However, the Committee has been examining the possibility of providing for such communications in an Optional Protocol. Setting up an arrangement for individual communications would be difficult, but such a development would, nevertheless, significantly strengthen the Covenant system of control and, so as a way of improving the protection of economic, social and cultural rights, should be welcome.

### **8. The Role of ILO**

The Treaty of Versailles established the ILO in 1919. It plays an important function in the field of economic and social rights. For example, such matters as the regulation of the hours of the work, the prevention of unemployment, the provision of adequate wages, social security, equal pay for equal work, freedom of association etc. The ILO has been pioneer in the international protection of economic and social rights and has an impressive record of achievement in the field.

There are two principal aspects of this work: standard-setting and measures of implementation. As regards standard setting, the ILO employs two principal methods: the conclusion of international conventions and the adoption of recommendations. The conventions, of course, are binding only on the states, which ratify them. Recommendations on the other hand do not create legal obligations for the states. Their purpose is rather to set standards. Since its creation the ILO has adopted more than

170 international conventions. The number of recommendations is even larger than the number of conventions. The following conventions may be noted as among the most important from the point of view of human rights: the Convention on the Freedom of Association and Protection of the Rights to Organize (1949), the Convention on the right to Organize and Collective Bargaining (1949), the Equal Remuneration Convention (1951), the Abolition of Forced Labor Convention (1953), the Discrimination Convention (1958), the Employment Policy Convention (1964), the Workers with Family Responsibilities (1983), the Indigenous and Tribal People's Convention.<sup>1</sup>

The system of international control operated by the ILO is considerably more effective than that provided in the United Nations Covenants. In the first place there is ILO reporting system. It is provided in the Constitution itself; therefore it applies to all member states, and not only to parties to specific conventions. Under Article 9 and 22 of the Constitution, the member states are required to report to the ILO on the measures they have taken in connection with the conventions and recommendations. The governments must send copies of their reports to the national organizations of employers and workers who thus have the opportunity to comment on them if they so desire. The observations must then be communicated by the governments to the ILO.

Another important element is the examination of the government reports by an independent organ made of the people who are not government officials. This is secured in

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<sup>1</sup> F. Wolf, 'ILO experience in implementing the human rights' *Journal of Law and Economics*, X, (1975), p 599

the ILO system at two stages. First, there is a Committee of Experts on the Application of Conventions and Recommendations. This Committee of 20 members is appointed not by governments, but by the Governing Body of the ILO. They are the persons who are experts in the legal and social matters. The Committee can make observations on any situation, which it regards as not in conformity with those obligations. The second stage of supervision takes place at the International Labour Conference, which each year appoints a Committee on the application of Conventions and Recommendations. This Conference Committee of 200 members consists of experts of governments, employers and workers. It examines the reports of the Committee of Experts and reports back to the Plenary Conference.

In addition to these reporting procedures, the ILO Constitution also provides for a complaint procedure and 'representation' procedure through which investigation can be initiated.<sup>1</sup>

One state may bring a complaint against another, if it considers that the latter is not complying with the obligations of a Convention by which both are bound. Under Representation procedure, a trade union or an organization of employers can claim that a convention is not being observed and the matter will be investigated by a Special Committee appointed by the Governing Body of the ILO. The ILO has set up a special procedure to protect freedom of association. More than 1600 cases have been handled so far by this procedure.

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<sup>1</sup> H Hannum, 'Guide to International Human Rights Practice' second edition, Philadelphia, 1992, at p 99



## 9. UNESCO

Several of the Specialized Agencies of the United Nations are concerned with the protection of social and economic rights. The Food and Agriculture Organization, for example, does important work in helping governments to improve and increase food supplies, so helping to combat undernourishment and starvation. These activities were carried on long before the adoption of the UN Covenants in 1966 but nevertheless are directly relevant to the obligations assumed by states in Article 11 of the International Covenant on Economic, Social and Cultural Rights. Similarly, the WHO is directly relevant to the right of everyone to the enjoyment of the highest attainable state of physical and mental health recognized in Article 12 of the same Covenant. The World Bank is likewise concerned with the rights of all peoples to freely pursue their economic development.<sup>1</sup>

Article 1 of the Constitution of UNESCO states that 'purpose of the organization is to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms. The promotion of human rights and fundamental freedoms is thus affirmed as one of UNESCO's aims when undertaking activities in the fields of education, science and culture. It is therefore, evident that UNESCO should be able to make a significant contribution to the work of ECOSOC and the Committee on Economic, Social and Cultural Rights.

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<sup>1</sup> Article 1, of ICESCR

UNESCO produced the Convention against Discrimination, adopted by General Assembly in 1960.<sup>1</sup> This Convention undertakes to eliminate and prevent discrimination in education based on race, colour, sex, language and other grounds. It provides that primary education shall be free and compulsory, and secondary and higher education generally available and accessible. These provisions correspond to Article 13 of the International Covenant on Economic, Social and Cultural Rights.

To supervise the reporting procedure, a special committee to examine the reports of member states was established in 1965. This committee is now called 'Committee on Conventions and Recommendations' with a membership of 30. The Committee must first decide whether the communication is admissible. Then it tries to bring about a friendly settlement of the matter. It normally examines 35 communications at each session. It is also required to submit reports on these activities to the Executive Board of General Conference, which considers these reports in private or public meetings keeping in view the seriousness of the violation.<sup>2</sup>

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<sup>1</sup> Text can be seen in Brownlie, 'Basic Documents' p381

<sup>2</sup> Weiss and Farley, 'The UNESCO Human Rights Procedure' *The Human Rights Quarterly*, XVI, 1994, p391

## Chapter Seven

# CONVENTION AGAINST TORTURE

### 1. Introduction

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") is an international human rights instrument that aims to prevent torture around the world.<sup>1</sup> The Convention requires states to take effective measures to prevent torture within their boundaries, and forbids states to transport people to a country where there is reason to believe that they will be tortured.<sup>2</sup>

The General Assembly, on 9 December 1975, adopted 'the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Pursuant to that Declaration, the Convention was adopted by the General Assembly of the United Nations on 10 December 1984, and after ratification by the 20th state party, it came into force on 26 June 1987. Therefore, 26 June is now commemorated as the International Day in Support of Victims of Torture.

The objective of the Convention is to define torture, bind states to take effective measures against torture and establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, so that torture and other cruel, inhuman or degrading treatment or punishment may be prevented.

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<sup>1</sup> Article 2

<sup>2</sup> Article 3

## **2. Basic Principles**

The following fundamental principles are declared in the Preamble of the Convention:

- 1) Equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- 2) All human rights derive from the inherent dignity of the human person;
- 3) It is the obligation of States to promote universal respect for, and observance of, human rights and fundamental freedoms;
- 4) The struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world shall be made more effective.

## **3. Definition of Torture**

The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>1</sup> However, this definition does not

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<sup>1</sup> Article 1

affect or prejudice any international instrument or national legislation, which does or may contain provisions of wider application.

### **1. Duties of the States**

The Convention imposes the following duties on the State Parties (parties to the Convention):

- 1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
- 2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
- 3) An order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>1</sup>
- 4) The State Party shall not expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture and for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>2</sup>
- 5) Each State Party shall ensure that all acts of torture, including any attempt to commit torture and to an act by any person, which constitutes complicity or

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<sup>1</sup> Article 2

<sup>2</sup> Article 3

participation in torture, are offences under its criminal law.

- 6) Each State Party shall make these offences punishable by appropriate penalties, which take into account their grave nature.<sup>1</sup>
- 7) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State; and (c) when the victim is a national of that State if that State considers it appropriate.
- 8) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him under this Convention.
- 9) Any State Party in whose territory a person alleged to have committed torture shall take him into custody or take other legal measures to ensure his presence. Such State shall immediately make a preliminary inquiry into the facts. Any person in such custody shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national and the relevant state shall be immediately notified the fact that such person is in custody and of the circumstances which warrant his detention and shall promptly report its findings to the said States and

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<sup>1</sup> Article 4

shall indicate whether it intends to exercise jurisdiction.<sup>1</sup>

- 10) If the State Party does not extradite him, then it shall submit the case to its competent authorities for the purpose of prosecution. And any person, regarding whom proceedings are brought, shall be guaranteed fair treatment at all stages of the proceedings.<sup>2</sup>
- 11) The state parties shall make torture-related offences as extraditable offences in any extradition treaty existing between States Parties. If a State Party receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences.<sup>3</sup>
- 12) States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences relating to torture.<sup>4</sup>
- 13) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. And each State Party shall include this prohibition in the rules or

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<sup>1</sup> Article 6

<sup>2</sup> Article 7

<sup>3</sup> Article 8

<sup>4</sup> Article 9

- instructions issued in regard to the duties and functions of any such person.<sup>1</sup>
- 14) Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, with a view to preventing any cases of torture.<sup>2</sup>
- 15) Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed within its jurisdiction.<sup>3</sup>
- 16) Each State Party shall ensure that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.<sup>4</sup>
- 17) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.<sup>5</sup>
- 18) Each State Party shall ensure that any statements, which have been made as a result of torture, shall not be invoked as evidence in any proceedings, except against a person accused of torture.<sup>6</sup>

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<sup>1</sup> Article 10

<sup>2</sup> Article 11

<sup>3</sup> Article 12

<sup>4</sup> Article 13

<sup>5</sup> Article 14

<sup>6</sup> Article 15



- 19) Each State Party shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture as defined earlier when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>1</sup>

## 2. **Committee Against Torture**

A Committee against Torture (the Committee) shall be established. The Committee shall consist of ten experts 'of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity'. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. The members of the Committee shall be elected for a term of four years.<sup>2</sup>

The Committee is one of eight UN-linked human rights treaty bodies. All State Parties are obliged under the Convention to submit regular reports to the Committee on how rights are being implemented. Upon ratifying the Convention, States must submit a report within one year, after which they are obliged to report every four years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations." Under certain circumstances, the Committee may consider complaints or

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<sup>1</sup> Article 16

<sup>2</sup> Article 17

communications from individuals claiming that their rights under the Convention have been violated. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

### **3. Optional Protocol**

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the General Assembly on 18 December, 2002 and it is in force since 22 June 2006. It provides for the establishment of "a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment". This system is to be overseen by a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.



## **Part III**

# **REGIONAL ARRANGEMENTS**



## Chapter Eight

# EUROPEAN CONVENTION FOR HUMAN RIGHTS

### 1. Introduction

The factors, which led the United Nations to concern itself with the protection of human rights, had a similar effect in Europe. One such factor was natural reaction against the Nazism and Fascism, which had provoked the Second World War and wrought such havoc on millions of lives. Another stimulus was that in the post-war years it soon became evident that the democratic systems of Western Europe needed protection against the Soviet style of despotism which had captured control of half of the Continent.

The principles championed by the French Revolution, Magna Carta, English Bill of Rights and French Revolution were menaced by a new political philosophy in which the so-called dictatorship of the proletariat gave all power to the State and reduced the individual to insignificance. The preservation of democracy and the maintenance of the rule of law required, as Robert Schuman put it, foundations 'on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism'. Those foundations were the effective protection of human rights and fundamental freedoms.

As early as August 1941 the Atlantic Charter proclaimed the historic Four Freedoms and the right of self-determination. The Congress of Europe at The Hague in May 1948 announced:

'We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well

as the right to form a political opposition; we desire a Court of Justice with adequate sanctions for the implementation of this Charter’.

An organized system was needed to ensure the collective guarantee of human rights in the proposed ‘European Union’. The Consultative Assembly of the Council of Europe took up the task of designing such a system during its first session, in August and September 1949. In August 1949 the Assembly’s Committee on Legal and Administrative Questions met to study a proposal for the establishment of ‘an organization within the Council of Europe to ensure the collective guarantee of human rights’ and before the end of the session presented its conclusions in the famous Teitgen Report of September 1949 which paved way for the convention.

The Convention was signed in 1950 and came into force on 3 September 1953. In the summer of 1950, even before the Convention was signed, the Assembly had proposed the inclusion of three additional rights, which were subsequently included in Protocol No.1, signed in March 1952, and which entered into force two years later. Four further protocols have been concluded between the years 1963 and 1994.

The ECHR is of particular importance in the context of initial human rights movement for several reasons:

- (i) It was the first comprehensive treaty in the World.
- (ii) It established the first international complaint procedure and the international court for the determination of human rights matters.
- (iii) It remains the most developed of three regional systems.
- (iv) It has generated a more extensive jurisprudence than any other part of the international system.

## 2. Rights guaranteed

The first article of the Convention provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.' The obligation assumed by each State is therefore not limited to protecting the rights of its own nationals, nor even to protecting those of the nationals of the other contracting parties. The obligation extends to all persons within the jurisdiction, whatever their nationality or legal status, and however short their length of stay.

The rights defined include, as we shall see shortly, the civil and political rights which are the hallmarks of a democratic society. Yet they do not include every right one might wish to see guaranteed in an ideal community. As a result, many individual applications to the Commission have to be rejected because the applicant alleges the violation of a right which, however necessary or desirable, is not covered by the Convention or its protocols.

Part I of the Convention sets out twelve rights and freedoms which are specifically guaranteed. We enumerate them as an overview:

1. the right to life (Article 2)
2. freedom from torture and inhuman or degrading treatment or punishment (Article 3)
3. freedom from slavery and servitude (Article 4)
4. the right to liberty and security of the person (Article 5)
5. the right to a fair trial (Article 6)
6. protection against retroactivity of the criminal law (Article 7)
7. the right to respect for private and family life, the home and correspondence (Article 8)



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8. freedom of thought, conscience and religion (Article 9)
9. freedom of expression (Article 10)
10. freedom of assembly and association (Article 11)
11. the right to marry and found a family (Article 12)
12. the right to an effective remedy if one's rights are violated (Article 13)

Protocol No. 1 adds three further rights:

13. the right to property (Article 1)
14. the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions (Article 2)
15. the right to free elections (Article 3)

Protocol No. 4 adds four more rights:

16. freedom from imprisonment for debt (Article 1)
17. liberty of movement and freedom to choose one's residence (Article 2)
18. freedom from exile and the right to enter the country of which one is a national (Article 3)
19. prohibition of the collective expulsion of aliens (Article 4)

Protocol No. 6 adds one further right:

20. prohibition of the death penalty in time of peace (Article 1 and 2)

Protocol No. 7 adds five further rights:

21. the right of an alien not to be expelled from a State without due process of law (Article 1)

22. the right to appeal in criminal cases (Article 2)
23. the right to compensation for a miscarriage of justice (Article 3)
24. immunity from being prosecuted twice for the same offence (Article 4)
25. Equality of rights and responsibilities of spouses as regards matters of a private law character between them and in their relations with their children (Article 5)

In many Articles, the first sentence or paragraph contains a general affirmation of the right, often based on the text of the Universal Declaration, and the following paragraphs set out the limitations to which that right might be subjected. However, the limitations are carefully formulated and, in general, permitted only when they are prescribed by law and necessary in a democratic society to safeguard some aspect of the public interest.

Articles 14-18 of the Convention relate to the exercise of the rights guaranteed. Article 14 contains a widely drawn prohibition against discrimination. Article 15 permits the suspension of some, though not all, rights 'in time of war or other emergency threatening the life of the nation', but only 'to the extent strictly required by the exigencies of the situation' and after a notice of derogation has been filed with the Secretary General of the Council of Europe.

Article 16 permits restrictions on the political activities of aliens. Article 17 provides that 'nothing in this Convention shall be interpreted as implying ... any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein'. In addition, Article 18 stipulates that the restrictions, which are permitted under the Convention, may

not be applied for any purpose other than those for which they have been prescribed.

**1) Protection of life**

Law protects everyone's right to life. No one can be deprived of his life intentionally except in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life will not be regarded as inflicted in contravention of this right when it results from the use of force which is not more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.<sup>1</sup>

The Article provides non-derogable protection of the right to life. This might seem straightforward – governments are enjoined to refrain from the wanton killing of their subjects – but in fact aside from that instance it is in fact hard to determine what a right to life encompasses.

Decisions under Article 2 do not yet provide a clear answer to this question but do suggest that it places two distinct duties on the national authorities, although their scope is unclear. Firstly it implies that the public authorities should refrain from some acts or omissions which directly endanger life. Secondly Article 2 implies a positive obligation on the part of the state authorities to take reasonable steps in order to prevent the deprivation of life by individuals.

The question has arisen in the context of national legislation on abortion whether an unborn baby can fall

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<sup>1</sup> Article 2 of ECHR

within the interpretation of 'everyone'. In *Paton v UK* (1980), the Human Rights Commission found that Article 2 applies only to persons who have been born.

The most important exception to Article 2 is that in respect of the death penalty which also includes extradition to a country where the death penalty is in force.

Generally speaking the paragraph 2 exceptions are reasonably straightforward and are obviously aimed mainly at unintentional deprivation of life. It has been held that paragraph 2 is concerned with situations where the use of violence is allowed as necessary force and may as an unintended consequence result in loss of life. However, paragraphs 2(a) and (c) would also seem to cover instances where the force used was bound to endanger life and was intended to do so, but was necessary in the circumstances. Thus national laws recognizing the right to use self-defence are in principle in harmony with Article 2.

## **2) Inhuman treatment**

No one can be subjected to torture or to inhuman or degrading treatment or punishment.<sup>1</sup> Article 3 contains no exceptions unlike most of the Articles and it is also non-derogable. The three forms of treatment mentioned seem to represent three different levels of seriousness. Thus, torture, unlike degrading treatment, has been quite narrowly defined to include 'deliberate inhuman treatment causing very serious and cruel suffering'. Clearly, treatment, which could not come within this restricted definition, could still fall within one of the other two heads especially the broad head – 'degrading treatment'. Degrading treatment will not, however, inevitably include all forms of physical punishment although it will include certain forms of

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<sup>1</sup> Article 3

corporal punishment including caning which has been found not to amount to torture or inhuman treatment.<sup>1</sup>

Numbers of cases have arisen concerning the position of detainees'. In determining whether a particular treatment, such as solitary confinement, amounts to a violation of Article 3, a number of factors must be taken into account. These will include the stringency and duration of the measure, the objective pursued – such as the need for special security measures for the prisoner in question or the fear of stirring up discontent among other prisoners and the effect on the person concerned.

However, for a breach of Article 3 to be established in the context of deportation cases, there must be a clear risk of ill treatment. The Convention cannot be viewed as a substitute for an effective domestic means of determining refugee claims.

### **3) Slavery and Servitude**

No one can be held in slavery or servitude. No one shall be required to perform forced or compulsory labour.<sup>2</sup> For the purpose of this right, the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of any emergency or calamity

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<sup>1</sup> For details refer to Convention Against Torture and other Inhuman or Degrading Treatment or Punishment, adopted on 10 Dec. 1984 and entered into force on 26 June 1987

<sup>2</sup> Article 4

threatening the life or well-being of the community; or (d) any work or service which forms part of normal civic obligations.

Article 4 provides a guarantee which is largely irrelevant in modern European democracies although it is conceivable that as states with less developed human rights regimes become signatories to the Convention, it might prove to be of value.

It is necessary to distinguish between slavery and servitude under paragraph 4(1) and forced or compulsory labour under paragraph 4(2). Slavery denotes total ownership, whereas servitude denotes less far-reaching restraints; it is concerned with the labour conditions and the inescapable nature of the service.

Forced or compulsory labour has been held to denote the following: 'firstly that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive, or the work or service itself involves avoidable hardship.

#### **4) Liberty and security**

Everyone has the right to liberty and security of person. No one can be deprived of his liberty except in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of

bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him. Everyone arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Everyone who has been the victim of arrest or detention in contravention of the provisions of these rights will have an enforceable right to compensation.<sup>1</sup>

The presumption embodied in the Article is that liberty and security must be maintained. However, it then sets out the two tests which must be satisfied if it is to be removed. Firstly, exceptions are set out where liberty can be taken away; secondly, under paragraphs 2-4 the procedure is set out which must be followed when a person is deprived of liberty. Thus, if the correct procedure is followed but an exception does not apply, Article 5 will be breached, as, conversely, it will if an individual falls within an exception but in detaining him or her the correct procedure is not followed.

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<sup>1</sup> Article 5

### 5) **Fair and public hearing**

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language 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 to pay for legal assistance, to be given it free when the interest of justice so require; (e) 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 witness against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>1</sup>

Article 6 is one of the most significant Convention Articles and the one, which is most frequently found to have been violated. This is partly due to the width of

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<sup>1</sup> Article 6



paragraph 6(1), which may cover numerous circumstances in which rights are affected in the absence of a judicial hearing. Paragraph 1 imports a general requirement of a fair hearing applying to criminal and civil hearings. Paragraph 3 lists minimum guarantees of a fair hearing in the criminal context only. In practice then, paragraphs 1 and 3 may often both be in question in respect of a criminal charge.

'Charge' has been described as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. Offences under criminal law must be distinguished from those arising only under disciplinary law. In order to do so, the Court will consider the nature and severity of the penalty the person is threatened with. Moreover, classification of a petty offence as 'regulatory' rather than criminal will not be decisive for 6(1) purposes; the Commission / Court may yet determine that the offence is of a criminal character. Otherwise, by reclassifying offences, the State in question could minimize the application of the Convention.

Access to legal advice may not always imply a right to legal aid. However, in some instances a person unable to obtain legal aid would be unable to obtain legal advice and therefore might be unable to defend proceedings.

What other rights are implied by the term a 'fair hearing'? It has been found to denote equality between the parties, and in principle entails the right of the parties to be present in person although criminal trial *in absentia* does not automatically violate Article 6. A refusal to summon a witness may constitute unfairness, as may a failure to disclose evidence.

The hearing must take place within a reasonable time. In determining what is meant by 'reasonable', fairly wide time limits have been applied so that in some

circumstances as much as seven or eight years may be reasonable. It will take into account the conduct of the accused (which may have contributed to the delay) and the need for proper preparation of the case, bearing in mind any special circumstances such as those which might arise in child care cases.

Paragraph 2 'requires inter alia that when carrying out their duties, members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him'.

It is not enough that a lawyer should be assigned; he or she should be appointed in good time in order to give time to prepare the defence and familiarize herself or himself with the case. However paragraph 6(3)(c) does not merely import a right to have legal assistance; it includes three rights:

- (i) to have recourse, if desired, to legal assistance;
- (ii) to choose that assistance;
- (iii) if the defendant has insufficient means to pay, for that assistance to be given it free if the interest of justice so requires.

The Courts have wide discretion as to the right to cross-examine witnesses -- and so has deprived this right of some of its effect. The second limb -- the right to call witnesses and have them examined under the same conditions as witnesses for the other side -- obviously allows for a wide discretion as it only requires that the prosecution and defence should be treated equally as regards summoning witnesses.

**6) Retrospectivity of laws**

No one can be held guilty of any criminal offence because 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 can a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This right can 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.<sup>1</sup>

Article 7 contains an important principle and it is therefore non-derogable although it is subject to the single exception contained in paragraph 2. It divides into two separate principles:

1. The law in question must have existed at the time of the act in question for the conviction to be based on it.
2. No heavier penalty for the infringement of the law may be imposed than that was in force at the time the act was committed.

As far as the first principle is concerned this means that someone should not be convicted if he or she could not have known beforehand that the act in question was criminal.

Paragraph 7(2) provides an exception, which appears to arise if a person is convicted retrospectively for an offence recognized in other countries but not the one in question at the material time. This exception is potentially quite wide and therefore if it is not to undermine the

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<sup>1</sup> Article 7

principle of non-retroactivity it may be argued that it should be interpreted restrictively.

### 7) **Respect for privacy**

Everyone has the right to respect for his privacy and family, his home and his correspondence. There can be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>1</sup>

The inclusion of the wide (and undefined) term 'private' means that rights other than those arising from the home, family and correspondence may fall within Article 8.

An important aspect of private life is that of control over personal information but there should be a procedure to weigh it up against a competing interest. It was held that although telephone tapping constituted an interference with a person's private life, it could be justified as being in the interests of national security, and there were sufficient controls in place (permission had to be given by a Minister applying certain criteria including that of 'reasonable suspicion') to ensure that the power was not abused.

The Courts are greatly influenced by general practice in the member states as a body and will interpret the Convention to reflect such practice so that a State, which is clearly out of conformity with the others, may expect an adverse ruling. The application of this principle, which has been termed the 'common standards' principle, clearly allows flexibility in decision-making since it may

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<sup>1</sup> Article 8

sometimes be difficult to pinpoint the time at which a common standard could be said to have emerged.

#### Sexual Life

The other aspect of privacy, which has generated a certain amount of case law, has related to sexual privacy and here the Court has adopted a cautious approach. In *Dudgeon* (1982) the Northern Ireland prohibition of homosexual intercourse was found to breach Article 8: In 1984 the Commission declared inadmissible an application challenging the Army Act 1955, which governs conviction for homosexual practices in the armed forces, on the basis that it could be justified under the prevention of disorder or protection of morals clauses.

'Family' may encompass formal or informal – but if the 'family' in question might not fall within the term, as, for example, a foster parent might not do, there might still be an interference with private life. Generally, a close relationship falling within the term will be presumed where close ties such as those between parent and child exist; for other relations the presumption will be the other way.

Although the term 'family' may receive a broad interpretation but it was determined, that 'family life' cannot be interpreted so broadly as to encompass a father's right to be consulted in respect of an abortion. Had it not adopted such an interpretation 'family life' might have come into conflict with 'private life' since pregnancy and its management has been accepted as an aspect of a mother's private life, although not to be divorced entirely from consideration of the life of the fetus. Family life has also received a narrow interpretation in immigration cases in respect of a right to enter a country.

With regard to correspondence, the Court has accepted the right of a detainee to correspond with the outside world and in the UK has led to a steady relaxation

of the rules relating to preventing, stopping and censoring of prisoners' correspondence.

### **8) Freedom of thought**

Every one has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs can be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>1</sup>

The right under Article 9 of possessing certain beliefs is unrestricted. However, Article 9 provides a valuable guarantee against using compulsion to change an opinion or prohibiting someone from entering a profession due to their convictions.

Freedom of religion will include the freedom not to take part in religious services, but it may also include the opposite obligation.

### **9) Freedom of expression**

Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This right can not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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<sup>1</sup> Article 9

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>1</sup>

Article 10 obviously overlaps with Article 9, but it is broader since it protects the means of ensuring freedom of expression.

The stance taken under Article 10 is that all speech is not equally valuable. The European Court values political speeches more than commercial ones. The Court has also stressed that Article 10 applies not only to speech, which is favourably received, but also to speech, which shocks and offends.

There is some evidence that the Court is reluctant to intervene in instances, which may not be perceived as constituting a direct interference with freedom of expression by domestic authorities.

Article 10 includes an additional guarantee of the freedom to receive and impart information. However, the words 'without restriction by public authority' do not imply a positive obligation on the part of the authority to ensure that information can be received.

The restrictions of the second paragraph are wide, and two, maintaining authority of the judiciary and preventing the disclosure of information received in confidence, are not mentioned in Article 10's companion Articles – Articles 9 and 11. The 'rights of others' exception may also receive a narrow interpretation.

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<sup>1</sup> Article 10

The exception in respect of confidential information overlaps with others including national security and the rights of others, but a situation could be envisaged in which a disclosure of information did not fall within those categories and could therefore be caught only by this extra exception.

### **10) Association and assembly**

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions can be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This right can not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.<sup>1</sup>

The addition of the word 'peaceful' has restricted the scope of paragraph 1. Thus assemblies can be subject to permits so long as the permits relate to the peacefulness of the assembly and not to the right of assembly itself.

The public authorities may positively intervene in order to prevent an interference with freedom of assembly by private individuals.

'Association' need not be assigned its notional meaning. Even if a group such as a trade union is not an 'association' according to the definition of national law, it may fall within Article 11. The term connotes a voluntary

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<sup>1</sup> Article 11



association, not a professional organization established by the Government. However, freedom of association also implies protection against compulsory membership of an association.

The right to join a Trade Union involves allowing members to have a union that can properly 'protect the interests of the members'. This right can be subject to the restrictions of the national legislature. Moreover, extra restrictions may be placed on certain groups of employees under the second sentence of paragraph 2.

### **11) Marriage and family**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.<sup>1</sup>

Article 12 contains no second paragraph setting out restrictions but it obviously does not confer an absolute right due to the words 'according to the national laws', which imply the reverse of an absolute right. The State can impose restrictions on certain men and women due to the social purpose of Article 12 which is concerned with the ability to procreate; marriages which cannot result in procreation may therefore fall outside its ambit. This interpretation was supported on the ground that the wording of the Article suggests that marriage is protected as the basis of the family; thus, Article 12 is aimed at protecting the traditional biological marriage.

If a person is in general free to marry but in particular circumstances will suffer detriment, flowing solely from the fact of being married, Article 12 may be breached. Thus, the right to marry may include placing no

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<sup>1</sup> Article 12

sanction on marriage such as sacking a person when he or she marries.

In accordance with the general Convention policy of reluctance to impose positive obligations on States, the right to found a family does not include an economic right to sufficient living accommodation for the family. Even prisoners have the right to marry; inherent restrictions are possible but they must not affect the essence of the right. When the applicant had two years to wait; that did affect the essence of the right and therefore led to a breach of Article 12.

### **12) Effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.<sup>1</sup>

This machinery may include a number of possible remedies. It has been held that judicial review proceedings will be sufficient.

The remedy is required if the substantive rights or freedoms are in question. The words do not and cannot connote a requirement that there should be domestic machinery in place to address any possible grievance.

### **13) Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>2</sup>

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<sup>1</sup> Article 13

<sup>2</sup> Article 14

Article 14 does not provide a general right to freedom from discrimination but only that the rights and freedoms of the Convention must be secured without discrimination.

Under Article 14 discrimination connotes differential treatment which is unjustifiable. The differential treatment may be unjustifiable either in the sense that it relates to no objective and reasonable aim, or in the sense that there is no reasonable proportionality between the means employed and the aim sought to be realized.

### **3. Restriction on Rights and Freedoms**

#### **1) Public emergency**

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.<sup>1</sup>

Article 15 allows derogation in respect of most but not all of the Articles. Derogation from Article 2 is not allowed except in respect of death resulting from lawful acts of war, while Articles 3, 4(1) and 7 are entirely non-derogatory. Apart from these exceptions, a valid derogation requires the State in question to show that there is a state of war or public emergency, and in order to determine the validity of this claim two questions should be asked. Firstly,

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<sup>1</sup> Article 15

is there an actual or imminent exceptional crisis threatening the organized life? Secondly, is it really necessary to adopt measures that require derogation from the Articles in question? A margin of discretion is allowed in answering these questions.

### **2) Political activity of aliens**

There can be more restrictions on the political activities of the aliens than those on citizens as nothing in Articles 10, 11 and 14 can be regarded as preventing the member states from imposing restrictions on the political activity of aliens.<sup>1</sup>

Since Article 16 implies that restrictions over and above those already imposed due to the second paragraphs of Articles 10 and 11 can be imposed on aliens in respect of their enjoyment of the freedoms as far as their political activity is concerned, it means that restrictions can be imposed only if they relate to political activities.

### **3) Destruction of rights**

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>2</sup>

Article 17 prevents a person relying on a Convention right where his or her ultimate aim is the destruction or limitation of Convention rights. Its 'restriction' applies to all the rights and freedoms. Thus, Article 17 must be read in conjunction with all the Articles.

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<sup>1</sup> Article 16

<sup>2</sup> Article 17

#### 4) **Margin of appreciation**

Under this doctrine, a degree of discretion will be allowed to member states as to the means adopted to protect certain interests although such means may affect Convention rights by restricting them. However, Strasbourg will finally determine whether such restriction is reconcilable with the right in question.

The courts see whether it was exercised in good faith and carefully and whether it was reasonable in the circumstances. The approach of the court will depend on the following factors:

1. The nature of the right in question.
2. The wording of the requirements in question.
4. The positive obligations placed on the State.

In general, the margin of appreciation doctrine clearly has the power to undermine the Convention and therefore its growth has been criticized. Some call it 'a spreading disease.'

#### 5) **First Protocol**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one can be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>1</sup>

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<sup>1</sup> Article 1 of First Protocol

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.<sup>1</sup>

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions, which will ensure the free expression of the opinion of the people in the choice of the legislature.<sup>2</sup>

Article 3 does not imply an absolute right to vote but that elections – be held at regular intervals, should be secret, free from pressure on the electorate and the choice between candidates should be genuine.

#### **6) Later Protocols**

Certain of the Protocols, including the most recent, Protocol 9, are concerned with the procedural machinery of the Convention. However, certain Protocols guarantee substantive right; these are broadly speaking: freedom of movement;<sup>3</sup> abolition of the death penalty;<sup>4</sup> the right of an alien (lawfully resident) to full review of his or her case before expulsion; rights of appeal, compensation for miscarriages of justice, the right not to be subjected to double jeopardy, and sexual equality between spouses as regards private law.<sup>5</sup>

#### **4. Conclusions**

It is clear that the Convention has been astoundingly successful in creating a standard of human rights, which is

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<sup>1</sup> Article 2 of First Protocol

<sup>2</sup> Article 3 of first Protocol

<sup>3</sup> Protocol 4

<sup>4</sup> Protocol 6

<sup>5</sup> Protocol 7

perceived by so many Europeans as relevant and valuable despite the 40 odd years, which have passed since it was created. Although it was only intended to create a minimum standard of human rights, yet it has succeeded in changing national laws as well.

On the other hand, it may be argued that the machinery for the enforcement of the Convention is wholly inadequate, particularly in the face of a government unashamedly prepared to breach it for long periods of time. In the process if an application is ultimately successful it takes five years before the final decisions; the individual affected must suffer a violation of his or her rights for all that time. There is no formal mechanism available, such as an interim injunction, to prevent the continuing violation. If the Court and Commission eventually merge, as seems likely, some of the overlapping stage such as the dual consideration of admissibility may disappear.

## Chapter Nine

# ENFORCEMENT SYSTEM UNDER ECHR

The rights discussed in the preceding Chapter are secured by the contracting parties by undertaking to ensure them to 'everyone within their jurisdiction'. However, the authors of the Convention did not consider that by itself this obligation was sufficient. They therefore provided something more, 'an institutional guarantee. For this purpose they decided to create a Commission of Human Rights and a Court of Human Rights, and also to make use of the existing governmental organ of the Council of Europe, the Committee of Ministers.

### 1. The European Commission

The Commission of Human Rights consists of as many members as there are high contracting parties. In fact there is normally one national of each State, although this is not mandatory. They act in an individual capacity and, in contrast with the members of the UN Commission on Human Rights, not as governmental delegates. The Commission elects its own President. Under Article 24 of the Convention any party may refer to the Commission an alleged breach of the Convention by any other party.

*Individual communications:* The system of control established by Article 24 is valuable, but if it stood alone would not be adequate. It is therefore vital to give the individual access to an international organ which is competent to provide a remedy every against a person's own government. The European Convention on Human Rights contains just such a procedure. The right of



individual petition was made optional, and so applies only to States, which have expressly, declared they accept it, in accordance with Article 25 of the Convention. It is pleasing to report that this provision has now been generally endorsed, with the result that the remedy is currently available to nearly 500 million people.

Since its creation in 1954 the Commission has been competent to examine cases brought by one State against another. However, only a handful of such cases have been brought so far, almost all in situations of political tension. The Commission acquired its competence to consider individual applications in July 1955, when six States had recognized the right of redress given by Article 25 to 'any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention'. The overwhelming importance of this right, as compared with the inter-State procedure, may be seen from the fact that in 1993 alone the Commission registered more than 2,000 individual application.<sup>1</sup>

*Admissibility:* The first task of the Commission when it considers an application is to decide whether it is admissible. Here strict rules apply. The Convention lays down two conditions which apply both to inter-State cases and to individual applications.<sup>2</sup> The Commission may deal with a case only after all domestic remedies have been exhausted, unless no such remedies are available or they are unreasonably delayed, and within six months of the date of the final decision at the national level. Moreover, the Commission must reject as inadmissible any application

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<sup>1</sup> European Commission on Human Rights, Survey of Activities and Statistics, 1993

<sup>2</sup> Article 26 of ECHR

which is anonymous, substantially the same as a matter already examined by the Commission or through another international procedure, incompatible with the provisions of the Convention or manifestly ill-founded, or which constitutes an abuse of the right of petition.<sup>1</sup> There are, therefore, seven separate grounds on which an application may be declared inadmissible, and bearing in mind that it is open to anyone to attempt to set the machinery of the Convention in motion by writing to Strasbourg, it is hardly surprising that the great majority of individual applications are rejected at this stage.

A ground of inadmissibility, which has caused particular problems in practice, is that of 'manifestly ill-founded'. However, it must reject an application as inadmissible if the fact that it is ill founded is 'manifest'. Where is the line to be drawn between these two concepts? This is clearly a difficult and important question. In its early days the Commission was very cautious and a high proportion of applications was rejected on this ground. Today, however, it is less restrictive and so more survive this initial scrutiny and pass to the next stage.

A rather different problem of admissibility arises when a matter is brought to the Commission having already been submitted to another procedure of international settlement. This issue assumed increased importance when the United Nations Covenant on Civil and Political Rights and its Optional Protocol came into force in 1976, since a respondent State which has accepted both the Covenants and the Convention along with their optional provisions, can now be faced with a claim from an individual who wishes to use both procedures. Article 27 (2) deals with just this type of situation.

If a matter has already been submitted to the Human Rights Committee, then the European Commission must

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<sup>1</sup> Article 27

declare an application to Strasbourg based on the same facts inadmissible, unless, of course, it contains new information. In the other direction, that is if the applicant tries first in Strasbourg and then in New York, Article 5(2) of the Optional Protocol will render the application inadmissible in New York for as long as it is under examination in Strasbourg, but not thereafter. However, to avoid what would look like an 'appeal' from the Commission, several parties to the Convention have made their acceptance of the Optional Protocol subject to a reservation which has had the desired effect.

If the Commission declares a case admissible, the Convention requires it to undertake an examination of the application 'with a view to ascertaining the facts'.<sup>1</sup> This examination is carried out 'together with the representatives of the parties', which means in practice a hearing of a judicial nature with the individual applicant and the respondent government represented by counsel on a footing of complete equality. The difference between the procedure of the European Commission and that of the Human Rights Committee is thus striking.

*Procedure:* Article 28 of the Convention also authorizes the Commission, when necessary, to undertake an investigation, for which the State or States concerned are obliged to 'furnish all necessary facilities, after an exchange of views with the Commission'. By ratifying the Convention, the States concerned have accepted the obligation to agree to an investigation if the Commission so desires.

When the Commission has completed its investigation, Article 28(1)(b) of the Convention requires it

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<sup>1</sup> Article 28

to try to secure a friendly settlement of the matter 'on the basis of respect for human rights as defined in this Convention'. About ten per cent of the individual applications found to be admissible are settled by this method, which was also used in the inter-State case against Turkey in 1985. In the even of a friendly settlement the Commission draws up a report, which is published, containing a brief statement of the facts and of the solution reached.<sup>1</sup> If a friendly settlement is not achieved. The Commission draws up a detailed report, setting out the facts and stating its opinion as to whether its findings disclose a violation of the Convention. The Commission then includes whatever proposals it thinks fit and the report is then transmitted to the Committee of Ministers of the Council of Europe.<sup>2</sup>

## **2. The Committee of Ministers**

The Committee of Ministers consists of the ministers for foreign affairs, or their deputies, of the member States of the Council of Europe. It is essentially a political organ, yet judicial or quasi-judicial functions were conferred on it by the Convention. If a case is not referred to the Court of Human Rights, the Committee of Ministers shall decide whether a violation has occurred.<sup>3</sup> It takes this decision by a two-thirds majority, although its important decisions in other spheres require unanimity.

In the majority of cases that are referred under Article 32, the Committee of Ministers simply endorses the conclusions in the report of the Commission. Sometimes, however, the parties succeed in reaching a settlement before a case reaches the Committee of Ministers or while it is actually under consideration. If the Committee finds that a

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<sup>1</sup> Article 30

<sup>2</sup> article 31

<sup>3</sup> Article 32

violation has occurred, Article 32(2) provides that it must prescribe a period during which the State must do whatever is necessary to correct the violation. However, in almost all cases in which the Committee identifies a violation the respondent quickly works out what is needed and informs the Committee of Ministers before it takes its decision.

The Committee of Ministers does not have the power to order a State to take specific remedial action, but can make recommendations to the respondent, which may then be taken into account when deciding whether Article 32(2) has been complied with. If it has not, in other words if the State has failed to correct a violation, Article 32(3) requires the Committee to decide 'what effect shall be given to its original decision', that is to review the matter again, and to publish the Commission's report.

The desire of a responsible government not to be seen to be violating its human rights obligations is as a rule normally all that is needed to achieve compliance. But there is a legal as well as a political sanction because the Statute of the Council of Europe empowers the Committee of Ministers to suspend or expel from membership any state which has seriously violated Article 3 of the Statute.<sup>1</sup> This, as mentioned earlier, is the Article, which makes respect for the rule of law and for the enjoyment of human rights a condition of membership of the organization. Thus the ultimate sanction is expulsion.<sup>2</sup>

### 3. The European Court

The Court of Human Rights contains as many judges as there are members of the Council of Europe.<sup>3</sup>

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<sup>1</sup> Article 8 of the Statute of the Council Of Europe

<sup>2</sup> Robertson, A and J. Merrills, 'Human Rights in the World' 3<sup>rd</sup> ed. Manchester University Press, 1989, at 131

<sup>3</sup> Article 38 of ECHR

The judges act in complete independence, and must possess the same personal and legal qualifications as the members of the International Court of Justice at The Hague.<sup>1</sup> The Court, like the Commission, elects its own President.

*Jurisdiction:* The Court's jurisdiction extends to all cases concerning the interpretation or application of the Convention that are referred to it under the conditions described below. However, such jurisdiction is not automatic, but exists only in relation to States, which have made a general declaration accepting it in accordance with Article, 46, or an ad hoc acceptance for a particular case under Article 48. Almost all the members of the Council of Europe have now made general declarations and so the contingent element in jurisdiction, which reflects the consensual basis of international adjudication, is in practice not a significant limitation on the Court's activity.

*Individual application:* Under the original Convention only the Commission or a State could refer a case to the Court – an individual applicant could not.<sup>2</sup> This was an unsatisfactory situation from the point of view of applicants because it meant that an individual who took a case to the Commission and was unsuccessful had no opportunity to have the matter reviews by the Court; but if the position was reversed and a State was unsuccessful before the Commission, it could, in effect, appeal against the ruling to the Court. To deal with this problem and to put individuals and States on a footing of equality, Protocol No. 9 was concluded in 1990 with the aim of enabling individuals to take cases to the Court in certain circumstances.

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<sup>1</sup> Article 39(3) of ECHR

<sup>2</sup> Article 44 of ECHR

Protocol No. 9 came into force in 1994. In relation to States which have ratified Protocol No. 9, the provisions dealing with the Court's jurisdiction are modified and there is the additional possibility of an individual taking a case to the Court, using a special procedure set out in Article 5(2) of the Protocol. This adds a new paragraph to Article 48 of the Convention.<sup>1</sup> In addition, creates a special panel of three judges to examine individual references and to decide which cases of this type shall actually be considered by the Court.

As one would expect, the new Article 48(2) lays down that the relevant national judge shall sit as an *ex officio* member of the panel. It then goes on to provide that the panel's function is to decide by an unanimous vote that a case shall not be considered by the Court if it 'does not raise a serious question affecting the interpretation or application of the Convention and does not for any other reason warrant consideration by the Court'. These criteria are very broad and allow the panel to consider the kinds of factors, which no doubt already influence the Commission when deciding which cases to refer to the Court. However, it is worth noting that to decide that the Court should not consider a case the panel must be unanimous. Thus, while a filtering procedure is appropriate as a way of preventing the Court from becoming over-burdened, any case in which its decision would be beneficial is likely to be taken forward.

To be considered by the Court, all cases must be submitted to it within three months after the report of the Commission has been transmitted to the Committee of Ministers.<sup>2</sup> Article 2 of Protocol No. 9 amends Article

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<sup>1</sup> Article 48(2) of ECHR  
<sup>2</sup> Article 47 of ECHR

31(2) of the Convention so as to ensure that the Commission's report shall also be transmitted to the applicant, which is obviously essential if an individual is to be in a position to decide whether to take a case to the Court. However, it is important to notice that the panel procedure laid down in Protocol No. 9 is not used if the Commission or a contracting State refers a case to the Court.

*Chambers:* Whether a case comes to the Court via a panel under Protocol No. 9, or directly as a result of a referral by the Commission or a State, the Convention<sup>1</sup> provides that for each case the Court shall consist of a chamber of nine judges, which shall include as ex officio members the President or the Vice-President and the judge who is a national of any State party concerned, with the remaining judges chosen by lot. This is the normal procedure. However, a chamber may relinquish jurisdiction in favour of a grand chamber of nineteen judges if the case pending before it 'raises one or more serious questions affecting the interpretation of the Convention'.<sup>2</sup> Moreover, such relinquishment is obligatory if there is a possibility of conflict with a previous judgement of the Court.

In exceptional cases the grand chamber may itself relinquish jurisdiction in favour of the plenary Court. The provision for grand chambers was introduced in 1993, when the Court became so large that referring important cases to the plenary Court, which was the former practice, ceased to be feasible. Under the old arrangement, when the Court's workload was smaller, the plenary Court heard a relatively large number of cases. However, use of the plenary Court was already declining when the concept of the grand

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<sup>1</sup> Article 43 of ECHR

<sup>2</sup> Rule 51, Rules of Procedure, European Court of Justice



chamber was introduced and so far little use has been made of the new facility. In practice therefore chambers now decide almost all the Court's cases.

*Remedial measures:* the Court decides any disputes relating to jurisdiction, as are questions of admissibility, propriety and similar matters. The Court's main work is, of course, the interpretation and application of the rights set out in the Convention and its protocols, a task which, as we shall see shortly, raises a wide range of issues of law and policy. If a violation has occurred, the Convention does not say whether the Court has the power to order remedial measures. In the absence of an equivalent provision, the European Court has concluded that it lacks this power and in a number of cases has made the point that it is for the Respondent State, not the Court, to decide upon the measures needed to implement its obligations. The Convention, on the other hand, specifically empowers the Court to give 'just satisfaction' to an injured party if the internal law of the country concerned does not provide an adequate remedy.<sup>1</sup> This has proved very important and, although a decision upholding a complaint does not invariably include an award of compensation, if loss can be proved the Court will generally award an applicant damages, as well as reimbursement of any costs and expenses.

The contracting parties undertake to abide by the decision of the Court in any case to which they are parties.<sup>2</sup> Moreover, the judgement of the Court is transmitted to the Committee of Ministers of the Council of Europe, which

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<sup>1</sup> Article 50 of ECHR

<sup>2</sup> Article 53 of ECHR

has the responsibility of supervising its execution.<sup>1</sup> This means, in practice, that the representative of the government concerned will explain to the Committee what action that government has taken in order to give effect to the judgement – for example, by amending its legislation or paying damages to an injured party – and the Committee will decide whether such action satisfies the requirements of the situation. Nevertheless, the Strasbourg system works quite well in practice and the requirement that governments should explain to the Committee of Ministers how they are implementing the Court's judgements is certainly of value.

#### **4. Comment on the Commission and Court**

The procedures prescribed by the Convention are relatively complex. For reasons noted below, a far-reaching set of institutional and procedural reforms was adopted by the member states in Protocol No. 11. It provides for the establishment of one institution, a full-time Court, to replace the present related functions of the Commission and Court and the present role of the Committee of Ministers.

Proceedings under the individual petition procedure begin with a complaint by an individual, group or NGO against a state that has expressly accepted this procedure.<sup>2</sup> By March 1995, some 550 million people in 30 countries were eligible to lodge petitions under this procedure. Under the Revised Convention acceptance of this procedure will be mandatory of all member states.

Where a friendly settlement is reached between the parties, and provided it considers the settlement to be based upon 'respect for human rights as defined in the Convention,' the Commission reports on this to the Committee of Ministers, which consists of the Foreign

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<sup>1</sup> Article 54 of ECHR

<sup>2</sup> Article 25 of the original and Article 34 of the revised ECHR

Ministers or their deputies of the member states of the Council of Europe. It is up to the government concerned to take the measures to which it has agreed.

Accordingly such a role to a quintessentially political body has been strongly criticized because bodies such as the Committee of Ministers are composed of State or Government representatives whose task is to defend what are-rightly or wrongly-regarded as 'State interests'. These political bodies are therefore, almost inevitably, a playground or battlefield of the 'raison detre'. When political bodies are entrusted with this task, are we not confronted with an inherent contradiction? Those bodies and their members whose normal task is to defend State interests are supposed to protect fundamental rights of individuals or groups against State power. Within these bodies, States are at one and the same time judges and parties.

Where no friendly settlement is reached the Commission determines whether there has been a breach of the Convention. Its opinions, which are usually published, are not per se legally binding on the state parties. Within three months of the Commission's report, the case can be referred to the Court by either the Commission or by a state concerned, but not by the complainant.<sup>1</sup> If the case is not referred to the Court, the Committee of Ministers decides whether there has been a violation of the Convention and what measures must be taken by the state concerned.

The Court cannot determine which cases it hears but rather is at the mercy of the Commission or the state concerned. It does not undertake the examination of a case de novo. The subject matter of each case brought before it

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<sup>1</sup> Until Protocol 9 comes into force

is, in essence, determined by the Commission's decision on admissibility. In practice, the Commission has referred most cases. There are no established criteria to guide the Commission about referral. One observer has identified elements that might be influential in these decisions: where the case raises a point of interpretation that has not previously arisen; where the Commission is divided as to whether there has been violation; or where a case is perceived to have particularly serious political implications.

Although the Commission is not a party to cases before the Court, one of its members participates in the proceedings to assist the Court. Since 1983, an individual applicant may be represented before the Court by a lawyer but is still not formally a party to the case. Although there is no *amicus curiae* provision, the President of the Court may authorize interested parties to submit comments on specific issues and various NGOs have been invited to do so.

### **5. Some individual applications**

Since the European Commission of Human Rights began work in 1954, it has declared admissible more than a thousand individual applications. About one-tenth formed the object of a friendly settlement within the meaning of Article 28 of the Convention, and as many more have been settled by some informal arrangements.

The remainders have been the objects of reports to the Committee of Ministers under Article 31 of the Convention. Many of these cases have been decided by the Committee of Ministers and more than 300 have been referred to the Court by the Commission or governments.

As a result, if we wish to obtain a general view of the application of the Convention we can find the best examples in the case law of the Court. And since space precludes an examination of that case law in detail, we shall limit ourselves to outlining the issues in some of the more significant applications.

*Fair trial:* The first case considered by the Court was the Lawless case, decided in 1961. It concerned the detention without trial in Ireland of a suspected member of the Irish Republican Army in the exercise of special powers conferred by the Offences against the State Act, 1940. The Irish government had made derogation under Article 15 of the Convention, claiming the existence of a state of emergency. The Court held that the derogation was justified and there was no violation.<sup>1</sup>

The Golder case in 1975 concerned the right of access to a court of law. The applicant, who was serving a sentence of imprisonment in the United Kingdom, wished to see a lawyer with a view to bringing a civil action against one of the prison warders. Permission to do so was refused. The Court found a violation of the Convention, because the right to a fair trial was held to imply the right of access to a court. Subsequently, the Home Secretary announced to Parliament a change in the prison rules in order to comply with the judgement.

*Family & home:* Another important group of cases has concerned the right to respect for private and family life, home and correspondence. The Klass case concerned the clandestine control of correspondence and telephone calls in the Federal Republic of Germany. While such action clearly interferes with the right to respect for correspondence and for private life, the Court held that in the circumstances it was justified in the interests of safeguarding national security and preventing disorder or

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<sup>1</sup> Series A, No. 1, 2 and 3 (1960-61)

crime. On the other hand, in the Keegan case,<sup>1</sup> an Irish applicant was successful when his daughter was placed for adoption without his knowledge, and in the Gaskin case,<sup>2</sup> the Court decided that Article 8 had been violated because a British applicant was denied details of the foster homes in which he had grown up.

In the Marckx case,<sup>3</sup> which also concerned Article 8, the Court held that certain provisions of Belgian law relating to children born out of wedlock, particularly as regards rights of inheritance, put them at a disadvantage as compared with legitimate children, and therefore violated the Convention. A notable feature of this decision was the emphasis, which the Court placed on its duty to interpret the Convention in the light of current attitudes towards illegitimacy, rather than ideas, which were prevalent when the Convention was drawn up. The Court also made the point that the Convention is not just concerned with restraining interference with rights, but in certain circumstances requires governments to take positive steps to promote them.

*Trade union:* Trade union freedoms were first considered by the Court in several early cases and the Court returned to the question in 1981 when it decided the case of Young, James and Webster, which raised the difficult issue of the 'closed shop'. The applicants complained that they had been dismissed for refusing to join a union, which was a condition of employment in the British railway industry. The Court held that they were entitled to compensation for violation of their rights under Article 11, despite the fact the Convention does not expressly provide for 'freedom of non-

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<sup>1</sup> Series A, No. 290, (1994)

<sup>2</sup> Series A, No. 160, (1989)

<sup>3</sup> Series A, No. 31, (1979)

association'.<sup>1</sup> This was taken further in 1993, when the Court held in the Sigurdur A. Sigurjonsson case that requiring the applicant to belong to a taxi drivers' organization in Iceland had violated Article 11 because a negative right of association is impliedly guaranteed.

*Freedom of expression:* Freedom of expression is one of the most basic rights in a democratic society. In almost all the cases the Court has had to decide whether the action complained of indicates that it has been infringed, or whether what is clearly a limitation of freedom of expression can be justified on one of the grounds set out in the Convention. In the Muller case,<sup>2</sup> for example, the applicant complained that his conviction in Switzerland for exhibiting obscene paintings violated his right to freedom of expression. However, the Court decided whether the actions complained of had exceeded the bounds of reasonableness. Deciding that the authorities were entitled to regard the paintings as morally pernicious, the Court held that in view of their margin of application no violation of the Convention had occurred.

*Property rights:* The cases mentioned so far were mainly concerned with the rights and freedoms protected by the original Convention. However, there have also been numerous cases involving the provisions of Protocol No. 1. The Court has considered the right to property, for example, which is protected by Article 1, on several occasions. For example, the Court held in the James case that the compulsory transfer of property under the Leasehold

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<sup>1</sup> Series A, No. 44 (1981)

<sup>2</sup> Series A, No. 133 (1988)

Reform Act did not give rise to a violation, and shortly afterwards in the *Lithgow* case reached the same conclusion as regards the nationalization of shipyards in the United Kingdom. In both of these cases the Court pointed out that the power of the State to take measures in the public interest, which is expressly preserved by Article 1, means that it is harder to establish a violation of this provision than of most articles of the Convention.

*Education:* Another right guaranteed by Protocol No. 1 is the right of parents to ensure education and teaching in conformity with their religious and philosophical convictions.<sup>1</sup> Like most of the Convention's provisions, this article requires a balance to be struck between the powers of the State and the rights of the individual and so can give rise to difficult questions of interpretation. In the Danish Sex Education cases in 1976, the Court held that the Danish legislation on this subject, which provided for information to be given to schoolchildren in an objective manner, did not violate the Convention, even though some parents objected. In *Campbell and Cosans* in 1982, on the other hand, it held that in similar circumstances the use of corporal punishment in a Scottish school did violate Article 2.<sup>2</sup>

## 6. The significance of the Convention

Any assessment of the record must begin by recognizing the crucial importance of co-operation by governments, which has been instrumental in enabling the Strasbourg institutions to work effectively. It is also interesting to note the great variety of problems which have arisen, involving nearly all the rights and freedoms

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<sup>1</sup> Article 2

<sup>2</sup> Series A, No. 48 (1982)



protected by the Convention and its protocols. Moreover, the case law of the Court and Commission indicates that no State should be immune from scrutiny to check that its domestic arrangements comply with the obligations it has accepted under treaties for the protection of human rights. Every State, which has accepted the right of individual petition has seen cases against it, brought before the Commission and the many states have also referred the cases to the Court. No administration is free from the possibility of error, even in countries, which are unquestionably among those with the best record for protecting civil liberties.

This appraisal suggests two conclusions: first, that a system of international supervision like that of the European Convention is necessary and desirable, even for States which respect the rule of law and possess constitutional guarantees of human rights and fundamental freedoms; secondly, that, as has often been pointed out, the Convention is the most effective international system for protecting human rights that has yet been introduced anywhere in the world. It is scarcely necessary to add that neither the guarantees provided, nor the supervisory arrangements, are perfect. Indeed, as we have seen, both have been periodically revised and are bound to change further.<sup>1</sup>

The fact remains, however, that the Convention functions in a way that would have delighted its founders and seems set for a promising future. However, the European system has been able to function effectively because the governments concerned have been willing to co-operate with the Strasbourg organs, and the States to

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<sup>1</sup> Robertson and Merrills, *op. Cited.* At 155

which the system applies genuinely wish to secure the effective exercise of human rights on their territories.

It follows that a member of the Inter-American Commission on Human Rights would be impressed by the functioning of the European system, but might reflect that it has comparatively little relevance to the problems of massive violations (the systematic torture of political prisoners, arrest of persons who then 'disappear', persecution of political opponents, imprisonment of human rights activists etc.) in certain Latin American countries with which that Commission has to deal. What is true for Latin America applies with even greater force elsewhere. If an analogy may be drawn without trivializing the issue, it is fine to have a referee in a football match when all the players know what game is being played and intend to respect the rules. But if there is no agreement on these matters, what is needed is not a referee but a fundamental change in outlook and political culture. Thus, much work remains to be done before we can expect to see regional arrangements for the protection of human rights, comparable to the European system, in other parts of the world.

### **7. Reforming the system**

Since the Convention was signed in 1950 membership of the Council of Europe has tripled and there has been a corresponding increase in the number of parties to the Convention. This expansion, and in particular the general acceptance of the right of individual application under Article 25, has generated an ever-increasing workload for the Strasbourg institutions. Contributing factors have been the dynamic approach of the Commission and the Court to the interpretation of the Convention, which, along with the conclusion of new protocols, has widened its protection, and the dissemination of knowledge about the Convention, which has encouraged more and

more people to explore its possibilities. These developments are, of course, an indication of the Convention's success. But they have also put its institutional machinery under increasing strain and raised the question of how it can be adapted to cope with the new situation.

A number of steps to relieve the pressure have already been taken. The Commission and the Court, though not yet permanent organs, have extended their sessions significantly and the main purpose of Protocol No. 8 was to streamline the Commission by enabling it to work in chambers and to handle issues of admissibility through committees. These changes have been beneficial and make it possible for the Strasbourg organs to deal with cases more efficiently. However, they are plainly not enough. When Protocol No. 8 came into force in 1990 it was already clear that more drastic changes would be needed. Accordingly, the Committee of Ministers, which had initiated a review of the control mechanisms of the Convention sometime earlier, decided that work on this project should be speeded up with a view to making further and more radical changes.

The negotiation of a new protocol with that object was, as may be imagined, not entirely straightforward, for while there was general recognition of the need for reform, there were different views as to how this should be achieved and a number of proposals had to be considered. Finally, however, in April 1994 agreement was reached on the text of Protocol No. 11, which was opened for signature in the following month.<sup>1</sup>

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<sup>1</sup> For the text of Protocol 11 and accompanying note see, *International Human Rights Reports*, I (3), 1994, at 206. For more detailed discussion see r. Bernhardt's article in *American Journal of International Law*, LXXXIX, 1995, at p 145

*The court:* The main effect of the new protocol is to replace the present Commission and Court of Human Rights with a single full-time Court which will perform all the functions of the present organs. Although the new Court will have the same name as the existing institution, it will be a quite different organ. The provisions of Protocol No. 11 will therefore replace Articles 19-56 of the Convention, which govern the present institutions, with a new set of articles, dealing with the composition and powers of their successor. They will also replace the provisions of Protocol No. 2, which concerns advisory opinions, and those of the recent Protocol No. 9, which, as noted earlier, provides for individual access to the Court.

The number of judges on the new Court will be equal to the number of parties to the Convention. Their term of office will be six years, with the possibility of re-election, but they must retire at seventy. The terms of office of the present judges and commissioners will expire when the new protocol comes into force but, as a transitional arrangement, the Commission will continue to deal with cases which are in progress, for up to one year.

The business of the new Court will be conducted through various sub-units in a manner analogous to the practice of the present organs. Thus the court will sit in committees of three judges to decide on admissibility. A case may be declared inadmissible if the committee is unanimous, but if it is not, the issue will be decided by a chamber of seven judges. Such chambers will also decide cases on the merits, unless a chamber decides to relinquish jurisdiction in favour of a grand chamber of seventeen judges. Grand chambers will also review decisions given by a chamber, if a case raises an important issue and a panel of five judges of the grand chambers decides that it is appropriate to do so. Grand chambers will also deal with all inter-State cases and requests for advisory opinions.

For each case that is registered, a judge rapporteur will be appointed to prepare the case and sit on the Committee, which will examine its admissibility. When a case is found to be admissible, the judge rapporteur may also take steps with a view to a friendly settlement, for which purpose the Court's facilities are to be at the parties' disposal. Committees will be established for one year and chambers for three years. The judge elected in respect of the State concerned will sit as an *ex officio* member of the chamber and, where relevant, the grand chamber; if necessary, an *ad hoc* judge may be appointed. The Presidents of the chambers and President and Vice-Presidents of the Court will also be members of grand chambers.

States will be able to bring cases, as at present, but, in an important innovation, the right of individual application will become mandatory. There will therefore be no need for this to be accepted separately, as is currently the position under Article 25. On the other hand, the existing conditions of admissibility will continue to apply and will presumably be given the same interpretation as at present. In all but exceptional cases the Court's hearings will be in public. Reasons will be given for decisions on admissibility and on the merits and the final judgement, which will be published and may, where appropriate, award just satisfaction, will be binding.

*Committee of ministers:* Although the most striking innovation of Protocol No. 11 is the replacement of the present Commission and Court with an entirely new institution, it also has major significance for the role of the Committee of Ministers. At present, as we have seen, the Committee performs two functions in the human rights system: supervising the execution of judgements in

accordance with Article 54, and dealing with cases which are not referred to the Court under Article 32. The first function will continue, but as the new Court will be competent to handle all cases, which are taken to Strasbourg, the second function will be abolished. The Committee of Ministers will therefore still be able to supply the necessary political backing for the Court, but will no longer be required to decide whether the Convention has been violated. That question will be exclusively one for the new Court, which is where, as a legal decision, it belongs.

As it is an amending protocol, Protocol No. 11 requires ratification by all the parties to the Convention and will come into force a year later. The new protocol, as noted earlier, was opened for signature in May 1994 and, since general ratification always takes some time, may not come into effect in the immediate future. Until it does so, the supervisory arrangements of the original Convention, as modified by the earlier protocols, will continue to apply. Protocol No. 11, however, aims to effect a radical overhaul of the machinery of control to equip the Strasbourg system to face the future and seems well designed to do so.<sup>1</sup>

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<sup>1</sup> Andrew Drzemczewski and Meyer-Ladewig, *Principles of the New ECHR Control Mechanism As established by Protocol 11*, 15 *Hum. Rts. L. J.* 81 (1992)

## Chapter Ten

# THE AMERICAN CONVENTION ON HUMAN RIGHTS

### 1. Context

At the ninth Inter-American Conference at Bogota in 1948, the American States undertook a review of their methods of cooperation and reorganized the whole system. The 'Charter of Bogota' adopted on this occasion furnished the new constitutional instrument that was needed and thereby established the Organization of American States (OAS). The Charter announces in its first article that the OAS is a regional agency within the United Nations. It then continues by laying down the essential purposes of the Organization. Next come two important chapters on 'Principles' and 'Fundamental Rights and Duties of States'. These affirm the significance of international law and fundamental human rights.

Another basic text adopted at Bogota was the American Declaration on the Rights and Duties of Man. While it is, for the most part, on rather similar lines to the Universal Declaration of the United Nations, it is worth noting that it was adopted in May 1948, that is to say, seven months before the Universal Declaration, and that it contains no less than ten articles setting out the duties of the citizens, in addition to twenty-eight articles proclaiming individual rights.

A meeting of the ministers for foreign affairs, held at Santiago in 1959, resulted in further initiatives in the field of human rights. The Ministers adopted a 'Conclusion' containing the following statement: eleven years after the American Declaration of the Rights and Duties of Man was

proclaimed, the climate in the hemisphere is ready for the conclusion of a Convention. The same document instructed the Inter-American Council of Jurists to prepare a draft Convention on Human Rights and a draft Convention for the creation of an Inter-American Court for the Protection of Human Rights, along with other appropriate organs. It also resolved to create an Inter-American Commission on Human Rights of seven members elected as individuals by the Council of the OAS from panels of three candidates presented by the governments.

Accordingly, the Inter-American Council of Jurists met in Santiago later in the year and prepared a draft Convention, which was largely based on the European model. This draft Convention was considered at the Second Special Inter-American Conference held in Rio de Janeiro in 1965. In fact the Conference considered three drafts: one prepared by the Inter-American Council of Jurists in 1959, and two revised drafts presented by Chile and by Uruguay which took account of recent European developments.<sup>1</sup>

The Rio Conference resolved that, pending the conclusion of the new Convention, the existing Commission on Human Rights should be authorized to consider complaints from individuals alleging violations of certain basic rights, namely the right to life and liberty, freedom of opinion and expression, the right to a fair trial, protection from arbitrary arrest, due process of law, equality before the law without discrimination, and freedom of religion. The Commission would have the right, when considering such complaints, to request information from and make recommendations to governments and, in certain cases, to publish reports on the action taken.

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<sup>1</sup> Robertson and Merrills, *Human Rights in the World*, p. 200



At the beginning of October 1968, the Council of the OAS submitted the revised draft Convention prepared by the Inter American Commission on Human Rights, inviting comments from governments. When these had been received a Special Conference on Human Rights was held in San Jose, Costa Rica, in November 1969 to produce a final text. Nineteen of the twenty-four member States of the OAS were represented at the Conference, the absentees being Bolivia, Barbados, Haiti, Jamaica and Cuba.

The American Convention on Human Rights, otherwise known as the 'Pact of San Jose', was drafted at this Conference and signed on 22 November 1969.<sup>1</sup> It entered into force on 18 July 1978, and has now been widely accepted. In 1988 an Additional Protocol was concluded which extended the range of rights protected, and two years later a further protocol was added to abolish the death penalty.

## 2. The Rights Protected

The undertaking of the States under the Convention is to 'ensure to all persons, subject to their jurisdiction, the free and full exercise of the rights and freedoms recognized therein'.<sup>2</sup> Article 2 provides that contracting parties will adopt such legislative or other measures, as may be necessary in cases where the rights and freedoms are not already ensured in their domestic law.

Twenty-six rights and freedoms are protected by the American Convention. Twenty-ones of these are included in the UN Covenant on Civil and Political Rights. They are:

- 1 the right to life;
- 2 freedom from torture and inhuman treatment;

<sup>1</sup> Text can be found in I. Brownlie, *Documents on Human Rights*, Oxford, 1992, p. 495

<sup>2</sup> Article 1 of the American convention on Human Rights (ACHR)

- 3 freedom from slavery and servitude;
- 4 the right to liberty and security;
- 5 the right to a fair trial;
- 6 freedom from retroactivity of the criminal law;
- 7 the right to respect for private and family life;
- 8 freedom of conscience and religion;
- 9 freedom of thought and expression;
- 10 freedom of assembly;
- 11 freedom of association;
- 12 freedom to marry and found a family;
- 13 freedom of movement;
- 14 the right to free elections;
- 15 the right to an effective remedy if one's rights are violated;
- 16 the right to recognition as a person before the law;
- 17 the right to compensation for miscarriage of justice;
- 18 the right to a name;
- 19 the rights of the child;
- 20 the right to a nationality;
- 21 The right to equality before the law.

The five rights and freedoms included in the American Convention but not in the United Nations' Covenant are:

- 22 the right of property;
- 23 freedom from exile;<sup>1</sup>
- 24 prohibition of the collective expulsion of aliens;
- 25 the right of reply;
- 26 The right of asylum.

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<sup>1</sup> However, the Covenant provides in Article 12 that 'No one shall be arbitrarily deprived of the right to enter his own country'.

### 3. Comparison

A comparison of the provisions of the American Convention with those of the European Convention and its Protocols reveals that the principal rights included in the American but not in the European text are: the right of reply, the rights of the child, the right to a name and to a nationality, and the right of asylum. On the other hand, the right to education, contained in Protocol No.1 to the European Convention, was omitted from the American text.

The definitions of the American Convention are generally closer to those of the United Nations Covenant on Civil and Political Rights than to the European Convention, though there are several differences which are sometimes due to following the European model.

It will be noted that the Convention contains no guarantees of economic, social and cultural rights like those to be found in the first UN Covenant and the European Social Charter. Instead, there is merely a general undertaking in Article 26 to adopt measures to achieve the full realization of the rights implicit in the corresponding standards of the OAS Charter. In 1988 the Additional Protocol, known as the 'Protocol of San Salvador', was therefore concluded with a view to improve matters.<sup>1</sup>

The new Protocol guarantees thirteen additional economic, social and cultural rights and has much in common with the first UN Covenant. As in the Covenant, the rights concerned are protected by a reporting system, but an important difference is that they are also subject to the jurisdiction of the Inter-American Commission and Court through the same system of individual petitions as the

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<sup>1</sup> Text can be found in I. Brownlie, (op . cited) at p. 521

civil and political rights guaranteed in the original American Convention.

As already mentioned, in 1990 a further protocol was concluded which has the effect of prohibiting the States which are parties to it from using the death penalty.<sup>1</sup> This brings the American Convention into line with the European Convention on Human Rights and the Covenant on Civil and Political Rights. As yet, however, neither this latest Protocol nor the Protocol of San Salvador has been generally accepted.

The provision in the UN Covenant on the Rights of Minorities<sup>2</sup> has no counterpart in the American Convention.

#### **4. Inter-American Commission**

The American Convention on Human Rights provides for two organs of control: a Commission and a Court. The Convention was not creating a new organ but conferring new functions and powers on an existing body as the Inter-American Commission had been created in 1959 by Resolution VIII of the meeting of ministers for foreign affairs at Santiago. As a result of this evolution the 1969 Convention was able to confer new functions and powers on the existing Inter-American Commission, but, of course, the new provisions would apply only to States which ratified the new Convention. It was therefore also necessary to provide that the existing functions and powers of the Commission would remain and continue to be exercised in relation to States, which did not ratify the new Convention.

In 1959, the Inter-American old function Commission drew up a Statute, which was approved by the

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<sup>1</sup> Text can be found in Gandhi, *International Human Rights Documents*, p. 170

<sup>2</sup> Article 27

OAS Council in 1960. The Statute gave the Commission power to examine the human rights situation in OAS member States where flagrant and repeated violations were occurring; to request pertinent information from the governments concerned and, if necessary, to request their consent to visit their territory; to make such visits if the necessary consent was obtained; to put forward any recommendations it thought advisable; and to prepare reports. It was not competent to take decisions on individual complaints of violation of human rights, but it could take account of such complaints as sources of information on the state of human rights in the countries concerned.

The competence to consider individual complaints of violation of a limited number of specific rights was conferred on the Commission, by the Rio Conference in 1965, and the Statute was amended accordingly. Using these provisions the Inter-American Commission has examined the situation of human rights in a considerable number of the Latin American Republics. The Commission has adopted a rule to the effect that once a communication has been declared admissible, the facts alleged will be presumed to be confirmed if the government concerned fails to bring forward convincing evidence in rebuttal.

From this brief summary two conclusions may be drawn. First, a large part of the Commission's contribution to human rights has stemmed from its 'old functions', which antedate the entry into force of the American Convention on Human Rights in 1978. Our second conclusion is prompted by a comparison of the work of the Inter-American Commission on Human Rights with that of the European Commission of Human Rights. It is plain that they are radically different.

The European Commission has been concerned with what might be called the finer points of human rights law –

questions, for example, such as what is a reasonable time in detention pending trial, what is the precise content of the right to a fair trial, what limitations may be placed on freedom of expression, and what exactly are the implications of the right of freedom of association? The Inter-American Commission, on the other hand, has had to deal with problems of a quite different order: arbitrary arrest on a massive scale, systematic use of torture, scores or hundreds of 'disappeared persons', total absence of judicial remedies, and other flagrant violations of civilized standards.

The new functions of the Commission are set out in Articles 44-47. It is competent to consider petitions from individuals, groups of individuals or NGOs alleging violation of the Convention by States parties.<sup>1</sup> In contrast to Article 25 of the European Convention, acceptance of this competence by States ratifying the treaty is not optional but obligatory. In terms of the provision of effective international procedures for protecting human rights, the compulsory jurisdiction of the Commission under Article 44 is the outstanding feature of the American Convention.

The rules on admissibility are generally similar to those contained in the European Convention.<sup>2</sup> They include the requirement of exhaustion of domestic remedies and require that the petition should be filed within six months of the notification of the final domestic decision.

Once the Commission has decided that a case is admissible, its first task is to establish the facts. It may undertake an investigation, for which the States concerned will furnish all necessary facilities.<sup>3</sup> An urgent procedure for emergency cases is set out in Article 48(2). The

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<sup>1</sup> Article 44 of ACHR

<sup>2</sup> Article 46 and 47

<sup>3</sup> Article 48(1) (d)

Commission then has the task of trying to bring about a friendly settlement. The procedure<sup>1</sup> is broadly similar to that of the European Convention. If no friendly settlement is achieved, the Commission is required to draw up a report setting out the facts and stating its conclusions and may make such proposals and recommendations, as it thinks fit.<sup>2</sup>

### 5. The American Court

The Court consists of seven judges, elected in an individual capacity from among jurists of the highest moral authority and recognized competence, and who possess the qualifications required for the highest judicial office.<sup>3</sup> Only the parties to the Convention may propose candidates and take part in election. However, candidates may be of the nationality of any member State of the OAS. The judges are elected for a term of six year, and may be re-elected, but only once.<sup>4</sup> In addition, Costa Rica is the seat of the Court.

Article 55 deals with the question of the 'national judge', that is, whether a judge who is a national of a party to a case should have the right to sit in a case in which his or her own country is involved. It allows the traditional system of national and ad hoc judges. The Commission also appears in all cases before the Court.<sup>5</sup>

The Court appoints its own Secretary.<sup>6</sup> Article 59 provides that the Court shall establish its own secretariat, which functions under the direction of the Secretary of the Court.

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<sup>1</sup> Article 48(1) (f) and 49

<sup>2</sup> Article 50

<sup>3</sup> Article 52

<sup>4</sup> Article 54

<sup>5</sup> Article 57

<sup>6</sup> Article 58

Only States parties and the Commission may submit cases to the Court.<sup>1</sup> Under Article 62 of the Convention, contracting parties may declare that they accept the jurisdiction of the Court un-conditionally or on condition of reciprocity, and for an indefinite or for a limited period.

The powers of the Inter-American Court are very wide and much more extensive than those of the European Court. If it finds that there has been a violation, it may order that the rights of the injured party are reinstated and, where appropriate, can also order that the consequences of a violation should be remedied and damages paid.<sup>2</sup>

Article 64 of the Convention invests the Inter-American Court with wide powers to give advisory opinions. Requests for advisory opinions may relate not only to the American Convention on Human Rights, but also to other treaties concerning the protection of human rights in the American States.<sup>3</sup>

#### **6. Other regional developments.**

In recent years, a number of further conventions of this type have been negotiated. The Inter-American Convention to Prevent and Punish Torture was concluded in 1985, one year after the United Nations Convention on the subject.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women entered into force in March 1995.<sup>4</sup> The Convention defines violence against women as including physical, sexual and

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<sup>1</sup> Article 61

<sup>2</sup> Article 63

<sup>3</sup> Buergenthal, *The Advisory Practice of the Inter- American Human Rights Court*, *Amer. J. of Inter. Law*, LXXIX, 1985, p. 1

<sup>4</sup> Bownlie, *op. Cited*. P.531



psychological violence.<sup>1</sup> It lists key rights of women and imposes a range of duties, on the States parties, intended to eliminate violence against women and its causes.

A threefold mechanism of protection is envisaged. In the first place, States undertake to report to the Inter-American Commission of Women on their measures to implement the Convention.<sup>2</sup> Secondly, the States parties and the Inter-American Commission of Women are authorized to seek advisory opinions from the Inter-American Court;<sup>3</sup> and thirdly, individuals and NGOs may lodge petitions with the Inter-American Commission concerning those obligations, which require immediate implementation. The new Convention came into force in March 1995, when Two States had ratified it.<sup>4</sup> The other recent convention is the Inter-American Convention on the Forced Disappearance of Persons.

The developments just described are symptomatic of a renewed emphasis on human rights in the OAS, following the replacement of the military regimes which were responsible for so many of the abuses described in this chapter with governments of a more democratic character in a significant number of member States.

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<sup>1</sup> Article 2 of the Convention on Prevention of Violence against Women

<sup>2</sup> Article 10 of *ibid.*

<sup>3</sup> Article 11, *ibid.*

<sup>4</sup> Bolivia and Venezuela

**Part IV:**

**SPECIAL INTEREST**



## Chapter Eleven

# WOMEN EMPOWERMENT

### I. State of Affairs

In most of the areas of the world, the traditional and cultural patterns perpetuate and reinforce the subordination of woman in the social, cultural, economic, and political spheres. Societies in general are patriarchal, where decisions are taken by man i.e. husband, father or eldest son. Man is considered the legal representative, the repository of authority while the woman is relegated to household tasks and to look after her husband and children. She is also responsible for generating additional income or consumer goods. In case of a careless father, the entire responsibility for the support of the children devolves upon her.

Women are restricted in choice of husband and are subject to honour killing. Maltreatment of women and domestic violence is not adequately defined as offences against the person.

Women are much less likely than men to be literate. In South Asia, female literacy rates are only around 50% those of males. Women make up two-thirds of the world's illiterates. Even in industrial countries, women are very poorly represented in scientific and technical study.

In developing countries the employment participation rate of women are on average only 50 % those of men (in South Asia 20% and in the Arab states only 10 %). Wage discrimination is common even in industrial

countries. Their works are poorly paid. In Japan, women receive only 51% of male wages.<sup>1</sup>

Low political participation and representation of the women in political institutions surely contributes to their further marginalization in the decision-making processes. Consider the following statistical information. In 1980 they made up just over 10% of the world's parliamentarians and less than 4% of national cabinets. In 1993, only six countries had women as heads of government.<sup>2</sup>

The following percentage refer to the seats in Legislatures occupied by women in 1992: Finland 39%, Norway 38%, Cuba 23%, China 21%, Pakistan 17%,<sup>3</sup> Tanzania 11%, USA 10%, UK 9%, Russia 9%, India 7%, France 6%, and Egypt 2%.<sup>4</sup>

This is the state of affairs despite the stress upon the equal protection norm in the following provisions in the UN Charter and the other International instruments that have entered into force long ago:

1. The Charter's preamble states the determination of the peoples of the United Nations to reaffirm faith 'in the equal rights of men and women.' Article 1(3) sets forth the organization's purpose of promoting respect for human rights 'for all without distinction as to race, sex language, or religion.' Article 55(c) is to similar effect.
2. Article 2 of the Universal Declaration states that 'everyone' is entitled to the rights declared 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,

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<sup>1</sup> Human Right Report, 1993, at p. 25

<sup>2</sup> *ibid.*

<sup>3</sup> 17<sup>th</sup> Constitutional Amendment, 31<sup>st</sup> December, 2003

<sup>4</sup> UNDP Women Development Report, 1994, p 144

- national or social origin, property, birth or other status.' Under Article 16, men and women are 'entitled to equal rights as to marriage, during marriage and at its dissolution.'
3. Under Article 2 of the ICCPR, the states undertake to ensure to all within their territory the rights recognized in the Covenant 'without distinction of any kind.' The list of prohibited distinctions is identical with that above in the UDHR. States further undertake in Article 3 to 'ensure the equal right of men and women' to enjoyment of all rights set forth in the Covenant. Under Article 23(4), states are to take 'appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.'" Article 26 contains undertakings by states to prohibit discrimination on the same grounds as those identified in the UDHR.
  4. Similar anti-discrimination provisions appear in the International Covenant on Economic, Social and Cultural Rights.

## 2. CEDAW

The basic treaty in the field is the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). The treaty entered into force in 1981. The Treaty consists of 29 articles: first 16 articles deal with the rights while the rest describe enforcement mechanism. It will be useful to characterize the obligations of states under CEDAW's varied provisions within the following scheme:

*Respect*: the duty to treat persons equally, to respect their individual dignity and worth, hence not to interfere with or impair their declared rights – that is, the classical 'hands-off' duties of liberal states that are correlative to individual rights;

*Protect, prevent:* the duty to extend protection against violations of rights by the state as well as by non-state actors (individuals or organizations), hence the duty to create and administer an adequate system of police, law enforcement, and civil and criminal justice;

*Provide:* the duty to ensure, to assure individuals of defined minimum levels of welfare, to improve (and not only refrain from worsening) the situation of individuals up to such levels – that is, the type of duty elaborated in the International Covenant on Economic, Social and Cultural Rights, as in its Article 11 where states parties undertake to ‘ensure the realization’ of the right of everyone to an adequate standard of living; and

*Promote:* the (varied and often indeterminate) duty to take measures such as education to reduce violations of rights, to train people to help to gain recognition of their own rights, to transform (to one or another extent) existing attitudes inimical to realization of rights.<sup>1</sup>

### 1) **Discrimination**

The Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>2</sup>

Three vital characteristics of the definition of the discrimination ought to be noted:

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<sup>1</sup> Steiner, *International Human Rights in Context*, Oxford Press, 1996, at p 908

<sup>2</sup> Article 1 of CEDAW

- (i) The article refers to effect as well as purpose, thus directing attention to the consequences of governmental measures as well as the intentions underlying them.
- (ii) The definition is not limited to discrimination through "state action" or action by persons acting under colour of law, as are the definitions of many rights such as the definition of torture under the Convention against Torture.
- (iii) The concluding phrase, 'or any other field' further expands the definition's range.<sup>1</sup>

## **2) Measures Against Discrimination**

State parties have agreed to pursue a policy of eliminating discrimination against women by embodying the principle of equality of men and women and adopting all measures in their national institutions or other appropriate legislation to establish legal protection of the rights of women on an equal basis with men. The goals stated are to be pursued without delay. Through the Articles the lines are blurred between the private and public spheres of life and the range of obligations on states to intervene in the private sector go beyond 'respect', to protect, ensure and provide.<sup>2</sup>

## **3) Development of Women**

The member states are obliged to take in the political, social, economic and cultural fields, all appropriate measures to ensure the full development and advancement of women to guarantee them the exercise and enjoyment of human rights and fundamental freedoms.<sup>3</sup>

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<sup>1</sup> Steiner, p 907

<sup>2</sup> Article 2

<sup>3</sup> Article 3



To ensure the full development and advancement of women is a grand goal set forth for states. No other international human rights regime contains a similar concept or goal for any group or people.

#### **4) Affirmative action**

States are obliged to adopt temporary special measures aimed at accelerating de facto equality between men and women. These measures will not be considered discriminatory. However, these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.<sup>1</sup> It is to be noted that Article 6 of ICCPR prohibits the death sentence being carried out on pregnant women.

This affirmative action clause also appears in the Convention on the Elimination of all Forms of Racial Discrimination but it is not provided in International Convention on Civil and Political Rights. The envisaged affirmative action is not to discriminate against men but to discriminate in favour of women – just to help them to fill the gap already existing between men and women in terms of opportunity and treatment.

#### **5) Eliminating the prejudices**

The states are bound to take all appropriate measures to modify the social and cultural patterns of conduct of men and women with the clean objective of the elimination of prejudices and other customary practices

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<sup>1</sup> Article 4

which are based on the concept of the inferiority of women or the superiority of the men. The states should also project proper understanding of maternity as an important social function. Member State should also adopt all measures to eradicate all forms of traffic in Women and prostitution.<sup>1</sup>

Normally women are discriminated against in the political and public life. This is true even in developed countries. Take the example of United States. In its history of more than 200 years, there is no single women president. The States ought to ensure that women have equal right to vote in all elections, public referenda and all other publicly elected bodies. Women have an equal right to participate in the formulation of public policy, hold public office and perform public functions at all levels of government.<sup>2</sup> States have to provide an equal opportunity to represent their governments at the international level and to participate in the work of international organizations.<sup>3</sup>

#### **6) Nationality**

Normally women are discriminated against in the matters of nationality. Traditionally they follow the nationality and domicile of their husbands. The Convention asks the member states to grant women equal rights with men to acquire, change or retain their nationality. Under the new regime, neither the marriage to an alien nor change of nationality of husband during the marriage shall automatically change the nationality of wife, render her stateless, or force upon her the nationality of her husband.

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<sup>1</sup> Article 5 and 6

<sup>2</sup> Article 7

<sup>3</sup> Article 8

Same is true with respect to the nationality of their children.<sup>1</sup> In nutshell, women can and will have now nationality of their own choice emanating from their own free existence, independent of their husbands. They are no more dependent variable.

### **7) Education**

As already discussed, the women folk lag behind the men in the field of education that is a major cause of their backward status in the society. Article 10 makes it obligatory on the member states to take all appropriate measures to eliminate discrimination against women in order to ensure the equal rights with men in the fields of general education, conditions for career, vocational/technical training, physical education, curricula, examinations, scholarships etc. This all ought to be done based on equality of men and women and with the objective to reduce gap in education existing between men and women.<sup>2</sup>

### **8) Employment**

Member states have to take all appropriate measures to eliminate discrimination against women in the field of employment to ensure in particular: the right to work, the right to same employment opportunities, the right to free choice of profession and employment, the right to equal service conditions and benefits, the right to receive vocational training, the right to equal remuneration, the

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<sup>1</sup> Article 9

<sup>2</sup> Article 10

right to social security, the right to protection of health, and right to safety in working conditions.

The states, in order to protect discrimination against women on the ground of marriage or maternity, have to prohibit dismissal on the grounds of pregnancy or maternity leave and have to introduce maternity leave with pay.<sup>1</sup>

### **9) Rural Women**

CEDAW addresses the problem particularly faced by rural women and recognizes the significant role they play in the economic survival of their families, including their work in the non-monetized sectors of the economy. The states have to take all appropriate measures to ensure to the rural women the right to participate in the elaboration and implementation of development planning at all levels; to have access to adequate health facilities; to have the benefit of social security programmes; to obtain all types of training and education; to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities; to participate in all community activities; to have access to agricultural credits and appropriate technology; and to enjoy adequate living conditions.<sup>2</sup>

### **10) Equality before Law**

The women have to be accorded equality with men before the law and have to be treated equally in all stages of procedure in courts. Women must have a legal capacity in civil matters and the same applies to exercise that

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<sup>1</sup> Article 11

<sup>2</sup> Article 14 -

capacity. They should have right to conclude contracts and to administer property. And all laws restricting their legal capacity shall be deemed null and void.<sup>1</sup>

### **11) Marriage**

The states shall have to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, shall have: the right to enter into marriage; the same right freely to choose a spouse; the same rights and responsibilities during marriage and its dissolution; the same rights and responsibilities as parents; the same rights and responsibilities with regard to guardianship and wards; the same personal rights as husband and wife; the same rights for both spouses in respect of the ownership, acquisition, management, enjoyment and disposition of property. Furthermore, the betrothal and the marriage of a child shall have no legal effect and the states shall legislate to specify a minimum age for marriage.

### **3. The Committee**

For considering the progress made in the implementation of the present Convention, a Committee on the Elimination of Discrimination against Women had to be established. The Committee consists of 23 experts of high moral standing and competence in the fields covered by the Convention. The state parties from among their nationals select the experts but serve in their personal capacity. In

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<sup>1</sup> Article 15

selection process, considerations have to be given to equal geographical distribution and to the representation of the different forms of civilizations as well as the principal legal systems.<sup>1</sup>

The current composition of the Committee is largely in accordance with that injunction. At the same time, one of the most striking features of CEDAW's membership is that, with one exception, all its members have been women. In contrast to other Treaty bodies, only about half of the experts who serve, as CEDAW members are lawyers. Other members come from such areas as medicine, public health and hospital administration, political science, geography, trade union and labour relations, social work and engineering. Nearly all the members have been involved in some manner with feminist or other groups working to advance the position of women.

The member states submit for consideration of the Committee (through Secretary General of the UN) a report on the legislative, judicial, administrative and other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect. Reports may also indicate factors and difficulties affecting the degree of fulfillment of obligations under the Convention.<sup>2</sup>

The Committee normally meets for a period of not more than two weeks annually in order to consider the reports.<sup>3</sup> The Committee, through the Economic and Social

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<sup>1</sup> Article 17

<sup>2</sup> Article 18

<sup>3</sup> Article 20

Council, annually reports to the General Assembly of the UN on its activities and may make recommendations.<sup>1</sup>

The Committee has endorsed the concept of a 'constructive dialogue'. This approach envisions the state parties and the Committee as engaged in a joint enterprise to advance the goals of the Convention by cooperative endeavours involving the exchange of information, ideas and suggestions. One feature of the Committee has been to press state parties to provide information that shows actual position of women in their societies without painting an excessively favourable picture.

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<sup>1</sup> Article 21

## Chapter Twelve

# RIGHTS OF CHILDREN

### 1. Introduction

The international community progressed slowly- and only relatively recently- down the path leading to the Convention on the Rights of the Child. The first legal step was taken in 1924, when the League of Nations endorsed the first Declaration of the Rights of the Child. The United Nations Charter (1945) also laid down much of the groundwork for the Convention by urging nations to promote and encourage respect for human rights and fundamental freedom 'for-all'. Other early signs of a move to recognize and protect children's rights are evident in the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. The Universal Declaration State that 'all human beings are born free and equal in dignity and rights' and also stresses that 'motherhood and childhood are entitled to special care and protection' and refers to the family as 'the natural and fundamental group unit of society'.

Also in 1948, the General Assembly adopted a second Declaration of the Rights of the Child, a brief, seven-point statement that built on the 1924 Declaration: 'By the present Declaration of the Rights of the Child...men and women of all nations, recognizing that Mankind owes to the child the best that it has to give, declare and accept it as their duty to meet this obligation in all respects...'. The 1948 Declaration was followed almost immediately by a decision to draft a still more detailed Declaration, resulting just over a decade later in a third



Declaration of the Rights of the Child, adopted by the General Assembly in 1959.

The international legal framework was buttressed further in 1966 with the adoption of the two International Covenants-international Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. These two Covenants became binding on State Parties as of 1976 when they entered into force and as such they provided a legal as well as moral obligation for countries to respect the human rights of each individual.

For child rights to carry the weight of international law, a 'Convention' or a 'Covenant' was required. Thus, in 1978, on the eve of the United Nations' sponsored International Year of the Child, Poland formally proposed a draft text for the Convention on the Rights of the Child. The following year, the United Nations Commission on Human Rights formed a Working Group to review and expand on the original Polish text. The Working Group was made up of members of the United Nations (governments), non-governmental organizations (NGOs) and UN agencies. The Working Group drew heavily from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, in formulating what became the 41 substantive articles of the Convention on the Rights of the Child.

The UN General Assembly unanimously adopted the Convention on the Rights of the Child on 20<sup>th</sup> November 1989 and it entered into force or became legally binding on State Parties in September 1990. The same month, the world leaders at the World Summit for

Children, held at the United Nations in New York, made a 'solemn commitment' to accord child rights a high priority.

The World Conference on Human Rights, held in Vienna in 1993, set the end of 1995 as a target for the universal ratification of the Convention. By the last day of the year, 185 State had ratified. The Convention reflects this global consensus and, in a very short period of time, it has become the most widely accepted human rights treaty ever. It has been almost universally ratified and out of 193 UN Member States, only two countries have not ratified it: the United State of America and Somalia.

The Convention on the Rights of the Child, normally called CRC, reflects a new vision of the child. Children are neither the property of their parents nor are they helpless objects of charity. They are human beings and are the subject of their own rights. The Convention offers the vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development.

Children living in poor developing countries have the same rights as children living in wealthy developed countries. The Convention places equal emphasis on all of the rights of the children. There is no such thing as a 'small' right and no hierarchy of human rights. All the rights enumerated in the Convention – the civil and political rights as well as the economic, social and cultural rights – are indivisible and interrelated, with a focus on the child as a whole.

The Convention on the Rights of Child outlines, in its first 41 articles, the human rights to be respected and protected for every child under the age of 18 years and requires that these rights be implemented in the light of the Convention's guiding principles. Articles 42-45 cover the obligation of the State Parties to disseminate the Convention's principles and provisions to adults and children, the implementation of the Convention and

monitoring of progress towards the realization of child rights through State Parties' obligations and the reporting responsibilities of State Parties. The final Clauses (Articles 46-54) cover the processes of accession and ratification by State Parties, the Convention's entry into force and the depositary function of the Secretary General of the United Nations. In May 2000, two Optional Protocols to the Convention were adopted by the General Assembly.

## **2. Guiding Principles**

The underlying values or 'guiding principles' of the Convention guide the way each right is to be fulfilled and respected and serve as a constant reference for the implementation and monitoring of children's rights. The Convention's four guiding principles are as follows:

- a. Non-discrimination (Article 2)
- b. Best interest of the child (Article 3)
- c. Survival and development (Article 6)
- d. Participation (Article 12)

Similarly, the Preamble of the Convention recognizes the following fundamental principles, which could be used as an aid to the interpretation of the Convention:

- 1) Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- 2) The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding;
- 3) The child should be fully prepared to live an individual life in the Society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of

peace, dignity, tolerance, freedom, equality and solidarity;

- 4) The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth;
- 5) The traditions and cultural values of each People have importance for the protection and harmonious development of the child.

### **3. Definition of Child**

The Convention on the Rights of the Child defines as children all human beings under the age of 18, unless the relevant national laws recognize an earlier age of majority. The Convention emphasizes that States substituting an earlier age for specific purposes must do so in the context of the Convention's guiding principles.

While in some cases, States are simply obliged to be consistent in setting benchmark ages, for example, in defining the age for admission to employment or for completion of compulsory education, in other cases, the Convention sets a clear upper benchmark:

- a. Capital punishment or life imprisonment without the possibility of release is explicitly prohibited for those under age of 18 years; (Article 37)
- b. While recruitment in to the armed forces or direct participation in hostilities is expressly prohibited for those under age 15 according to article 38 of the Convention, an 'Optional Protocol to the Convention on the Involvement of Children in Armed Conflict' was adopted by the General Assembly on 25<sup>th</sup> May 2000, which raises to 18 years, the age of participation in hostilities and forced recruitment of children into armed forces.

States are also free to refer in national legislation to ages over 18 as the upper benchmark in defining the child. In such instances and others, where national or international law sets child rights standards that are higher than those in the Convention on the Rights of the Child, the higher standards always prevail. (Article 41)

#### **4. Rights guaranteed**

The Convention guarantee, the following forty rights:

- 1) No discrimination (Article 2)
- 2) The best interest of the child (Article 3)
- 3) Economic and social rights (Article 4)
- 4) Rights of parents (Article 5)
- 5) Survival and development (Article 6)
- 6) Rights and registration (Article 7)
- 7) Right to identify (Article 8)
- 8) No separation from parents (Article 9)
- 9) Right of re-union (Article 10)
- 10) Prevention from illicit transfer (Article 11)
- 11) Right of participation (Article 12)
- 12) Freedom of expression (Article 13)
- 13) Freedom of conscience (Article 14)
- 14) Freedom of association and assembly (Article 15)
- 15) Right to privacy and family (Article 16)

- 16) Right to information (Article 17)
- 17) Common responsibilities of the parents (Article 18)
- 18) Protection against violence (Article 19)
- 19) Special protection (Article 20)
- 20) Adoption (Article 21)
- 21) Rights of refugee (Article 22)
- 22) Rights of the disabled (Article 23)
- 23) Health rights (Article 24)
- 24) Periodic review of treatment (Article 25)
- 25) Social security (Article 26)
- 26) Adequate standard of living (Article 27)
- 27) Rights to education (Article 28)
- 28) Rights to purposive education (Article 29)
- 29) Rights of minority child (Article 30)
- 30) Right to rest and leisure (Article 31)
- 31) Protection from economic exploitation (Article 32)
- 32) Protection from drugs (Article 33)
- 33) Protection from sexual exploitation (Article 34)
- 34) Protection from abduction and sale (Article 35)
- 35) Protection from exploitation (Article 36)

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|---------------------------------------|--------------|
| 36) Protection from inhuman treatment | (Article 37) |
| 37) Protection in armed conflicts     | (Article 38) |
| 38) Recovery and reintegration        | (Article 39) |
| 39) Protection of law                 | (Article 40) |
| 40) Protection of conducive rights    | (Article 41) |

### **1) No Discrimination**

The governments are obliged to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. They shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **2) Best interest of Child**

'The best interest of the child' shall be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The governments shall have to take all appropriate legislative and administrative measures to ensure the child such protection and care as is necessary for his or her well-being. The governments have to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities.

### **3) Economic and Social Rights**

The convention directs State Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present for the implementation of the rights recognized in the present convention. With regard to economic, social and cultural rights, the State Parties have to undertake such measure to the maximum extent of their available resources and, where needed, within framework of international cooperation.

### **4) Rights of Parents**

The Convention respects the responsibilities, rights and duties of parents, or the members of the extended family or community, legal guardians or other persons legally responsible for the child (where applicable), as provided for by local custom, to provide an appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. These rights and duties should be in a manner consistent with the evolving capacities of the child.

### **5) Survival and Development**

Every child has the inherent right to life. The States Parties have to ensure to the maximum extent possible the survival and development of the child.

### **6) Name and Registration**

Every child has the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. Every child shall be registered immediately after birth. The State Parties have to ensure the implementation of these rights in accordance with their national laws and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be refugee or stateless.



**7) Right to Identity**

Every child has right to preserve his or her identity, including nationality, name and family relations, as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

**8) No separation from Parents**

The child shall not be separated from his or her parents against their will. The competent authorities can determine, in accordance with applicable laws and procedures, that such separation is necessary for the best interests of the child. This determination by the authorities should be subject to judicial review by the competent courts. In any proceedings where the competent authorities are determining the separation, all interested Parties shall be given an opportunity to participate in the proceedings and make their views known.

The State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis. Where such separation results from any action initiated by a State Party, such as detention, imprisonment, exile, deportation or death of one or both parents of the child, it shall, upon request provide the parents, the child or another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family.

**9) Right of re-union**

Every child or parents have right to enter or leave a State Party for the purpose of family reunification and the State Party shall deal with such application in a positive,

humane and expeditious manner. The State Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. Furthermore, a child whose parents reside in different States shall have the right to maintain on a regular basis, personal relations and direct contacts with both parents. The State Parties shall respect the right of the child and his or her parents to leave any country for contact. The right to leave any country shall be subject only to such restrictions as are prescribed by law of the land and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

**10) Prevention from illicit transfer**

The State Parties shall take measures to combat the illicit transfer and non-return of children abroad. For this purpose, the State Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

**11) Right of participation**

The State Parties shall assure to the child, who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child. The views of the child should be given due weight in accordance with the age and maturity of the child. The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.

**12) Freedom of expression**

Every child has 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 print, in the form of art, or through any other media of the child's choice. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals.

### **13) Freedom of conscience**

Every child has right to freedom of thought, conscience and religion. However, the parents and when applicable legal guardians have right to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. These rights can be subject only to such limitations as are prescribed by Law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

### **14) Freedom of association and assembly**

Every child has right to freedom of association and to freedom of peaceful assembly. Nobody can impose restrictions on the exercise of these rights other than those imposed in conformity with the Law and which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

### **15) Right to privacy and family**

Every child has right to privacy, family home or free correspondence. No child shall be subjected to arbitrary or unlawful interference with his or her privacy,

family, home or correspondence or to unlawful attacks on his or her honor and reputation.

#### **16) Right to information**

The child has right to access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. For this purpose, State Parties shall encourage the mass media to disseminate information and material of social and cultural benefits to the child. There should be international cooperation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources. Production and dissemination of children's books should be encouraged. The State should encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.

#### **17) Common responsibilities of parents**

Both the parents have common responsibilities for the upbringing and development of the child. Parents or, as the as may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. The State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. They shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

**18) Protection against violence**

The child has to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. The State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child. Such protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child and for identification, reporting, referral, investigation, treatment and following up of instances of child maltreatment, and, as appropriate, for judicial involvement.

**19) Special protection**

The child who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the State that should ensure alternative care for such a child. Such care could include, inter alia, foster placement, Kafalah of Islamic Law, adoption or, if necessary, placement in suitable institution for the care of children. When considering solutions, due regard shall be paid to the child's ethnic, religious, cultural and linguistic background.

**20) Adoption**

The State Parties recognize and/or permit the system of adoption shall ensure that the best interest of the child shall be the paramount consideration in the adoption.

They shall ensure that the adoption of a child is authorized only by competent authority that shall determine in accordance with applicable law and reliable and relevant information. They should also ensure that the child by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption and the placement does not result in improper financial gain for those involved in it.

**21) Rights of refugee**

The child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law, shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights under the Law. The State Parties shall provide cooperation in any efforts by the United Nations or other organizations to protect and assist such a child.

**22) Rights of the disabled**

The mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilities the child's active participation in the community. They have right to appropriate special care to be provided by the State.

The State Parties shall promote the exchange of appropriate information in the fields of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling State Parties to improve their capabilities and skills and to widen their experiences in these areas. In this regard, particular account shall be taken of the needs of developing countries.

**23) Health rights**

The child has right to the enjoyment of the highest attainable standards of health and to facilities for the treatment of illness and rehabilitation of health. The State shall take appropriate measures: (a) to diminish infant and child mortality; (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) to combat disease and malnutrition; (d) to ensure appropriate pre-natal and post-natal health care for mothers; (e) to ensure that parents have basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) to develop preventive health care, guidance for parents, and family planning education and services; and (g) to abolish traditional practices prejudicial to the health of children.

**24) Periodic review of treatment**

The child, who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, has a right to a periodic review of the treatment and all other circumstances relevant to his or her placement.

**25) Social security**

Every child has the right to benefit from social security, including social insurance and State shall take the necessary measures to achieve the full realization of this right in accordance with their national Law. The benefits should be granted, taking into account the resources and the circumstances of the child and person having responsibility for the maintenance of the child and person having responsibility for the maintenance of the child, as well as other relevant considerations.

**26) Adequate standard of living**

Every child has right to a standard of living adequate for his physical, mental, spiritual, moral and social development. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. The State in accordance with means, shall take appropriate measures to assist parents and others responsible for the child to implement this right. The State shall also take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both, within the State and from abroad.

**27) Right to education**

The child has right to education and the State, with a view to achieving this right progressively and on the basis of equal opportunity, shall: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education including general and vocational education; (c) make educational and vocational information and guidance available and accessible to all children; (d) take measures to encourage regular attendance at school and the reduction of drop out rates; and (e) take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the Convention.

**28) Right to purposive education**

The child has a right not only to education but to a meaningful education which shall be directed to: (a) the development of the child's personality, talents and mental



and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living and the country from which he or she may originate, and for civilizations different from his or her own; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all people, ethnic, national and religious groups and persons of indigenous origin; and (e) the development of respect for the natural environment.

**29) Rights of minority child**

The child belonging to ethnic, religious or linguistic minorities or persons of indigenous origin shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

**30) Right to rest and leisure**

The child has right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. The State shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

**31) Protection from economic exploitation**

The child has a right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. For this purpose, the State Party shall take legislative, administrative, social and educational measures to provide for: (a) a minimum age or minimum wages for admission to employment; (b) appropriate regulation of the hours and conditions of employment; (c) appropriate penalties or other sanctions to ensure these measures etc.

**32) Protection from drugs**

The State Parties are obliged to take all appropriate measures, including legislative, administrative, social and educational, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international Treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

**33) Protection from sexual exploitation**

The child has a right of protection from all forms of sexual exploitation and sexual abuse. For this purpose, the State Parties shall have to take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

**34) Protection from abduction and sale**

The State Parties are bound to take all appropriate national, bilateral and multilateral measures to prevent the

abduction of, the sale of, or trafficking in, children for any purpose or in any form.

**35) Protection from exploitation**

The child has a right of protection against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**36) Protection from inhuman treatment**

Every child has right to be protected from torture or other cruel, inhuman or degrading treatment or punishment. Capital punishment or life imprisonment without possibility of release cannot be imposed for offences committed by the child.

The child cannot be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the Law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Every child deprived of liberty should be treated with humanity and in a manner, which takes into account the needs of persons of his or her age. Every child deprived of liberty should be separated from adults unless it is considered in the child's best interests not to do so. The child shall have the right to maintain contact with his or her family.

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before an independent court or impartial authority.

**37) Protection in armed conflicts**

The rules of International Humanitarian Law applicable to the children in armed conflicts should be

respected. The children who have not attained the age of fifteen years cannot take a direct part in hostilities. Any child who has not attained the age of fifteen years cannot be recruited into the armed forces.

### **38) Recovery and reintegration**

It is the duty of State to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel inhuman or degrading treatment or punishment or armed conflicts. Such recovery and reintegration shall take place in an environment, which fosters health, self-respect and dignity of the child.

### **39) Protection of law**

Every child alleged as accused of or recognized as having infringed the Penal Law has a right to be treated in a manner consistent with the promotion of the child's sense of dignity and which takes into account the child's age and the desirability of promoting the child's reintegration in society.

Every such child shall: (i) be presumed innocent until proven guilty according to Law; (ii) be informed promptly the charges against him or her, and to have legal or other appropriate assistance in the preparation of his or her defence; (iii) have right that the matter be determined without delay by a competent and independent judicial body in a fair hearing according to Law; (iv) not be compelled to give testimony or to confess guilt; (v) have right to an appeal to a higher competent, independent and impartial authority or judicial body according to Law; and (vi) have free assistance of an interpreter if the child cannot understand or speak the language used.

A variety of dispositions, such as care, guidance and supersession orders, counseling, probation, foster care,

education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate, both to their circumstances and the offence.

**40) Protection of conducive rights**

These rights enshrined in the Convention shall not affect any provisions which are more conducive to the realization of the rights of child and which may be contained in: (a) the Law of a State Party, or (b) International Law in force for that state.

## Chapter Thirteen

# INTERNATIONAL LABOUR STANDARDS

### 1. Introduction

The World Commission on the Social Dimension of Globalization says that "The rules of the global economy should be aimed at improving the rights, livelihoods, security, and opportunities of people, families and communities around the world."<sup>1</sup> For this lofty objective, the International Labour Organization has developed a system of international labour standards that aim at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity.

Globalization has created great opportunities and benefits for many, yet at the same time hundreds of millions of workers and employers have had to face new economic and social challenges. Because of the globalized economy workers and enterprises have shifted to new locations. It has also resulted in the sudden accumulation or flight of capital, and caused financial instability in certain regions. In 2001, it was estimated that virtually half of the world's population survived on US\$2 or less per day, while some 1.1 billion people, or 21% of the world's population, were living on US\$1 or less per day. Even in 20 industrialized countries, over 10% of the

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<sup>1</sup> ILO: *A Fair Globalization: Creating opportunities for all*, Report of the World Commission on the Social Dimension of Globalization (Geneva, 2004), p. 143.

population on average was living below the poverty line in the mid-1990s.

Similarly, inequality within many countries and between the world's richest and poorest nations has also grown exponentially over the last few decades. In 1960, the income gap between the wealthiest and the poorest fifth of the world's population was 30 to 1. By 1999, it had increased to 74 to 1. In 1995, average GDP per capita in the richest 20 countries was 37 times the average in the poorest 20 - a gap that doubled in 40 years<sup>1</sup>.

In 1919, the International Labour Organization (ILO) was created in recognition of the fact that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled." To tackle this problem, the ILO established System of International Labour standards (ILS) - international conventions and recommendations drawn up by representatives of governments, employers and workers from around the world - covering all matters related to workplace.

## 2. What is ILS?

The ILSs are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and these set out basic principles and rights at work. They are either *conventions*, (legally binding international treaties), or *recommendations*, which serve as non-binding guidelines. Recommendations may be independent of any

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<sup>1</sup> W. Sengenberger: *Globalization and Social Progress: the role and impact of international labour standards* (Bonn. Friedrich-Ebert-Stiftung, 2002), p.20

convention.

The conventions and recommendations are drawn up by representatives of governments, employers and workers and are adopted at the ILO's annual International Labour Conference. Once a standard is adopted, member states are asked to *submit* them to their competent authority (normally the parliament or cabinet) for consideration. In the case of conventions, this means consideration for *ratification*. If a convention is ratified, it generally comes into force for that country one year after the date of ratification. Ratifying countries are bound to applying the convention in national law and practice and reporting on its application at regular intervals to ILO. Representation and complaint procedures can be initiated against countries for violations of a convention they have ratified.

### 3. Benefits of International Labour Standards

The benefits of the ILS include:

- a. **A path to decent work:** ILS are first and foremost about the development of people as human beings. The Declaration of Philadelphia of 1944 recognized that "labour is not a commodity". Work is part of everyone's daily life and is crucial to a person's life, dignity, well-being and development as a human being. Therefore, work shall be in freedom, safety and dignity and ILS are there to ensure that it remains focused on improving human life and dignity.
- b. **Framework for fair and stable globalization:** having opportunity of decent work in the globalized economy requires action at the international level. The ILO contributes to this legal framework by elaborating and promoting international labour



standards aimed at making sure that economic growth and development go along with the creation of decent work.

- c. **A level playing field:** ILS ensures a level playing field in the global economy. It helps governments and employers to avoid the temptation of lowering labour standards in the belief that this could give them a greater comparative advantage in international trade.
- d. **A means of improving economic performance:** growing research indicates that compliance with ILS often accompanies improvements in productivity and economic performance as higher wages and better working conditions/ standards and respect for equality translate into better and more satisfied workers and lower turnover of staff. Investment in vocational training results in a better-trained workforce and higher employment levels. Safety standards can reduce costly accidents and health care costs.
- e. **A safety net in times of economic crisis:** any economy can experience unforeseen economic downturns e.g. Asian financial crisis of 1997. An ILO study concludes that strengthening social dialogue, freedom of association, and social protection systems in the region would provide better safeguards against such economic downturns.

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<sup>1</sup> E. Lee: *The Asian financial crisis: the challenge for social policy* (Geneva, ILO, 1998)

- f. **A strategy for reducing poverty: an economy** governed by a fair set of rules and institutions is more efficient and brings benefit to everyone. Fair labour practices set out in ILS and applied through a national legal system ensure an efficient and stable labour market for workers and employers alike. The freedom of association, social protection, occupational safety and health, vocational training, and other measures required by ILS have proved to be effective strategies in reducing poverty and bringing workers into the formal economy.
  
- g. **The sum of international experience and knowledge:** ILS represent the international consensus on how a particular labour problem could be tackled at the global level and reflect knowledge and experience from all corners of the world and all can benefit from this knowledge by incorporating the standards in their domestic framework.

#### **4. Fundamental conventions**

The ILO has identified the following eight conventions as 'fundamental' or 'core' conventions:

##### **1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (C 87)**

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. "Recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;
- b. "Freedom of expression and of association are essential to sustained progress";
- c. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization

- concerned, to join organisations of their own choosing without previous authorization.
- d. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.
  - e. The public authorities shall refrain from any interference, which would restrict this right or impede the lawful exercise of these rights.
  - f. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.
  - g. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organization, federation or confederation shall have the right to affiliate with international organisations of workers and employers.
  - h. Workers and employers and their respective organisations shall respect the law of the land.
  - i. The law of the land shall not impair the guarantees provided for in this Convention.
  - j. National laws or regulations shall determine the matters of the armed forces and the police.
  - k. Each Member shall take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

**2) Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (C 98)**

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. Workers shall enjoy adequate protection against

- acts denoting discrimination against workers' right to organize.
- b. Such protection shall apply more particularly in respect of acts calculated to--
    - i. Make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
    - ii. Cause the dismissal of or otherwise a worker against an account of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.
  - c. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
  - d. Acts, designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, are prohibited.
  - e. Machinery, appropriate to national conditions, shall be established where necessary, for the purpose of ensuring respect for the right to organize.
  - f. Measures appropriate to national conditions shall be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.
  - g. National laws or regulations shall determine the matters of the armed forces, public servants and the police.

**3) Convention concerning Forced or Compulsory Labour (C 29)**

The fundamental principles underlying this Convention and the rights guaranteed include:

The term forced or compulsory labour shall mean all work or service, which is exacted, from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

The term forced or compulsory labour shall not include--

- (a) Any work or service exacted by virtue of compulsory military service laws for work of a purely military character;
- (b) Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or a threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

- (e) Minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community.

Each Member undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

Recourse to forced or compulsory labour may be had, during the transitional period of five years, for public purposes only and as an exceptional measure, subject to the conditions and guarantees hereinafter provided.

The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.

Where concessions exist containing provisions involving such forced or compulsory labour, such provisions shall be rescinded as soon as possible.

The responsibility for every decision to have recourse to forced or compulsory labour shall rest with the highest civil authority in the territory concerned.

Any authority competent to exact forced or compulsory labour shall, before deciding to have recourse to such labour, satisfy itself- (a) that the work to be done or the service to be rendered is of important direct interest for the community called upon to do work or render the service; (b) that the work or service is of present or imminent necessity; (c) that it has been impossible to obtain voluntary labour for carrying out the work or rendering the service by the offer of rates of wages and conditions of labour not less favourable than those prevailing in the area concerned for similar work or service; and (d) that the work or service will not lay too

heavy a burden upon the present population, having regard to the labour available and its capacity to undertake the work.

Forced or compulsory labour exacted as a tax and forced or compulsory labour to which recourse is hard for the execution of public works by chiefs who exercise administrative functions, shall be progressively abolished.

Only adult, able-bodied males, who are of an apparent age of not less than 18 and not more than 45 years, may be called upon for forced or compulsory labour.

The maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months shall not exceed sixty days, including the time spent in going to and from the place of work.

The normal working hours of any person from whom forced or compulsory labour is exacted shall be the same as those prevailing in the case of voluntary labour, and the hours worked in excess of the normal working hours shall be remunerated at the rates prevailing in the case of overtime for voluntary labour.

A weekly day of rest shall be granted to all persons from whom forced or compulsory labour of any kind is exacted.

Any laws or regulations relating to workmen's compensation for accidents or sickness and any laws or regulations providing compensation for the dependents of deceased or incapacitated workers shall be equally applicable to persons from whom forced or compulsory labour is exacted and to voluntary workers.

The persons from whom forced or compulsory labour is exacted shall not be transferred to districts where the food and climate differ so considerably from those to which they have been accustomed as to endanger their health.

Before permitting recourse to forced or compulsory labour for works of construction or maintenance which entail the workers remaining at the workplaces for considerable periods, the competent authority shall satisfy itself that (i) all necessary measures are taken to safeguard the health of the workers; (ii) definite arrangements are made to ensure the subsistence of the families of the workers including facilitating the remittances;

Forced or compulsory labour shall not be used for work underground in mines.

#### **4) Abolition of Forced Labour Convention, 1957 (C 105)**

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. Each Member undertakes to suppress and not to make use of any form of forced or compulsory labour:
  - i. As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
  - ii. As a method of mobilizing and using labour for purposes of economic development;
  - iii. As a means of labour discipline;
  - iv. As a punishment for having participated in strikes;
  - v. As a means of racial, social, national or religious discrimination;



- b. Each Member undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.

**5) Convention concerning Minimum Age for Admission to Employment, 1973 (C 138)**

The fundamental rights in the Convention are:

- a. Each Member undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons;
- b. Each Member shall specify a minimum age for admission to employment or work within its territory and on means of transport registered in its territory;
- c. The minimum age shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.
- d. A Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, initially specify a minimum age of 14 years.
- e. The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years.
- f. National laws or regulations may, after consultation with the organisations of employers and workers concerned, authorize employment or work as from the age of 16 years on condition that the health,

safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training.

- g. In so far as necessary, the competent authority, after consultation with the organisations of employers and workers concerned, may exclude from the application of this Convention limited categories of employment or work in respect of which special and substantial problems of application arise.
- h. Such member shall list in its first report on the application of the Convention submitted to ILO any categories which may have been excluded, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice in respect of the categories excluded and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.
- i. A Member whose economy and administrative facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, initially limit the scope of application of this Convention.
- j. The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.
- k. This Convention does not apply to work done by children and young persons in schools for general,

vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, and is an integral part of:

- a) A course of education or training for which a school or training institution is primarily responsible;
  - b) A program of training mainly or entirely in an undertaking, which program has been approved by the competent authority; or
  - c) A program of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.
- l. National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is:
- a) Not likely to be harmful to their health or development; and
  - b) Not such as to prejudice their attendance at school, their participation in vocational orientation or training programs.
- m. After consultation with the organisations of employers and workers concerned, the competent authority may, by conditional permits granted in individual cases, allow exceptions to the prohibition of employment or work, for such purposes as participation in artistic performances.
- n. All necessary measures, including the provision of appropriate penalties, shall be taken by the competent authority to ensure the effective

- enforcement of the provisions of this Convention.
- o. National laws or regulations or the competent authority shall define the persons responsible for compliance with the provisions giving effect to the Convention.
  - p. National laws or regulations or the competent authority shall prescribe the registers or other documents which shall be kept and made available by the employer; such registers or documents shall contain the names and ages or dates of birth, duly certified wherever possible, of persons whom he employs or who work for him and who are less than 18 years of age.
  - q. This Convention revises, on the terms set forth in this Article, many earlier Conventions.

**6) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182)**

The fundamental principles and rights in the Convention are:

- a. There is a need to adopt new instruments for the prohibition and elimination of the worst forms of child labour. The term **child** shall apply to all persons under the age of 18.
- b. The effective elimination of the worst forms of child labour requires immediate and comprehensive action;
- c. Child labour, to a great extent, is caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education;
- d. For the purposes of this Convention, the term the worst forms of child labour comprises:
  - i. all forms of slavery or practices similar to

- slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- ii. the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
  - iii. the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
  - iv. work, which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. Such work shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards.
- c. The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist and the list of the types of work so determined shall be periodically examined and revised as necessary.
  - f. Each Member shall, after consultation with employers' and workers' organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.
  - g. Each Member shall take immediate and effective

- measures, including penal sanctions, to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.
- h. Each Member shall design and implement programs of action to eliminate as a priority the worst forms of child labour.
  - i. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the prohibition.
  - j. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:
    - i. prevent the engagement of children in the worst forms of child labour;
    - ii. provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;
    - iii. ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;
    - iv. identify and reach out to children at special risk; and
    - v. take account of the special situation of girls.

**7) Equal Remuneration Convention, 1951 (C 100)**

The fundamental principles and rights in the Convention are:

- a. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
- b. The term *remuneration* includes the ordinary, basic

- or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- c. **The term equal remuneration for men and women workers for work of equal value** refers to rates of remuneration established without discrimination based on sex.
- d. These principle may be applied by means of:
- i. national laws or regulations;
  - ii. legally established or recognized machinery for wage determination;
  - iii. collective agreements between employers and workers; or
  - iv. combination of these various means.
- e. Measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration and by collective agreements.
- f. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

**8) Discrimination (Employment and Occupation) Convention, 1958 (C 111)**

The fundamental principles and rights in the Convention are:

- a. All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-

- being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- b. Discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights;
  - c. The term discrimination includes:
    - i. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
    - ii. Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations;
  - d. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
  - e. The terms 'employment and occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.
  - f. Each Member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination.
  - g. Each Member undertakes, by methods appropriate to national conditions and practice, to:



- i. Seek the co-operation of employers' and workers' organisations in promoting the acceptance and observance of this policy;
- ii. Enact such legislation and to promote such educational programs as may be calculated to secure the acceptance and observance of the policy;
- iii. Repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- iv. Pursue the policy in respect of employment under the direct control of a national authority;
- v. Ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- vi. Indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.
- vii. Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.
- viii. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

- ix. Any Member may, after consultation with representative employers' and workers' organisations, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

## Chapter Fourteen

### BEYOND CHAINS

Although the world is no longer blighted by the forms of slavery which were practiced openly in many countries during the nineteenth and even early twentieth century, slavery nevertheless continues to be reported in a wide range of forms. However, national laws, ban slavery and the prohibition is enshrined in international treaties, notably the 1948 Universal Declaration of Human Rights, Article 4 of which guarantees that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Yet slavery still occurs and humiliation associated with slavery has not disappeared. Contemporary slaves still work in the rural fields as well as in the urban industries.

The debates, which preceded the adoption of the two main international conventions against slavery, the first in 1926 and the second in 1956, provide ample information about the existing forms of servitude, which the international community wished to prohibit. Many states tend to assume now that there is no need for antislavery laws. In practice, there is a pressing need for laws and action to ensure that new forms of exploitation and oppression do not take the form of slavery.

#### 1. Definition

A question arises, what is slavery? When it adopted an international treaty prohibiting slavery almost 60 years ago, the League of Nations, gave the following definition of slavery: 'Slavery is the status or condition of a person

over whom any or all of the powers attaching to the right of ownership are exercised.’<sup>1</sup>

This definition of slavery makes clear that the international community was also determined to abolish a wide range of other practices which involved partial ‘powers’ of ownership and were considered to be ‘analogous to slavery’ even though they had not previously been defined as slavery. These included debt bondage, false adoption,<sup>2</sup> servitude imposed by serfdom or caste, and domestic slavery. Some of these were the subject of explicit prohibition by the United Nations 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

The four ‘institutions and practices similar to slavery’ which were banned by the 1956 Supplementary Convention, which still persists and affect millions of victims, are: debt bondage, serfdom, servile marriage, and child labour. Finally, three other forms of servitude are described which exhibit many of the characteristics of slavery: servile domestic work, forced labour and servitude for ritual or religious purposes. Governments are under an obligation to take urgent remedial action to prevent these if they amount to slavery-like practices, as is often the case.

## 2. Traditional ‘Chattel’ Slavery

Countries experiencing resurgence in slavery are mostly those affected by armed conflict somewhere in their territory. In the areas of conflict, the militias are able to force people to work for them unpaid<sup>3</sup> without fear of retribution. However, there have also been recent reports of

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<sup>1</sup> Article 1(1) of International Slavery Convention, 1926

<sup>2</sup> of children to work as domestic servants

<sup>3</sup> to perform forced labour

Government soldiers forcing civilians to work as slaves, outside any legal framework.

There are several countries in which slavery has been formally abolished relatively recently but due to ineffective governmental measures, the former slaves and their families are still obliged to provide services to a former owner or owner's family. Evidently in such cases, it is important that the state concerned should be reporting on a regular basis to the international community about the progress made towards the complete eradication of all slavery-like practices. However, neither the Conventions require States Parties to report on measures taken against slavery, nor have they established any form of permanent treaty-monitoring committees.<sup>1</sup> As a result, it is only if governments or non-government organizations choose to present information to the annual meeting of the United Nations Working Group on Contemporary Forms of Slavery, which was established in 1974 and which reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (and indirectly to the United Nations Commission on Human rights), that the international community becomes aware of persisting patterns of slavery or slavery-like practices.

### 3. Bonded Labour

The Chief Justice of a country in which debt bondage, also known as 'bonded labour' still occurs, has graphically depicted it in the following terms: 'Bonded labourers' are non-beings, exiles of Civilization, living a life worse than that of animals, for the animals are at least free to roam about as they like...this system, under which

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<sup>1</sup> in contrast to recently adopted UN Human Rights Instruments

one person can be bonded to provide labour for another for years and years until an alleged debt is supposed to be wiped out, which never seems to happen during the lifetime of the bonded labourer, is totally incompatible with the new egalitarian socio-economic order which we have promised to build..'

The Article 1 of 1956 Supplementary Convention does not prohibit people from taking loans in money or in kind and then repaying their debt by working for the person who has given the loan. However, it does forbid any cases of 'debt bondage' in which the precise terms of the repayment have not been specified<sup>1</sup> or in which work done by the debtor is not rewarded at least at the same rate paid for other similar work.

In cases of chronic bondage, debts are inherited from one generation to the next, maintaining members of a family in permanent bondage in return for an old loan, the details of which have long been forgotten. In some cases, employers who are owed money 'sell' the debt to a new employer; the difference between such transactions and the slave trade is one of semantics rather than substance.

Nowadays there are also many cases of shorter-term bondage. For example migrant workers who agree to travel to another province or country in order to work, may then discover that they are obliged to work unpaid because their wages must be used to repay the costs of their travel, accommodation and meals. Loans are accepted by people who work not only on farms but in a wide variety of low status manual jobs, for example in stone quarries, at brick or charcoal kilns, at looms making carpets or cloth, preparing fish or other sea-food for freezing, and making a variety of articles out of glass.

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<sup>1</sup> so the person making loan can potentially add unspecified interest or other costs to the loan

In many cases, entire families have to work <sup>1</sup>to pay off debt. In other cases, parents 'pawn' their own children, sometimes from the age of as little as four or five in return for loans which they never repay; the child consequently remains a bonded labourer for the rest of his or her childhood.

#### 4. Serfdom

Article 1 of the Supplementary Convention also prohibits

(b) Serfdom That is to say the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.

It is not just debts which tie farmers to a landlord. In many countries, individuals, families or entire social groups have traditionally been obliged to work for others for little or no reward. Although this status usually has no basis in law, the practices nevertheless persist and are frequently enforced with violence at local level. For example, many agricultural workers are not able to get access to work or to land on which to produce food for their families unless they agree to work on a permanent basis for richer landlords, either on their farms or in the homes. They have to accept a form of serf or servile status.

Elsewhere, the same sort of servile status, although formally abolished in law, receives legitimacy through local religious beliefs. This is particularly the case in countries with caste systems where at village level

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<sup>1</sup> for example in stone quarries or at brick kilns

particular families are obliged both by tradition and sometimes by violent coercion to work unpaid as sweepers, cleaners or in various forms of agricultural work. In extreme cases, the services which workers must provide include domestic works both during the day and at night, and on some occasions the sexual services of women workers or the wives of male workers.

The Governments of countries in which such practices persist are obliged by the Supplementary Convention to take action to end them, not just in law (for example, by declaring caste or serf status to be abolished), but also in practice.

### **5. Servile Marriage**

Supplementary Convention prohibits:

Any institution or practice whereby,

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money to her parents, guardian, family or any other person or group, or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person ...<sup>1</sup>

This prohibition affects a wide range of practices, which continue to be reported in the 1990s. Taken together with other international agreements, this Convention imposes significant obligations on governments to make changes to both the law and practices in their countries not

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<sup>1</sup> Article 1



only those directly concerning marriage, but also others which have an indirect effect.

A typical case in which this Article of the Supplementary Convention is violated occurs when a 12 years old girl is told that her family has arranged her marriage to a 60-years man. Ostensibly, she has right to refuse, but in practice she has no opportunity to exercise that right and is unaware that she can do so. The marriage is considered to constitute 'servile marriage' and to be a form of slavery if a payment of any kind is made for the girl that exceeds the amount of gifts or money customarily exchanged at the time of marriage in the country or culture concerned.

In many cultures, it is traditional for money or goods to exchange hands at the time of marriage. In some cases, it is the husband or his family that pays bride-wealth to the bride's family. This practice can evidently deteriorate into a form of 'purchase' for the bride and her services, and as such is prohibited by the Supplementary Convention. In other cultures, it is the bride's family which must provide money or goods to the husband or his family and their failure to provide large enough amounts sometimes provokes acts of violence against the newly-married wife.

In order to reduce the opportunities for servile marriage of this sort to occur, the Article 2 of the Supplementary Convention also imposes an obligation on States Parties to take other positive action: 'with a view to bringing to an end the institutions and practices mentioned in Article 1.(c) of this Convention, the State Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to marriage may be freely expressed in the presence of a competent

civil or religious authority and to encourage the registration of marriage may be freely expressed in the presence of a competent civil or religious authority and to encourage the registration of marriages'.<sup>1</sup>

In practice, many states, which have acceded to the Supplementary Convention, have not yet implemented Article 2. Subsequent international instruments have reinforced the obligation that states should make the registration of marriage compulsory. For example, the Convention on the Elimination of All forms of Discrimination Against Women, adopted by the UN General Assembly in 1979, stipulates that: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.<sup>2</sup>

The final part of Article 1 of the supplementary Convention dealing with servile marriage becomes relevant when, just a few years after her marriage, the same young girl's older husband dies. In numerous countries, the young widow is 'inherited' by a male member of her husband's family, often a surviving brother. This practice is known as the 'levirate'. She is remarried whether or not she desires the new marriage and whether or not her new husband already has an existing wife. This form of inheritance is sometimes justified by those who practice it on the grounds that it ensures the widow is looked after and does not become destitute. However, she would only fall into destitution if she is already the victim of a servile marriage in which she is denied the right to property of her own or the opportunity to develop her own sources of livelihood.

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<sup>1</sup> Article 2 of the Supplementary Convention

<sup>2</sup> Article 16(2) of CEDAW

The practice of 'the levirate' is clearly condemned by the Supplementary Convention and the governments of states, which have ratified the Convention, are under an obligation to eliminate it. The Supplementary Convention is also quite categorical in banning any sale or transfer of a married woman by her husband or his family to a new husband in exchange for money or other goods.<sup>1</sup>

### 6. Child Labour

The supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery prohibits: 'any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour'.<sup>2</sup>

This is not a prohibition of all child labour for the emphasis is on preventing parents from passing their child on to another person (whether or not any money is exchanged) who effectively gains control of the child and the child's labour. The prohibition in the Supplementary Convention was designed among other things to prevent children from being exploited as domestic workers, either through the practice of 'sham adoption' (i.e. being nominally welcomed into a new household as a member of the family, when the real motive is to require the new member to work as an unpaid domestic servant).

Children's labour is also exploited in other ways that contravene the Supplementary Convention, as well as

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<sup>1</sup> Article 1© of the Supplementary Convention on the Abolition of Slavery

<sup>2</sup> Article 1(d) of the Supplementary Convention

other international human rights standards such as the United Nation's Convention on the Rights of the Child (1989). This Convention<sup>1</sup> contains clear principles to protect children from the exploitation of their labour. While children may work, the Convention stipulates that their jobs should not be 'hazardous' and should not 'interfere with [their] education' or 'harmful to the child's health or physical, mental, spiritual, moral or social development.' The priority due to primary education means that children below the age of 12 should not have jobs. Child labourers are routinely prevented from attending school, despite being of primary school age, and, in the case of child domestic workers, although there may be other children attending school in the household where they work.

In all cases, child labourers are dangerously vulnerable to physical abuse,<sup>2</sup> excessively long hours or being made to work in dangerous or cramped conditions. Girl domestic workers, in particular, are vulnerable to sexual abuse. Although many countries have laws regulating the hours or conditions for child labourers, employers often avoid visits by labour inspectors by claiming that children are working in 'cottage industries' or 'family units'.

Debt bondage, described above, affects many children as well as adults. Parents 'pawn' their own children, sometimes from the age of as little as four or five years, in return for loan, which they never repay. Often they are pawned to employers who stress the need for what they call the 'nimble fingers' of children to undertake particular forms of work, when in fact they are seeking a docile labour which can be coerced into obeying orders and is unable to defend itself or organize any collective action

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<sup>1</sup> Article 12 of the Convention on the Rights of the Child

<sup>2</sup> both beatings and sexual abuse

in its own defense. For example, a 10-year-old boy works 14 hours a day at a loom. At night he sleeps under the loom as his parents live hundreds of kilometers away. They sent him away to work in exchange for a loan, which will in theory be repaid out of his wages. He is no longer chained to the loom, as he was when, at the age of eight, he first started work and tried to escape.

## 7. Slavery like practices

### 1) Migrant Labour

Throughout the world domestic workers are generally afforded inadequate protection by the law as far as minimum wages or conditions are concerned, and some categories of domestic workers are subjected to slavery, particularly children and immigrants who work and live in the same house as their employer and are paid little or nothing for their work. Both are particularly vulnerable, being cut off both from their own families and from local society and the possible protection which social contacts or local institutions might provide. Case of enslaved domestic workers continues to be reported in developed countries – where servants are brought in from other countries, either legally or illegally, and then treated like slaves.

In many cases, domestic workers receive low wages or no wages at all, on the grounds that they receive food and lodging, but there is no attempt to ensure that this payment 'in kind' is worth as much as the monetary wages which workers would be paid for similar long hours in any other comparable sector. Their living condition, as well as conditions of work, are often extremely harsh, but are virtually never inspected by any independent authority.

Before both the Conventions against slavery were adopted, there were discussions about whether the

definition of slavery should explicitly prohibit domestic slavery or define the circumstances in which domestic work amounted to slavery. The conclusion, however, was that the general definition of slavery adopted in the 1926 Slavery Convention ('any or all of the powers attaching to the right of ownership') covered domestic workers along with all others.

## **2) Forced Labour**

'Forced labour' is not an alternative term for slavery, although confusion is sometimes created by implying that slavery is simply a category of forced labour. International standards adopted soon after the 1926 Slavery Convention prohibited the use of forced labour other than by the state, but recognized that the state was entitled to oblige people to undertake work of certain types and in some particular circumstances. Although the circumstances in which individual citizens can be obliged to perform forced labour are now clearly circumscribed, international standards recognize that states may make convicted prisoners perform forced labour and also allow states to require some or all of their citizens to perform compulsory military service.

In reality, political authorities, both government forces and other political movements, which exercise powers of coercion, are able to force individuals to work without payment, often in harsh or dangerous condition. Such cases have been reported recently mainly in countries affected by war or civil conflict, where forced labour is reported both in areas of fighting and elsewhere, with the typical image of a column of civilian porters carrying heavy loads of military equipment towards the battle-front, surrounded by armed men in uniform who threaten to shoot anyone who drops their load. Those enslaved in this way are often the weak or defenseless—refugees, members of ethnic groups and in the worst cases, they have been used

as 'human mine detectors' or arbitrarily killed by soldiers after working for them.

International Standards very strictly limit the use of Forced Labour and urge its total elimination. The Forced Labour Convention 1930 (NO. 29) was adopted on 28 June 1930 and entered into force by 1 May 1932. The Convention defines the term 'forced or compulsory labour' as 'all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' Nevertheless, the term 'forced or compulsory labour' shall not include:

- a. Any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- b. Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- c. Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- d. Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic disease, invasion by animals, insect or vegetable pests, and in general any circumstances that would endanger

the existence or the well-being of the whole or part of the population;

- e. Minor communal services of a kind, which, being performed by the members of the community in the direct interest of the said community can, therefore, be considered as normal civic obligations incumbent upon the members of the community<sup>1</sup>

The Convention obligates the States Parties to suppress the use of forced or compulsory labour in all its forms within the shortest possible<sup>2</sup> period. However, with a view to this complete suppression, recourse to force or compulsory labour may be had, during the transitional period, for public purposes only and as an exceptional measure, subject to certain conditions and guarantees. Furthermore, the competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations<sup>3</sup>. Most recently, the same ban on forced or compulsory labour has also been reiterated in the UN 1966 International Covenant on Civil and Political Rights<sup>4</sup>.

### **3) Slavery for Ritual or Religious Purposes**

The fundamental right to freedom of religious belief, guaranteed by Article 18 of the Universal Declaration of Human Rights, makes it sensitive to criticize any practices prescribed by religion or carried out in a religious context as violation of human rights. However, just as ritual killings have invariably been the subject of

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<sup>1</sup> (Article 2)

<sup>2</sup> (Article 3)

<sup>3</sup> (Article 4)

<sup>4</sup> (Article 8)



prohibition, so certain forms of servitude occur in a religious context, which constitute forms of slavery.

Some such cases also occur as a form of sacrifice: in an effort to atone for an act interpreted as a sin or offence against holy law, families offer one of their members to work unpaid for a religious institution. In several parts of the world, for example, girls or women are obliged to live and work in religious institutions and to provide sexual services to priests other on the pretext that such women are 'married' to a deity. In many cases, they perform other unpaid services, they are not free to change their place of residence or work, and often remain in servitude for many years and retain a distinct status for the rest of their lives.

In other cases, the students or followers of a religious teacher or leader work effectively in servitude, either forwarding all their earnings to their master, or working unpaid for long periods in return for religious instruction in an exploitative situation.

#### **4) Vulnerable Groups**

The following are groups which are particularly vulnerable and whose conditions of employment, therefore, require especial monitoring by the authorities of states, which are committed to preventing slavery:

##### **a. Women**

Women are vulnerable both because male employers can use physical force against them and because of the additional possibility of sexual abuse, there are cases where women are clearly forced to work as prostitutes, which evidently violates the Conventions against slavery.

**b. Children**

Children have already been mentioned above as a group, which is especially vulnerable, particularly when child labour occurs in conjunction with certain other practices, such as debt bondage, early marriage and domestic work. They too are vulnerable to physical abuse and intimidation and face the threat of sexual abuse.

**5) Migrant Workers**

These include both migrants who cross international frontiers to work and those who travel considerable distances within their own country. In both cases, they are deprived of the protection of their own families and others who know them. Those who enter foreign countries illegally to work are particularly at risk, because their illegal status usually puts them effectively beyond the protection of the law. However, people who migrate within their own countries are also at risk. For example, young people are told by recruiting agents that they will receive good pay elsewhere, but then find themselves locked into a factory and are not paid. A solution taken by some states to prevent such exploitation, at least at the inter-state level, has been to replace private recruitment agents by state run employment agencies.

**8. Groups Attributed Low Social Status**

In many parts of the world there are social groups, (defined by racial or ethnic origin, religion, class or caste) which for historical or cultural reasons are regarded by their fellow citizens as having near permanent servile status. They belong to distinct and powerless groups, and as a result can be exploited by others without fear of any consequences. In numerous cases, such groups are subjected to slavery or practices similar to slavery by owners who are frequently allied with those in power and thus able to stifle any complaints or threats of legal action.

### **1) Nomadic Groups**

The process of economic development has frequently led to pastoral and other nomadic groups moving into permanent settlements and abandoning their traditional economy. In such situations, where they have lost their traditional source of food and income, they have been particularly vulnerable to exploitation of their labour.

### **2) Indigenous Peoples**

Similarly, in many countries indigenous people have been prevented from maintaining their traditional economies, either because of government efforts to change local economy or because of the take-over by others of the land they use. Again, with no alternative sources of income, they enter the labour market and frequently become the victims of slavery-like practices.

In the cases outlined above, governments evidently have a responsibility under a variety of international human rights standards to ensure that particularly vulnerable groups are not subjected to discrimination, and have a particular responsibility under the Slavery Conventions to prevent them from being exploited by any slavery-like practices.<sup>1</sup>

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<sup>1</sup> This chapter has been prepared with help of material available at the official web site of Anti-Slavery International

## Chapter Fifteen

# RIGHT TO DEVELOPMENT

### 1. Context

The list of internationally recognized human rights is by no means exhaustive. Just as the British sociologist T.H. Marshall characterized the 18<sup>th</sup> century as the century of civil rights, the 19<sup>th</sup> century as that of political rights and the 20<sup>th</sup> century as that of social rights, so too some writers over the past two decades have been putting forward claims for some new rights e.g. third generation of solidarity rights, the right to development etc.<sup>1</sup>

According to Bedjaoui, the right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights. In short, it is a core right from which all other rights stem. The international dimension of the right to development is the right to equitable share in the economic and social well being of the world. It is the essential demand of the four fifth of the world's population that the fifth should no longer continue to build its wealth on their poverty.<sup>2</sup>

Ever since the first UN World Conference on Human Rights at Tehran in 1968, the relationship between human rights and development has occupied a prominent place in the international discourse on rights. Since 1977 the debate brings together several important themes e.g.

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<sup>1</sup> T. H. Marshall, *Citizenship and Social Class* 14 (1950)

<sup>2</sup> *The Right to Development in Bedjaoui, (ed.) International Law: Achievements and Prospects*, 1177 (1991), at p. 1182.

foundations of rights, priority to be accorded to the different rights, the link between human rights and democratic governance, the responsibility of international community towards states whose resources are inadequate, the effects of globalization on economy etc.

The concept of the right to development was first mooted in 1972. The UN Commission on Human Rights recognized it in 1977. In 1981 the debate was institutionalized through the establishment of a separate Working Group of Experts on the Right to Development. In 1986, the General Assembly adopted the Declaration on the Right to Development. This chronology of events is predated by the emergence of the Third World that led to the elevation of economic development goals to the top of international agenda. The Eastern European countries provided significant political support for all of these demands. The North, for its part, was anxious to insist that the development process and economic rights should be taken seriously but was not prepared to accept its implications on aid and trade.<sup>1</sup>

## **2. Legal Basis**

It is possible to think of different bases of the right to development as a collective right. The first possibility is to consider the right to development as the aggregate of social, economic and cultural rights of all the individuals constituting a collectivity. Another way is to approach it either as the economic dimension of (or inherent or built in) the right of self-determination or at least as a parallel right to self-determination. Some argue that satisfaction of the

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<sup>1</sup> Alston, Philips, 'Revitalizing United Nations Work on Human Rights and Development', 18 *Melb. U. L. Rev.* 216 (1991) at 218

collective right is a necessary condition, a condition precedent, for the materialization of the individual rights. Hence without self-determination and right to development, civil, political, social and economic rights of the people can not be realized.<sup>1</sup>

Bedjaoui considers it as a corollary of the right to life, the 'primary' and 'first' right that is independent both of international law and the municipal laws of states. Some lawyers consider the right to development to be a legal concept and principle enshrined in the UN Charter and finds its basis both in the preamble, in Article 1, paragraph 3, and, above all, in Article 55. Others argue that this right is founded on international solidarity based on international interdependence, the universal duty of every state to develop the world economy and the preservation of the human species.<sup>2</sup>

### **3. Content**

- (1) The right has several aspects, the most important and comprehensive of which is the right of each person ( or people) to choose freely its economic and social systems without outside interference or constraint of any kind and to determine, with equal freedom, its own model of development.
- (2) When the national control over economic planning is non-existent as it has been expropriated by foreign power, it is impossible to speak of sovereign equality of states or of state sovereignty without lapsing into fiction. There is thus a necessary relationship between authentic sovereignty and the right to development.

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<sup>1</sup> George Abi-Saab, *The Legal Formulation of a Right to Development*, in *Academy of International Law, The Right to Development at International Level* 159 (1980), at 163

<sup>2</sup> Bedjaoui, *op. cited.* At 1182

- (3) The right to development dictates that the people should in no case be deprived of its own means of subsistence.
- (4) The right to development can be stated as 'to each his due'. It means that the state seeking its own development is entitled to demand that all other states, the international community and international economic agents collectively do not take away from it what belongs to it and do not deprive it of what is or 'must be' its due in international trade. The states may claim a 'fair price' of its raw materials and for whatever it offers in its trade with the more developed countries. The claim of such a state is like this: 'before giving me charity or offering me your aid, give me my due. Perhaps I shall then have no need of your aid. Your charity is my own property that you are handing back to me in this way and, what is more, not all of it.'
- (5) The right to development includes 'to each according to his needs.' The relationship between the donor and the recipient states should be seen in terms of responsibility and reciprocal rights over goods that are considered belonging to all. There is no place in such analysis for 'charity' or the 'act of mercy.' The concept of charity gives place to that of need and justice.
- (6) 'To each according to his needs' means that the 'fair price' can not be tied to market mechanism, which can not achieve an equitable relationship between the producer and the consumer. The fair price should be calculated according to the general principle of responsibility towards the most needy countries. What belongs to the international community and is 'the common heritage of mankind' should be shared among

all states in accordance with the maxim 'to each according to his needs'.<sup>1</sup>

#### **4. The Declaration**

The General Assembly of the United Nations passed a Resolution<sup>2</sup> on the Right to Development. This was a great breakthrough in popularizing the concept of right to development. While adopting the Resolution, the General Assembly bore in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature. The General Assembly also recognized that development is a comprehensive economic, social and political process which aims at the constant improvement of the well being of nations and individuals on the basis of their meaningful participation in development and in the fair distribution of benefits. It would be pertinent to summarize some of the Articles of the Declaration. It encompasses all the points discussed above.

The right to development is an inalienable human right by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized. The right to development also implies the full realization of the right of people to self-determination which includes the exercise of their inalienable right to full sovereignty over their entire natural wealth and resources.<sup>3</sup>

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<sup>2</sup> Resolution No. 41/128 of 1986

<sup>3</sup> Article 1 of the Declaration



The human person is central subject of development and should be the active participant and beneficiary of the right to development. All human beings have a responsibility for development, which alone can ensure the free and complete fulfillment of the human beings and they should therefore promote and protect an appropriate political, social and economic order for development. And the states have right and duty to formulate appropriate national development policies that aim at the constant improvement of the well being of the entire population.<sup>1</sup>

The states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.<sup>2</sup>

States have the duty to take steps to formulate international development policies with a view to facilitating the full realization of the right to development. Effective international cooperation and action is required to provide the developing countries means and facilities to foster their comprehensive development.<sup>3</sup>

All human rights are indivisible and interdependent. All states should cooperate with a view to promoting universal respect for and observance of all human rights and should also take steps to eliminate obstacles to development resulting from failure to civil, political, economic, social and cultural rights.<sup>4</sup>

The states should undertake all necessary measures for the realization of the right to development and shall ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing,

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<sup>1</sup> Article 2 of the Declaration

<sup>2</sup> Article 3 of the declaration

<sup>3</sup> Article 4 of the Declaration

<sup>4</sup> Article 6 of the Declaration

employment and fair distribution in income. Women should also have an active role in the development process. Appropriate reforms should also be carried out with a view to eradicating all social injustices.<sup>1</sup>

All the aspects of the right to development, set forth here are indivisible and interdependent and each of them should be considered in the context of the whole.<sup>2</sup>

### 5. Needs v Rights

Do the economic needs and political rights represent a basic contradiction? This is altogether a wrong way to understand the forces of economic needs and the salience of political rights. The real issues involve taking note of extensive interconnection between the enjoyment of political rights and the appreciation of economic needs. The connection between rights and needs are not merely instrumental, they are also constitutive. The proper conceptualization of economic needs depends on open public debates and those public debates require political rights.

According to Amartya Sen the general theory of negative relationship between political liberty and economic prosperity had been articulated by Lee Kuan Yew, the former Prime Minister of Singapore. It is true that some authoritarian states, such as Singapore, South Korea and China, have had faster rates of economic growth than some less authoritarian states as India, Costa Rica and Jamaica. But the overall picture is much more complex than such isolated observations might suggest. Systematic studies give little support to the view of a general conflict between civil rights and economic performance. In fact some reputable scholars have offered substantial evidence

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<sup>1</sup> Article 8 of the Declaration

<sup>2</sup> Article 9 of the Declaration

to suggest that political and civil rights have a positive impact on economic progress.

The processes that led to the economic success of, say, South Korea are now reasonably well understood; a variety of factors played a part, including the use of international markets, an openness to competition, a high level of literacy, successful land reforms and the provision of incentives to encourage growth and exports. There is nothing to indicate that these economic and social policies were inconsistent with greater democracy. Thus, some allegedly negative effects of these rights on economic performance do not refute the fundamental importance of political rights.

Consider the matter of famine. The avoidance of such economic disaster as famine is made much easier by the exercise of various political rights. Famines kill millions of people in different countries but they do not kill rulers. If there are no political rights (elections, free press) the rulers do not have to suffer the political consequences of their failures to prevent famine. Indeed, a free press and active political opposition constitute the best 'early warning system' that a country threatened by famine can possess.<sup>1</sup>

### **6. Obligation to Assist**

The Proponents of the right to development want to establish an obligation on the part of the wealthier countries to provide financial and other types of assistance to poorer countries. The issue has also been prominent in relation to the obligations contained in International Covenant on Economic, Social and Cultural Rights

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<sup>1</sup> Amartya Sen, *Freedom and Needs*, *The New Republic* 31 (Jan. 10 and 17, 1994), at 32

(ICESCR). The Covenant contains three provisions that could be interpreted as giving rise to an obligation on the part of the richer states to provide assistance to poorer states.

1. The first is the phrase -' individually and through international assistance and cooperation, especially economic and technical'<sup>1</sup>
2. The second is in the provision in Article 11(1) according to which state parties agree to 'take appropriate steps to ensure the realization of this right (to an adequate standard of living), recognized to this effect the essential importance of international cooperation based on free consent.'
3. In Article 11(2) state parties agree to take, 'individually and through international cooperation' relevant measures concerning the right to be free from hunger.

Different and dramatically diverge interpretations of the provisions have been put forward. However, on the basis of the preparatory work it is difficult to sustain the argument that these are legally binding obligations. It would also be unjustified to suggest that these commitments are meaningless.<sup>2</sup>

Consider the following interesting comments of Mohammed Bedjaoui, President of International Court of Justice: we are advocating that 'the world's food stocks' essential to life, that is to say principally grain stocks, be declared to be ' the common heritage of mankind' so as to guarantee every people the vital minimum of a bowl of rice or a loaf of bread in order to eradicate the hunger which kills fifty million human beings a year. We are not

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<sup>1</sup> Article 2(1) of ICESCR

<sup>2</sup> Alston and Quinn, *The Nature of the Obligations under the ICESCR*, 9 Hum. Rts. Q. 156 (1987) at 186

suggesting this out of moral idealism but out of a concern to avoid a dangerous impasse in international relations.

Why, for example, should not the twentieth century be equal to the spirituality of the seventh century when the Quran announced to all mankind that 'all wealth, all things belong to Allah' and thus to humanity, and that consequently 'Zakat', the act of charity, should be seen as a 'compulsory institutionalized act, a manifestation of human solidarity, making it every man's duty to give away one tenth of his wealth each year.

Is the twentieth century incapable of matching the principles of solidarity stated by the lawyer Vattel in 1758 when he affirmed that each nation must contribute, by every means in its power, to the happiness and perfection of others.<sup>1</sup>

### 7. Foreign Aid

Normally foreign aid serves no developmental purpose but is used instead to promote the exports of the donor country; to encourage the use of imported capital-intensive methods of production or to strengthen the police or the armed forces of the recipient country. Nevertheless, there is evidence that when the donor and the recipient act responsibly, foreign aid can indeed be of benefit. Griffin and Khan have suggested the following measures for rationalization of the aid system.

1. The aid should be de-politicised by bringing it under the control of a supranational Authority operating under clearly defined and agreed principles.
2. Most foreign aid, if not the all, be channeled through this Authority while individual countries will be free to

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<sup>1</sup> Bedjaoui, *op. cited.* At 1196

- supplement multilateral assistance with bilateral programs if they wish so.
3. All multilateral aid should be allocated to countries representing the poorest 60% of the world's population e.g. only countries with a per capita income of about \$700 or less would be eligible for aid.
  4. The criteria for determining the amount of aid allocated to such eligible countries should reflect:
    - (i) the severity of poverty as measured by the shortfall of real per capita income from the agreed threshold
    - (ii) the degree of commitment to human development as demonstrated by recent successes and current programmes, and
    - (iii) the size of population.
  5. the desired total amount of foreign aid must be set as an agreed proportion of the combined GNP of all potential recipients.
  6. The burden of financing this total aid should be distributed among the donor countries progressively so that a richer country contributes a higher proportion of its per capita income than a less rich country. This would make the total volume of aid predictable and the distribution of its burden among the donors equitable.<sup>1</sup>

### **8. International assistance**

Article 22 of the Covenant on Economic, Social and Cultural Rights establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matter arising out of reports submitted under the covenant. The Committee on Economic, Social and Cultural Rights advises and assists

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<sup>1</sup> Keith Griffin and A. R. Khan, *Globalization and Developing World*, 1992, at 90.

the Council in this regard. Recommendations can be made to any organ of the UN, their subsidiary organs or specialized agencies involved in any aspect of international development cooperation. The Committee in its Report of 1990 has made the following comments:

- (1) UN agencies should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. They should avoid projects that involve violations of human rights and they should encourage projects, which enhance enjoyment of the full range of human rights.
- (2) The UN agencies should recognize the intimate relationship, which should be established between development activities and efforts to promote respect for human rights.
- (3) As per proposal made by the General Assembly in 1979, a 'Human Right Impact' statement be required to be prepared about all major development cooperation activities.
- (4) Every effort should be made, at each phase of a development project (identification, design, implementation, and evaluation) to ensure that the rights contained in the Covenant are duly taken into account.
- (5) Adjustments for debt burden must take care of the most basic rights. Such an approach is called 'adjustment with a human face' or as promoting 'the human dimension of development'.<sup>1</sup>

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<sup>1</sup> UN Doc. E./1990/23, Annex. III

## **9. Globalization**

The thrust for globalization came largely from the West and served to increase its economic influence and hegemony over the rest of the world. Its link to the human rights was sought to be established through claims of increased choices for investors, consumers, workers, and restrictions on state power and the emergence and strengthening of civil society. So democracy and marketisation of economies, the promotion of human rights and the emergence of civil society are declared to be all of a piece.

This approach of the West brought to the fore the responsibility of the international community for the protection of human rights everywhere, and thereby highlighted the ways in which UN Charter and the human rights Conventions have qualified national sovereignty. Human Rights, therefore, are increasingly mediated through human rights debates and practice. Aid conditionalities based on human rights, unthinkable a decade ago, have become common place. However, not all governments are sympathetic to internationalization of human rights, although many of them are unable to carry their opposition to it to international forums because of their fragile political and economic systems and the dependence on external donors.



## Chapter Sixteen

### NGOs AS AGENTS OF HUMAN RIGHTS

There are thousands of non-governmental organizations that are working worldwide for the promotion of human rights. Majority of Organizations work locally i.e. within the jurisdiction of a certain state whereas some NGOs work internationally. In this Chapter we will briefly discuss about some of International Non-governmental organizations that can be considered leaders in this field

#### 1. The International Committee of the Red Cross

It is a predominantly Swiss Organization with close links to the Swiss Government. It is considered an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent human sufferings by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.<sup>1</sup>

The International Red Cross and Red Crescent Movement is made up of the National Societies. Although each of the Movement's components engages in different

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<sup>1</sup> In the Muslim countries, the Red Cross societies are called Red Crescent societies.

activities, they are all united by the same Fundamental Principles: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

As its founding institution, the ICRC has certain statutory responsibilities towards the Movement. In particular, it is responsible for ensuring respect for and promoting knowledge of the Fundamental Principles, recognizing new National Red Cross or Red Crescent Societies, which meet the current conditions for recognition, and discharging the mandates, entrusted to it by the International Conference of the Red Cross and Red Crescent. The ICRC takes an active part in the Movement's statutory meetings, which it often organizes jointly with the Federation.

In accomplishing these tasks the ICRC maintains close relations with the National Societies, cooperating with them in areas of mutual interest such as preparedness for situations of armed conflict, development and ratification of and respect for the Geneva Conventions, and dissemination of humanitarian law and the Fundamental Principles. It also acts as lead agency for international relief operations conducted by the Red Cross and Red Crescent in situations of international and non-international armed conflict, internal strife and their direct results, as well as in situations of armed conflict concomitant with natural or technological disasters.

Finally, while fully respecting the Federation's competence in the matter, the ICRC cooperates actively in the development of National Red Cross and Red Crescent Societies, in particular through technical and legal assistance, by supporting the National Societies'

dissemination programmes and by contributing to the training of their staff in areas that fall within its mandate.<sup>1</sup>

## **2. The International Commission of Jurists**

The International Commission of Jurists (ICJ) is an international non-governmental organization devoted to the promotion of the understanding and observance of the rule of law as well as the promotion and legal protection of human rights throughout the world.

A special focus of the ICJ is the interdependence and interrelation of economic, social, cultural, civil and political rights under the Rule of Law, without which there can be no meaningful development.

Based in Geneva, the ICJ has consultative status with the United Nations Economic and Social Council, UNESCO, the Organization of African Unity and the Council of Europe.

Commission membership is limited to 45 eminent jurists who are representative of the different legal systems of the world to assist in carrying out its work; the International Secretariat of the ICJ benefits from a network of independent national sections and affiliated legal organizations in Africa, Asia, Australia, Eastern and Western Europe, the Middle East, as well as Latin and North America and the Caribbean.

The Commission was founded in 1952 in Berlin. It created Centre for the Independence of the Judiciary and the Legal Profession to protect the human rights of persons working in legal professions.

The ICJ was awarded the first European Human Rights Prize by the Council of Europe in 1980, the Wateler Peace Prize in 1984, the Erasmus Prize in 1989 and the

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<sup>1</sup> This portion of the chapter is prepared by the material available on the official web site of the International Committee of the Red Cross.

United Nations Award for Human Rights in 1993. In order to promote human rights and the rule of law, the ICJ has a wide range of activities in Geneva and around the world.<sup>1</sup>

### **3. The Lawyers Committee for Human Rights**

It is based in New York and draws financial support from foundations and Law firms. Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the standards affirmed in the International Bill of Human Rights. Its programs focus on building the legal institutions and structures that will guarantee human rights in the long term. Strengthening independent human rights advocacy at the local level is a key feature of its work.

The Committee also seeks to influence the US. Government to promote the rule of law in both its foreign and domestic policy, and presses for greater integration of human rights into the work of the UN and the World Bank. The Committee works to protect refugees through the representation of asylum seekers and by challenging legal restrictions on the rights of refugees in the United States and around the world.

The Committee is also lobbying for establishing International Criminal Court, protecting of asylum seekers and human rights advocates and advancing legal reforms in China and Hong Kong.<sup>2</sup>

### **4. The Anti-Slavery International**

The Anti-Slavery International is based in London. It was originally established as the Anti-Slavery Society.

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<sup>1</sup> This portion of the chapter is prepared with the help of the material available on the official web site of the International Jurist Commission.

<sup>2</sup> This is based on the material available on the official web site of the Lawyers Committee for Human Rights.

Anti-Slavery International is the oldest human rights organization in the world. It was responsible for the abolition of slavery within the British Empire in 1833 and was set up in its present form in 1839 to carry the fight to other parts of the world.

It gave inspiration to the abolitionist movement in the United States and Brazil and has contributed to the formulation of all the relevant international standards on slavery.

Throughout its history, it has campaigned relentlessly and intervened effectively on behalf of enslaved people. Generally, it is the most marginalized and dispossessed groups that fall victim to slavery, and the anti-slavery movement has always been closely allied with the struggle of indigenous people.

Since its merger with the Aborigines's Protection Society in 1909, anti-Slavery International has formally included the promotion of the rights of indigenous peoples within its mandate.

Today the role of this small, agile and dedicated organization is more important than ever. Anti-Slavery International (ASI) promotes the eradication of slavery and slavery-like practices, and freedom for everyone who is subjected to them. The abuses which ASI opposes include: slavery and the buying and selling of people as objects; trafficking of women and the predicament of migrant workers who are trapped into servitude; debt bondage and other traditions which force people into low status work; forced labour; forced prostitution; abusive forms of child labour; and early or forced marriage and other forms of servile marriage. ASI focuses on the rights of people who are particularly vulnerable to exploitation of their labour, notably women, children, migrant workers and indigenous peoples.

**ASI pursues its objectives by:**

- \* Collecting information about these abuses, bringing them to the attention of the public and promoting public action to end them;
- \* Identifying ways in which these abuses can be brought to an end, and influencing policy-makers in governments or other institutions at national and international level to take action accordingly;
- \* Supporting victims of the abuses which ASI opposes in their struggle for freedom, in particular by working with organizations they establish and other organizations campaigning on their behalf.<sup>1</sup>

**5. Human Rights Watch**

It is the largest US organization in this field. It began in 1978 with the founding of its Helsinki division. Today, it includes five divisions covering Africa, the Americas, Asia, the Middle East, as well as the signatories of the Helsinki Accords. It also includes five collaborative projects on arms transfer, children's rights, free expression, prison conditions, and women's rights. It has its office in London, Moscow, Hong Kong, Belgrade, Zaghreb Rio de Janeiro and Dushanbe.

Human rights Watch is dedicated to protecting the human rights of people around the world. It stands with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. It investigates and exposes human rights violations and hold abusers accountable. It challenges governments and those who hold power to end abusive practices and respect international

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<sup>1</sup> This is based on the material available on the official web site of the Anti-Slavery International.

human rights law. It enlists the public and the international community to support the cause of human rights for all.

The academic freedom programme aims to monitor, expose, and mobilize concerted action to challenge threats to academic freedom worldwide, and to foster greater scholarly and media attention to the critical role played by institutions of higher education in the promotion of human rights and the development and preservation of civil society. The program brings together the expertise of Human Rights Watch staff and the committed efforts of the academic leaders and prominent scholars who form the Human Rights Watch's Academic Freedom Committee.<sup>1</sup>

Now even the most abusing governments at least pay a lip service to human rights but most Multinational Corporations still argue that they do not bear any responsibility for human rights in the places where they trade and invest. In the last ten years, more and more corporations have addressed human-rights issues directly. The footwear and apparel industry was the first to respond, in part because the marketing for their product depended so heavily on a corporate image. But the movement now reaches well beyond shoes and shirts. The 1995 execution of Ken Saro Wiwa, the Nigerian environmental and democracy activists, galvanized protests around the role of Royal Dutch Shell and other oil companies in the Niger Delta. Shell has since announced a public human rights policy. What the policy means in practice, though, has yet to be seen. But some organizations/companies still lag far behind. While recognizing that corporations are not rights agencies, it believes that the corporate sector has a critical

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<sup>1</sup> Formerly known as the Committee for International Academic Freedom, which was established in 1991.

role to play in enhancing respect for universally recognized human rights. A good human rights record is good for business. That is a bottom line we can all agree on.

As drug trafficking has spread around the world, national and international counter-narcotics programmes have also proliferated. In 1995, Human Rights Watch began effort to challenge human rights violations caused by efforts to curtail drug trafficking. HRW presses for the incorporation of human rights consideration into the drug policies. In July 1996, the Human Rights Watch report, "Race and Drug Law Enforcement in the State of Georgia" was released as the first international human rights assessment of any anti-drug policies in the United States. Data analysis for the years 1990 to 1995 revealed that Black residents were arrested for cocaine-related offenses at seventeen times the rate of whites. Black arrested for drug offenses were imprisoned at twice the rate of whites. A black eligible for a life sentence for drug offenses was five times more likely to receive it than an eligible white.

The defense of the right to free expressions is a major focus of the work of Human Rights Watch. It documents and protests a variety of challenges to this basic right, most commonly used against journalists and members of the political opposition. Human Rights Watch also participated with several coalitions of on-line rights groups to protest Internet censorship agreements by the G-8 countries and the ASEAN nations, and a specific instance of on-line censorship in Germany.

Human Rights Watch administers the Hellman/Hammett grant program for writers who have been victims of political persecution and are in financial need. The program gives grants of as much as US\$ 10,000 to writers all over the world. Established in 1989, the grant program is funded by the estates of Lillian Hellman and Dashiell Hammett, American writers who were victimized for their political beliefs and associations during the U.S.



anti-Communist “witch hunts” of the early 1950s. With this experience in mind, Ms. Hellman left the legacy to provide support for writers who have been persecuted for expressing political views.

Violations of basic human rights are common in prisons and the plight of the great majority of the world’s prisoners pass largely unnoticed. Many countries deny human rights groups access to their penal facilities. Human Rights Watch has conducted specialized prison research and campaigns for prisoner’s rights since 1987, to focus international attention on prison conditions worldwide. Human Rights Watch monitors conditions of detention around the world, pressuring governments to bring their treatment of prisoners into compliance with basic human rights standards.<sup>1</sup>

#### **6. Amnesty International**

In 1961, London lawyer Peter Benenson read about a group of students in Portugal who were arrested and jailed for raising a toast to “freedom” in a public restaurant. This incident prompted him to launch a one-year campaign called “Appeal for Amnesty” in the *London Observer*, a local newspaper. “The Forgotten Prisoners”, was published worldwide on 28 May 1961 and brought in more than 1,000 offers of support for the idea of an international campaign to protect human rights.

Within 12 months the new organization had sent delegations to four countries to make representations on behalf of prisoners, and had taken up 210 cases. Amnesty International members had organized national bodies in seven countries.

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<sup>1</sup> This is based on the material available on the official web site of Human Rights Watch.

Amnesty International has more than 1,000,000 members' subscribers and regular donors in more than 160 countries and territories. There are more than 5,300 local, youth & student, and professional AI groups registered at the International Secretariat. There are nationally organized sections in 56 countries, 34 of them in Latin America and the Caribbean, Africa, Asia and the Middle East and Central Europe.<sup>1</sup>

The Organization's nerve centre is the International Secretariat in London, with more than 320 permanent posts and 95 volunteers from more than 50 countries. The Secretary General is Pierre Sane.

A nine-member International Executive Committee (IEC) governs amnesty International. It comprises eight volunteer members, elected every two years by an International Council comprising representatives of the worldwide movement, and an elected member of the International Secretariat.

It is based in London. It has formal relations with the United Nations, UNESCO, The Council of Europe, The Organization of African Unity and The Organization of American States. Amnesty International has specialist networks – groups of medical professionals, lawyers and others – who use their specialist expertise to campaign for victims of human rights violations.

Today an ever-growing human rights constituency is gathering the facts on abuses by governments, taking action to stop them and strengthening the forces necessary to prevent future violations. More than 1,000 domestic and regional organizations are working to protect basic human rights.

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<sup>1</sup> Amnesty International Report 1994, at 352.

The object of Amnesty International is to contribute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights. In pursuance of this object, and recognizing the obligation on each person to extend to others rights and freedoms equal to his or her own, Amnesty International adopts as its mandate:

\* To promote awareness of and adherence to the Universal Declaration of Human Rights and other internationally recognized human rights instruments, the values enshrined in them, and the indivisibility and interdependence of all human rights and freedoms;

\* To oppose grave violations of the rights of every person freely to hold and to express his or her convictions and to be free from discrimination by reason of ethnic origin, sex, colour or language, and of the right of every person to physical and mental integrity, and, in particular.

\* To oppose by all appropriate means irrespective of political considerations:

- (a) the imprisonment, detention or other physical restrictions imposed on any person by reason of his or her political, religious or other conscientiously held beliefs or by reason of his or her ethnic origin, sex, colour or language, provided that he or she has not used or advocated violence (hereinafter referred to a 'prisoners of conscience'); Amnesty International shall work towards the release of and shall provide assistance to prisoners of conscience;
- (b) the detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms;
- (c) the death penalty, and the torture or other cruel, inhuman or degrading treatment or punishment of

prisoners or other detained or restricted persons, whether or not the persons affected have used or advocated violence;

- (d) The extra-judicial execution of persons whether or not imprisoned, detained or restricted, and 'disappearances', whether or not the persons affected have used or advocated violence.

In order to achieve the previously mentioned objects and mandate, Amnesty International shall:

- a) at all times make clear its impartiality as regards countries adhering to the different world political ideologies and groupings;
- b) Promote as appears appropriate the adoption of constitutions, conventions, treaties and other measures.
- c) support and publicize the activities of and cooperate with international organizations and agencies which work for the implementation of the aforesaid provisions;
- d) take all necessary steps to establish an effective organization of sections, affiliated groups and individual members;
- e) secure the adoption by groups of members or supporters of individual prisoners of conscience;
- f) provide financial and other relief to prisoners of conscience and their dependants and to persons who have lately been prisoners of conscience;
- g) provide legal aid, where necessary and possible, to prisoners of conscience;
- h) investigate and publicize the 'disappearance' of persons where there is reason to believe that they may be victims of violations of the rights set out in Article 1 hereof;
- i) oppose the sending of persons from one country to another where they can reasonably be expected to

- become prisoners of conscience or to face torture or the death penalty;
- j) send investigators, where appropriate, to investigate allegations that the rights of individuals under the aforesaid provisions have been violated or threatened;
  - k) make representations to international organizations and to governments whenever it appears that an individual is a prisoner of conscience or has otherwise been subjected to disabilities in violation of the aforesaid provisions;
  - l) promote and support the granting of general amnesties of which the beneficiaries will include prisoners of conscience;
  - m) Adopt any other appropriate methods for securing its object and mandate.<sup>1</sup>

It is due to the concerted efforts of organizations like AI that an increasing body of international human rights agreements holds governments accountable for their action:

- 167 governments are now party to the International Covenant on Civil and Political Rights (ICCPR) and 160 governments are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). These Covenants require countries ratifying them to recognize or protect a wide range of human rights;
- 114 states are now party to the First Optional Protocol to the International Covenant on Civil and Political Rights. The protocol establishes procedures allowing

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<sup>1</sup> Amnesty International Report 1994, at 332-3

- both individuals and states to present complaints of human rights violations;
- 75 states are now party to Second Optional to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty;
  - 153 governments are now party to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
  - 145 states are party to the Refugee Convention and the Refugee Protocol.<sup>1</sup>

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<sup>1</sup> This portion of the chapter is written with the help of the material available on the official web site of Amnesty International and UN.

## Chapter Seventeen

# THE ISLAMIC PERSPECTIVE ON HUMAN RIGHTS

### 1. Introduction

Islam since its very advent has been propagating human rights. The Charter of Medina, a Social Contract freely negotiated between various tribes of the Quraish (Mohajeroon)<sup>1</sup>, the Jews, Bani Khazraj Bani Oaous etc. (Ansaar)<sup>2</sup> had contained various specific provisions for the protection of human rights especially of the weak and vulnerable. The Last Sermon<sup>3</sup> of the Prophet Muhammad is a classical example of a Charter of Human Rights.

The Cairo Declaration on Human Rights in Islam (CDHRI) is usually seen as an Islamic response to the United Nations' Universal Declaration of Human Rights (UDHR) of 1948. Some Muslim countries, such as Sudan, Iran, and Saudi Arabia, had frequently criticized the Universal Declaration of Human Rights for its perceived failure to take into account the cultural and religious context of non-Western countries. The CDHRI was adopted by the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from

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<sup>1</sup> The people and tribes who migrated with the Prophet Muhammad to Medina called 'Mohajeroon'. Those who migrated.

<sup>2</sup> The people and tribes who welcomed Prophet and supported him in Medina are called 'Ansaar'-helpers.

<sup>3</sup> Also called as 'Khutbaa Hajj -atul-Vidaa"-sermon on last Hajj-pilgrimage to Makah-

9-14 Muharram 1411H (31 July to 5 August 1990).

The CDHRI provides an overview on the Islamic perspective on human rights. CDHRI declares its purpose to be "general guidance for Member States of the OIC in the field of human rights".<sup>1</sup> It declares that all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah and the Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.<sup>2</sup>

The West has criticized the CDHRI on the grounds that the CDHRI, being based on religion, limits Human Rights, Religious Freedom and Freedom of Expression as enshrined in the Universal Declaration of Human Rights and other International Covenants.<sup>3</sup>

## **2. The Underlying Principles**

The Preamble of the CDHR explains the fundamental principles that are basis of all of its provisions. They include:

- 1) Mankind in Islam is vicegerent of Allah on Earth;
- 2) Islamic Ummah is made by Allah as the best community that gave humanity a universal and well-balanced civilization, in which harmony is established between here and the hereafter, knowledge is combined with faith.
- 3) Mankind needs to be protected from exploitation

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<sup>1</sup> Preamble

<sup>2</sup> Articles 24 and 25

<sup>3</sup> Joint written statement submitted by the International Humanist and Ethical Union (IHEU), the Association for World Education (AWE) and the Association of World Citizens (AWC). International Humanist News, 28 May, 2008



and persecution, and it has right to a dignified life in accordance with the Islamic Shari'ah.

- 4) Mankind has reached an advanced stage in materialistic science but still is in dire need of faith to support its civilization as well as a self-motivating force to guard its rights;
- 5) Fundamental rights and freedoms are an integral part of the Islamic religion and that no one shall have the right to abolish them and safeguarding of these fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire Ummah;

### 3. The Guaranteed Rights

The CDHR guarantees the following Rights and Freedoms:

- |                                  |              |
|----------------------------------|--------------|
| 1) Equality of humanity          | (Article 1)  |
| 2) Right to life                 | (Article 2)  |
| 3) Rights in armed conflict      | (Article 3)  |
| 4) Right to dignity              | (Article 4)  |
| 5) Right to Family               | (Article 5)  |
| 6) Rights of women               | (Article 6)  |
| 7) Rights of child               | (Article 7)  |
| 8) Right to eligibility          | (Article 8)  |
| 9) Right to education            | (Article 9)  |
| 10) Choice of religion           | (Article 10) |
| 11) Right to freedom             | (Article 11) |
| 12) Freedom of movement          | (Article 12) |
| 13) Right to work                | (Article 13) |
| 14) Right to legitimate living   | (Article 14) |
| 15) Right to property            | (Article 15) |
| 16) Intellectual property rights | (Article 16) |
| 17) Right to decent living       | (Article 17) |

- |   |              |
|---|--------------|
| 18) Right to security and privacy                     | (Article 18) |
| 19) Right to equality and justice                     | (Article 19) |
| 20) Protection from arrest and torture                | (Article 20) |
| 21) Protection from taking hostage                    | (Article 21) |
| 22) Freedom of expression and right<br>to information | (Article 22) |
| 23) Political rights                                  | (Article 23) |

### **1) Equality of Humanity**

All human beings are equal in terms of basic human dignity and basic obligations and responsibilities. There cannot be any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.

The reasons for this equality are that:

- (i) All human beings form one family; when all are from one family, then there is no difference amongst themselves;
- (ii) These one family members are united by their subordination to Allah and descent from Adam; there is equality based on the purpose in life and one common lineage;
- (iii) Islam, being the true religion, guarantees for enhancing such equality and dignity along the path to human integrity;
- (iv) The most loved by Allah are those who are most beneficial to His subjects; so if one has to be 'first among equals', then he has to excel in service to other human beings;
- (v) No one has superiority over another except on the basis of piety and good deeds. And if at all, there is a distinction, it is based on purity of soul and righteous life style rather than any other criterion.

## 2) Right to Life

Under Muslim Jurisprudence and Philosophy, life is a God-given gift and the right to life is guaranteed to every human being. No one has the authority to take this gift away from anybody; even the individual himself cannot take his life as it has been bestowed upon him as a precious gift from his Lord. Therefore, homicide and suicide is prohibited. This is the right guaranteed to every human being, may be Muslim or Hindu, old or young, healthy and infirm, Eastern and Western. So life of a non-believer is as sacred as that of a believer.

It is the duty of individuals, Societies and States to safeguard this right against any violation whatsoever. Every individual including oneself, every member of the Society and every organ of the State (Executive, Legislature and Judiciary) have to take all possible and reasonable steps to protect and promote this sacred right. There are limited exceptions to this right and these exceptions are already declared in in Shari'ah e.g. Shari'ah has already prescribed death penalty in certain offences.

In addition to the protection of right to life of an individual, it is also forbidden to resort to any means whatsoever, which could result in the genocidal annihilation of mankind. The use of the word, 'could' instead of 'shall' is worth consideration. If any means can possibly result into any aspect of 'genocide', it is also prohibited.

As a motive and basis for the protection of this sacred right, it is declared that the preservation of human life, throughout the life span willed by Allah, is a duty prescribed by Shari'ah. It means that it is obligatory Islamic duty of everyone to protect this right to life of oneself and of every other person as it is the command of Allah

Almighty and if one desists from this duty, he will be penalized.

Similarly, this right to life also extends to every kind of bodily harm or hurt or injury. Therefore, safety from any bodily harm is also a guaranteed right. It is the duty of the State to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason. In other words, no individual or a State organ can breach this duty without any cogent reason prescribed under Islamic Law.

### **3) Rights in armed conflict**

Islam guarantees certain rights in the times of use of force or any armed conflict. In the event of the use of force and in case of any armed conflict, it is not allowed to kill non-combatants such as old men, women and children. The use of force has to be restricted to only combatants and the non-combatants and other civilians have to be protected at all costs.

Similarly, the sick and the injured combatants as well as non-combatants shall have the right to proper medical treatment. All the prisoners of war shall have the right to be adequately fed, properly sheltered and decently clothed.

Even in the rage of a war, it is absolutely prohibited to mutilate or dismember dead bodies even of the fighting enemy, not to speak of ordinary civilians. The prisoners of war have right to be exchanged. Similarly, if certain families are displaced due to use of force or war, then arrangements shall be made for visits or reunions of families separated by circumstances of war.

During the war or use of force, or any military operation, natural environment has to be protected as far as possible. It is prohibited to cut down trees, to destroy crops or lives ock, to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means. In other words, damage has to be controlled and it shall be

limited to only combatants and military installations.

#### **4) Right to dignity**

Every human being, young or old, man or woman, believer or non-believer, black or white, is entitled to human sanctity and the protection of one's good name and honour during one's life and even after one's death. No one can damage the sanctity of name and honour. This right to dignity does not end at death but extends beyond that. It is the duty of both the State and the Society, to protect one's body and burial place from desecration.

#### **5) Right to family**

Family is the very foundation of Society, and marriage is the very foundation of family. All, men and women, have the fundamental right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right. On the other side, the Society and the State shall remove all obstacles to marriage and facilitate it, and shall protect the family and safeguard its welfare.

#### **6) Rights of Women**

Woman is equal to man in human dignity, and has her own rights to enjoy and duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. The husband is responsible for the maintenance and welfare of the family, the provider.

#### **7) Rights of child**

From the very moment of birth, every child has rights to proper nursing, education and material, hygienic and moral care. These rights are due from the parents, the Society and the State. Both the fetus and the mother must be

safeguarded and accorded special care.

The parents and those in such like capacity (like guardian or Kafeel) have the right to choose the type of education they desire for their children but they shall take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah. Similarly, both parents are entitled to certain rights from their children, and relatives are also entitled to rights from their kin and all such rights and liabilities have to be determined and performed in accordance with the tenets of the Shari'ah. Later parts of these rights are not included in Universal Declaration of Human Rights.

### **8) Right to Eligibility**

Every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligations and in case such eligibility is lost or impaired, the person shall have the right to be represented by his/her guardian.

### **9) Right to Education**

Seeking knowledge is an obligation of every person and provision of education to mankind is the duty of the Society and the State. In other words, education is a duty as well as a right. It is a duty of an individual to get education and it is his right that Society and State provide him education. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the Society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind. The ultimate objective of education is to understand the religion (the ultimate purpose of life and the way of life) and to be beneficial for the mankind.

There is no difference between religious and temporal education. Every human being has a right to

receive both religious and worldly education from the various institutions of teaching, education and guidance, including the family, the school, the university, the media, etc. The education shall be imparted in an integrated and balanced manner to develop (i) human personality, (ii) strengthen man's faith in Allah and (iii) promote man's respect to and defence of both rights and obligations.

#### **10) Choice of religion**

There is no coercion in Islam. Therefore, it is prohibited to pressurise or to exploit poverty or ignorance to force someone to convert to Islam. Islam guarantees freedom of choice of religion and protects mankind from every pressure - political, moral, economic or social - to change someone's religion forcibly.

#### **11) Right to freedom**

Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them. There can be no subjugation but to Allah, the Almighty. Colonialism of all types, being one of the most evil forms of enslavement, is totally prohibited. Colonized People have the full right to freedom and self-determination.

It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of occupation, and all States and peoples have the right to preserve their independent identity and have control over their wealth and natural resources.

#### **12) Freedom of movement**

Every man shall have the right to free movement and to select his place of residence whether within or outside his country and this right has to be exercised within the framework of the Shari'ah. If he is persecuted

somewhere, then he is entitled to seek asylum in another country. In such case, it is the obligation of the country of refuge to provide protection to the asylum-seeker until his safety has been attained. There is no such obligation if asylum is motivated by committing an act regarded by the Shari'ah as a crime.

### **13) Right to work**

Right to work is guaranteed by the State and the Society for each able person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the Society.

Every employee shall have the right to enjoy safety and security as well as all other social guarantees. The employee cannot be assigned work beyond his capacity. He cannot be subjected to compulsion or exploited or harmed in any way in his work.

The employee shall be entitled, without any discrimination between males and females, to fair wages for his work-without delay, as well as to the holidays, allowances and promotions, to which he is entitled. On his part, the employee shall be required to be dedicated and meticulous in his work. If there is disagreement between workers and employers on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

### **14) Right to legitimate living**

Every person shall have the right to earn a legitimate living without monopolization of resources, deceit or causing harm to oneself or to others. Usury (riba) is explicitly prohibited.



**15) Right to property**

Everyone shall have the right to own all forms of property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or the Society in general. Expropriation, in any form, is not permissible except (i) in public interest and (ii) upon payment of prompt and fair compensation. Similarly, private property cannot be confiscated and seized except for a necessity dictated by law.

**16) Intellectual property rights**

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author. He shall have the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles as laid down in the Shari'ah.

**17) Right to decent living**

Everyone shall have the right to live in a clean environment, away from vice and moral corruption that would favour a healthy ethical development of his person. It is the obligation of the State and Society in general to ensure that right.

Everyone shall have the right to medical and social care, and to all public amenities provided by Society and the State within the limits of their available resources. The State shall ensure the right of the individual to a decent living that may enable him and his dependents to meet requirements like food, clothing, housing, education, medical care and all other basic needs.

**18) Right to security and privacy**

Security of life and property is the right of every

citizen. Similarly, everyone has the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. It is the duty of State to protect him from arbitrary interference.

A private residence (house) is inviolable in all cases. No one can enter in it without permission from its inmates or without due process of law. It cannot be demolished or confiscated and its dwellers cannot be evicted arbitrarily.

### **19) Right to equality and justice**

All individuals are equal before the law, without any distinction between the ruler and the ruled. The right to justice is guaranteed to everyone. Liability is in essence personal and one cannot be burdened for the liability of the others. There shall be no crime or punishment except as provided for in the Shari'ah. An accused is innocent until his guilt is proven in a fast and fair trial in which he shall be given all the guarantees of defence.

### **20) Protection from arrest and torture**

It is not allowed to arrest an individual, or restrict his freedom, to exile or to punish him without a legitimate reason. It is not allowed to subject him to any physical or psychological torture or to any form of maltreatment, cruelty or indignity. No one can be subjected to any medical or scientific experiment without his consent or at the risk of his health or of his life. The State is not permitted to promulgate emergency laws that would provide any executive authority for such actions.

### **21) Protection from taking hostage**

Taking humans as hostages is expressly forbidden. It is not allowed in any form or for any purpose.

**22) Freedom of expression and right to information**

Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. Similarly, every person shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

Information is a vital necessity to Society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm Society or weaken its faith. It is also not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

**23) Political rights**

Authority is a sacred trust and its abuse or malicious exploitation is explicitly prohibited. This protection is there in order to guarantee fundamental human rights.

Everyone shall have the right to participate, directly or indirectly, in the administration of public affairs of his country. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

**Part V**

**PAKISTAN SCENARIO**



## Chapter Eighteen

# FUNDAMENTAL RIGHTS IN PAKISTAN

### 1. Introduction

Pakistan came into existence on 14 August 1947. Its constitutional history is marred by ideological and regional tensions. It was after 9 years of its creation that the nation had in 1956 its first constitution. The ink on its fragile pages had not yet dried when martial law was imposed in 1958. The military government introduced its own constitution in 1962 but it could not provide a viable framework for the actualization of national aspirations and Pakistan was dismembered in 1971. The present constitution of the Islamic Republic of Pakistan was promulgated on 12 April 1973. Human rights are discussed in the Preamble, Introductory chapter and the special chapters on Human Rights and Principles of Policy. The preamble enunciates the following fundamental principles which describe the basic human rights philosophy of the constitution:

- (a) Sovereignty belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within limits prescribed by Him is a sacred trust.
- (b) The will of the people is that the state shall exercise its powers and authority through the chosen representatives of the people.
- (c) The principles of democracy, freedom, equality, tolerance and social justice shall be fully observed.
- (d) Adequate measures shall be made for the minorities freely to profess and practice their religion and develop their culture.

- (e) Fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and assembly, shall be guaranteed.
- (f) Adequate measures shall be made to safeguard the legitimate interests of minorities and backward and depressed classes.
- (g) Independence of judiciary shall be fully secured.
- (h) The people may make their full contribution towards international peace and progress and happiness of humanity.
- (i) Pakistan would be a democratic state based on Islamic principles of social justice; and
- (j) Egalitarian society to be created through a new order.

The Introductory chapter of the Constitution guarantees freedom against all forms of exploitation and fundamental right of due process of law.

## **2. Elimination of exploitation**

The state shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability, to each according to his work. (Article 4) The Pakistani society, being at an early stage of human development, still exhibits many forms of exploitation inherent in the behaviour of the people and the functioning of the institutions. Exploitation is antithesis of the basic human rights values of equality, liberty, fraternity and social justice, which are espoused by the Constitution; hence, the Constitution addresses this issue at the very outset.

The Constitution obliges the state to ensure the gradual fulfillment of the fundamental egalitarian principle: from each according to abilities, to each according to his work.

This principle is a modified version of the socialist principle 'from each according to his ability, to each according to his needs.' (For details see chapter on Right to Development)

### **3. Due process of law**

It has been declared an inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law. In particular, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

No person shall be prevented from or be hindered in doing that which is not prohibited by law. No person shall be compelled to do that which the law does not require him to do.

### **4. Rights Guaranteed**

The chapter on Fundamental Rights begins with the declaration that any law, custom or usage, in so far it is inconsistent with the rights conferred by the chapter on fundamental rights<sup>1</sup> shall be void.<sup>2</sup> This declaration makes human rights superior to any other law, custom or usage in force. If they conflict with enumerated rights, they will be declared void. However, it mentions certain qualifications to the omnipotence of operation of the section. It means that there are certain exceptions to the generality of the supremacy of fundamental rights.

The state can not make any law, which takes away or abridges these rights. However, the provisions of this Article will not apply to the members of forces charged with the maintenance of public order for ensuring the

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<sup>1</sup> Articles 7-28 of the 1973 Constitution of Pakistan

<sup>2</sup> Article 8



proper discharge of their duties or the maintenance of discipline among them.<sup>1</sup>

The limitation imposed by Article 8(2) on promulgation of laws in contravention of fundamental rights other than those enumerated in Article 233(1) is not removed by virtue of imposition of emergency. State cannot make laws in violation of fundamental rights.<sup>2</sup>

The constitution guarantees the following fundamental rights and freedoms;

- |   |               |
|---|---------------|
| 1) Right to life and liberty                        | (Article 9)   |
| 2) Freedom from illegal arrest                      | (Article 10)  |
| 3) Right to fair trial                              | (Article 10A) |
| 4) Abolition of slavery, forced labour              | (Article 11)  |
| 5) Freedom from retroactivity                       | (Article 12)  |
| 6) Freedom from double jeopardy                     | (Article 13)  |
| 7) Right to dignity and privacy                     | (Article 14)  |
| 8) Freedom of movement and residence                | (Article 15)  |
| 9) Freedom of Assembly                              | (Article 16)  |
| 10) Freedom of Association                          | (Article 17)  |
| 11) Freedom of Profession and trade                 | (Article 18)  |
| 12) Freedom of Expression                           | (Article 19)  |
| 13) Right to Information                            | (Article 19A) |
| 14) Freedom of Religion                             | (Article 20)  |
| 15) Protection from religious taxation              | (Article 21)  |
| 16) Protection of religious education               | (Article 22)  |
| 17) Right to property                               | (Article 23)  |
| 18) Protection from deprivation of property         | (Article 24)  |
| 19) Equality before law and equal protection of law | (Article 25)  |
| 20) Right to education                              | (Article 25A) |

<sup>1</sup> do

<sup>2</sup> *Rifat Perveen v Bolan Medical. College* PLD [1980] Quetta 10

- 21) Access to public places (Article 26)
- 22) Freedom from discrimination in services (Article 27)
- 23) Protection of language and culture (Article 28)

**1) Sanctity of life and liberty**

Life or liberty of persons cannot be deprived except in accordance with law.<sup>1</sup> Liberty has a much wider scope and it means, not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is used to embrace the right of the citizen to be free in the enjoyment of all his faculties, e.g., to live and work where he wills, to earn his living by all lawful calling, to pursue any avocation and for that purpose to enter into any contract.<sup>2</sup>

The right of 'access to justice', a well-recognized inviolable right, is enshrined in Article 9. This is equally found in the doctrine of 'due process of law'. It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal.

Legislature can not frame such law as may bar right of access to courts of law and justice. Denial of the right of access to courts and justice is infringement of the Article. However, a trial of army officers by a court-martial validly constituted under the Pakistan Army Act, 1952, does not raise any question of 'public importance', much less a question regarding enforcement of any of the fundamental rights. Supreme Court, thus, lacks jurisdiction in circumstances.<sup>3</sup>

Any assault on the body of a person, e.g., whipping, torture, blind-folding, fettering, bastinadoing, house arrest,

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<sup>1</sup> Article 9

<sup>2</sup> *Allegar v State of Louisiana* (1897) 163 US 578.

<sup>3</sup> *Shahida Zahir Abbassi v President of Pakistan*, PLD [1996] S.C. 632

solitary confinement, preventing a person from reading a book (religious or non-religious), is an invasion of liberty, and in the absence of a law or rule having the force of law authorizing it, such act would be violative of Article 9.<sup>1</sup>

No public functionary or private person may injure or confine a person, unless he has a legal warrant to do so. Where an authority deprives a person, whether a citizen or not, of his liberty in flagrant violation of the law under which it purports to act, the arrest or detention cannot be said to be in accordance with law and the High Court can set such person at liberty.

However, the Legislature may make laws, which can deprive life or can curtail liberty. Similarly, on the Proclamation of Emergency under the Constitution, the operation of Article 9 may be suspended.

## 2) Arrest Procedure

The arrested person cannot be detained in custody without being informed of the grounds for such arrest. He shall be given the right to consult and be defended by a legal practitioner of his own choice. He shall be produced within a period of 24 hours before a magistrate who shall decide whether the person shall be detained or released.

However, this rule will not apply to any person who is arrested or detained under any law providing for preventive detention.

The law providing for preventive detention can be made to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or external affairs, or public order, or the maintenance of supplies or services.

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<sup>1</sup> Shamim Afridi v Province of the Punjab PLD [1974] Lah.

The person arrested or detained under preventive laws will be produced before the Review Board who after affording him an opportunity of being heard in person, will review the case and will decide whether there is a sufficient cause for such detention. The Review Board will consist of the judges of Supreme Court or a High Court.

The detaining authority will inform the detainee within 15 days the reasons /grounds for the detention and shall afford him the earliest opportunity of making a representation against the order. The grounds may not be informed if such authority considers it to be against the public order. The maximum detention period for a person detained for acts prejudicial to public order is 32 months whereas it is 36 months for any other case. However, this will not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan.<sup>1</sup>

In past, there have been observations in some cases that the provisions in Article 10 relating to safeguards as to arrest and detention are not really constitutional provisions, but are a part of the ordinary law relating to arrest and detention and, therefore, have a sub-constitutional status. However, it is respectfully submitted that this view is not correct. The ordinary law relating to arrest must provide for these constitutional safeguards, but even if it does not, the requirements, being a part of the Constitution, will be read as part of the law and the person aggrieved may seek redress if they are disregarded. The Article does not limit its application to criminals alone and affords protection to all persons arrested, whether criminals or not.

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<sup>1</sup> Article 10

However, a trial of army officers by a court-martial validly constituted under the Pakistan Army Act, 1952, does not raise any question of 'public importance', much less a question regarding enforcement of any of the fundamental rights. Supreme Court, thus, lacks jurisdiction in circumstances.<sup>1</sup>

The person arrested must be produced before the nearest magistrate within the time prescribed. Failure to comply with this requirement would make further detention illegal. The person arrested must be informed of the grounds for his arrest within a reasonable time, but not later than fifteen days and the communication should contain enough particulars to enable him to understand the nature of the accusation against him. If no grounds were communicated, the detention would be illegal. The grounds must be sufficiently particularized with facts and information to enable the *detenu* to understand the alleged reason for his arrest.<sup>2</sup>

The constitutional provision giving to an accused person the right to be defended by counsel must be read as part of the law, irrespective of whether the law gives or denies such right. The provisions of the law, which deny to such person the right to be defended by a legal practitioner, are void.

The ground open to attack the detention is that the order does not relate to any of the matters specified in Article 10(4), namely, 'acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services'. If none of these

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<sup>1</sup> Shahida Zahir Abbasi, op. Cited. P. 632

<sup>2</sup> Roshan Bijaya Shaukat Ali Khan v Government of East Pakistan  
PLD [1955] Dacca, 241

objections were available, then the only question that would require determination would be whether the detaining authority satisfied the test, which enabled him to pass the order.

The leading case on the point is *Liversidge v. Sir John Anderson* where the words used were 'if the Secretary of State has reasonable cause to believe any person to be of hostile origin'. Construing this expression Lord Maughan observed: 'I am not disposed to deny that, in the absence of a context, the *prima facie* meaning of such a phrase as "If a person has reasonable cause to believe a certain circumstance or thing," should be construed as "If there is in fact reasonable cause for believing that thing and a person believes it." "If a person acting on what he thinks is reasonable cause, and of course acting in good faith, believes the thing in question."<sup>1</sup>

For some time after the *Liversidge* case, it continued to be held that mere production of the order of detention reciting that the relevant authority was satisfied that there was a good answer to an application for a writ until the Supreme Court held that mere production of the order reciting satisfaction of the authority was not sufficient, and that the authority must also place before the court the material upon which it so claims to have been satisfied so that the court may in discharge of its duty be in turn satisfied that the *detenu* is not being held without lawful authority.<sup>2</sup> Thus, by a process of interpretation, the theory of subjective satisfaction has been converted into that of objective satisfaction.

The Chief Justices are under a constitutional obligation to take the necessary steps to constitute the appropriate Boards. Where the case is not placed before the

<sup>1</sup> *Liversidge v John Anderson* [1942] AC 206

<sup>2</sup> *Abdul Baqi Baluch v Government of Pakistan* PLD [1968] SC 313

Review Board within the prescribed period, the detention would be illegal. The proceedings before Review Board are *quasi-judicial* in nature and amenable to judicial review by superior courts. Moreover, the judge who is appointed a member of the Review Board is appointed as a *persona designata* and does not function as a High Court so as to make an appeal to the Supreme Court competent.<sup>1</sup>

Article 10 remains in force even during the Proclamation of Emergency.<sup>2</sup>

### 3) Right to fair trial

A new right, 'right to fair trial' has been added.<sup>3</sup> It means that a person shall be entitled to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him. Various rights associated with a fair trial are explicitly proclaimed in Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention of Human Rights, as well as numerous other constitutions and declarations throughout the world.

There is no binding definition of the concept and it includes: (i) presumption of innocence until the accused is proven guilty; (ii) fair and public hearing by an independent and impartial tribunal; (iii) review or appeal by a higher court against conviction or sentence or obligation; (iv) prohibition against double jeopardy; (v) equality before the courts and tribunals; (vi) public hearings; (vii) judgment rendered shall be made public; (viii) hearing within a reasonable time; (ix) right to

<sup>1</sup> Karishna v The State PLD [1972] SC 1

<sup>2</sup> Ghulam Jilani v Federation of Pakistan PLD [1975] lah. 65.

<sup>3</sup> Article 10A inserted by the Constitution (Eighteenth Amendment) Act, 2010

counsel, (x) right to interpretation and translation etc.

#### **4) Abolition of Slavery**

The Constitution declares that the slavery is non-existent. Even if it is existent, it is forbidden. No law can permit or facilitate its introduction into Pakistan in any form. Furthermore, all forms of forced labour are also prohibited; same is true about traffic in human beings. No child below the age of fourteen years can be engaged in any factory or mine or any other hazardous employment.<sup>1</sup>

These rights, however, will not affect compulsory service by any person undergoing punishment for an offence against any law or required by law for public purpose. As a further safeguard, compulsory service cannot be of a cruel nature or incompatible with human dignity. (For details see chapter 'Beyond Chains').

The Pakistani courts are quite sensitive in respect of protecting the people from slavery, or slavery-like practices. In an unusual case where a telegram was received by Chief Justice of Pakistan alleging bonded labour and illegal detention by employers in brick kiln industry, the matter was taken cognizance for the enforcement of fundamental rights, regarding bonded labour practices.

#### **5) Retroactivity of laws**

No one can be punished for an act or omission that was not punishable by law at the time of the act or omission. Moreover, no person can be punished for an offence by a penalty not prescribed by law for that offence at the time the offence was committed.<sup>2</sup>

The General principle governing the powers of a legislature is that it can make all laws, including

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<sup>1</sup> Article 11

<sup>2</sup> Article 12



retrospective laws operating in the field of substantive laws and procedure. However, the doctrine of parliamentary sovereignty has no place in a federal system of government functioning under a written Constitution and the power of judicial review extends to executive acts and legislative measures.

There is no fundamental distinction between *ex post facto* and retroactive laws, except that the former is wider and includes procedural legislation, which may require lesser evidence for proof. In American constitutional law, an *ex post facto* law is one which, operating retrospectively on penal or criminal matters only, renders a previous innocent act criminal, aggravates or increases the punishment for a crime, alters the rules of evidence to the prejudice of the accused, penalizes an innocent act, deprives an accused of some protection or defense previously available, or otherwise alters his situation to his disadvantage.<sup>1</sup> However, here in Pakistan Article 12 prohibits convictions and sentences being recorded in the criminal jurisdiction under *ex post facto* laws.

The laws providing civil disabilities and disqualification for professions, trades, elections and callings for past acts and omissions may in Pakistan, as in the United States of America, be held *ex post facto*.

#### 6) Double jeopardy

No person can be prosecuted or punished for the same offence more than once and no one can be compelled

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<sup>1</sup> *Calder v Bull* [1798] 1 Law Ed. 648

to be a witness against himself when accused of an offence.<sup>1</sup>

In the Anglo-American legal system, the principle in Article 13 is stated in the form of the rule against double jeopardy. This Article raises to a constitutional status the principle of *autrefois convict* and *autrefois acquit* embodied in the Code of Criminal Procedure and the Evidence order 1984.

The Code of Criminal Procedure provides that a person who has once been tried by a competent court for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence,<sup>2</sup> nor on the same facts for any other offence for which a different charge from the one made against him might have been made<sup>3</sup> or for which he might have been convicted.<sup>4</sup>

The principle also finds place in a modified form in the General Clauses Act, which provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or anyone of those enactments, but shall not be liable to be punished twice for the same offence<sup>5</sup>.

The rule against self-incrimination as stated in the Evidence Order, 1984, is that a witness shall not be excused from answering any question as to any matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or

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<sup>1</sup> Article 13 of the Constitution

<sup>2</sup> Section 403, Code of Criminal Procedure, 1898 (Cr. P C)

<sup>3</sup> Section 236 of Cr. P C.

<sup>4</sup> Section 237 of Cr. P C

<sup>5</sup> Section 26 of The General Clauses Act, 1897

forfeiture of any kind.<sup>1</sup> This rule is subject to the proviso that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer. Thus, an accused person is not a competent witness and he cannot be administered an oath, but in some special cases an accused person is a competent witness; though in such cases the laws generally permit him to volunteer evidence and do not compel him to give evidence.<sup>2</sup>

### 7) Dignity and privacy

The dignity of man and privacy of home is inviolable. Furthermore, no one can be subjected to torture for extracting evidence.<sup>3</sup> This Article embodies within itself the Islamic concept of *pardah*. Which is inherent in the concept of the privacy of home.

In a novel case, Supreme Court of Pakistan, on receipt of a letter from the citizens about their apprehension against construction of a grid station by authorities, found that letter raised two questions, namely, whether any government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which could not be withdrawn or altered without the citizen's consent. The court observed that a balance should be struck between the rights of the citizens and also the plans which were executed by the authority for the welfare, economic progress and prosperity of the country and if there were

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<sup>1</sup> Article 132 of the Evidence Order, 1984

<sup>2</sup> Section 340, Code of Criminal Procedure (Cr. P C)

<sup>3</sup> Article 14 of the Constitution

threats of serious damage, effective measures should be taken to control it.

The court appointed a commission to examine the plan and the proposals or schemes of the authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station. The authority was directed by the court that in future, prior to installing or constructing any grid station and / or transmission line, it would issue public notice in newspapers, radio and television inviting objections and finalize the plan after considering the objections, if any, by affording public hearing to the persons filing objections.<sup>1</sup>

#### **8) Freedom of movement**

Every citizen will have the right to remain in, enter and move freely throughout Pakistan and to reside and settle in any part of it. However, law can impose any reasonable restrictions in the public interest.<sup>2</sup>

A citizen's right to step out and step in the country, move freely throughout Pakistan and to reside and settle in any part thereof, are subject to reasonable restrictions imposed by law in the public interest. The question whether a law imposed reasonable restrictions on the freedom of movement and residence of a person is justiciable, and in determining this question the court has to look at the nature and extent of the restriction, the manner in which it is imposed, the nature of the right alleged to have been infringed and the underlying purpose of the restriction imposed.<sup>3</sup>

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<sup>1</sup> Shehla Zia v WAPDA, PLD [1994] S.C. 693

<sup>2</sup> Article 15 of the Constitution

<sup>3</sup> Nawabzada Nasruilah Khan v Government of West Pakistan, PLD [1965] Lah. 642

The classes of persons whose freedom of movement and residence has been restricted have been common prostitutes, habitual criminals, dangerous persons and persons likely to disturb inter-communal peace and the restrictions have generally taken the form of orders of internment in or externment from particular areas.

### 9) Freedom of assembly

Every citizen will have the right to assemble peacefully and without arms but law can impose any reasonable restrictions in the interest of public order.<sup>1</sup>

The right to freedom of assembly, although fundamental, is not in its nature absolute, as it is subject to reasonable restrictions with necessary conditions to safeguard the public interest. The restrictions imposed must however, be reasonable, and it is for the court to decide in each case whether the restriction questioned is reasonable or otherwise. In deciding this, the court will have to take into consideration the conditions prevailing at the time, the nature, extent and duration of the restrictions, and all the surrounding circumstances.<sup>2</sup>

The expression 'public order' is not defined anywhere, but danger to property human life and safety and the disturbance of public tranquillity fall within the purview of reasonable restrictions that may be imposed in the public interest to avert such danger or disturbances. Hence, if prevention seems impossible in the circumstances, the assembly may, in the interest of law and order, be directed to disperse. However, the right to free assembly cannot be abridged, merely because some persons threaten to stage a riot or, because peace officers apprehend a breach of the peace.

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<sup>1</sup> Article 16 of the Constitution

<sup>2</sup> Nawabzada Nasrullah Khan, op. Cited at p. 642

The laws which punish members of an unlawful assembly,<sup>1</sup> or otherwise allow the use of force to disperse such assembly,<sup>2</sup> are not infractions of the right to freedom of assembly, nor are magistrate's powers under the Code of Criminal Procedure,<sup>3</sup> unconstitutional, if they are exercised in good faith for the protection of public interest.<sup>4</sup>

The State may in a proper manner regulate the use of the streets by requiring a permit. Similarly, a District Magistrate may prohibit a public meeting if, in the circumstances, he considers it necessary in the interest of public order.

The right to parade or march in processions flows from the right of free assembly, but here other considerations, e.g., the right of others to use public roads and streets and apprehension of breaches of the peace, intervene and, therefore, in the interest of public order, the law<sup>5</sup> may empower the authorities responsible for the maintenance of law and order to impose restrictions on the exercise of this right. The reasonableness of such restrictions will have to be construed with reference to the conditions prevailing in the particular locality.

Self-organization, collective bargaining and all other allied labour union activities involve the right of free assembly which may not be conditioned by statute or by previous restraint by injunctive process; but the government may regulate labour unions with a view to protect the public interests without trespassing on the domain set apart for free assembly.

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<sup>1</sup> Section 141 and 153 of Pakistan Penal Code, 1860 (PPC)

<sup>2</sup> Section 127-132 of CrPC

<sup>3</sup> Section 144

<sup>4</sup> *Abdul Hamid Qadri v District Magistrate* PLD [1957] Lah. 213

<sup>5</sup> Section 144 of Cr. P C and Section 30 and 31 of the Police Act, 1861.

**10) Freedom of association**

Every citizen will have the right to associations or unions but law in the interests of sovereignty or integrity of Pakistan, public order or morality can impose reasonable restrictions.

Every citizen will have the right to form or be a member of a political party but this right is subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. If the federal government declares that any political party has been found or is operating in a manner prejudicial to sovereignty or integrity of Pakistan, the federal government, shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference will be final.<sup>1</sup>

In the United States, the right to freedom of association is not specifically stated as a fundamental right, and is a result of the application of the due-process clause to the right to liberty recognized by the Fourteenth amendment. In Pakistani and Indian Constitutions, however, it is enumerated as a separate right. In Pakistan, an association may take the form of a political party, company, an institute, etc.

What a person may legally do alone, he may do with the assistance and cooperation of others. Thus, associations, the object of which is to advocate or carry on some immoral purpose, e.g., gambling, or illegal activity, or overthrowing the government by unlawful means, may be prohibited by law, and such prohibition will not amount to a denial of the constitutional right to freedom of association.

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<sup>1</sup> Article 17 of the Constitution

The question whether a restriction is reasonable or unreasonable is for the court to determine and in determining it the court has to examine not only the reasonableness of the law itself, but also the reasonableness of the mode of application of the restriction, whether such mode be prescribed by law or not. While construing Article 17, approach of the court need not be narrow and pedantic, but elastic enough to march with the changing times and be guided by the object for which it is embodied in the Constitution.

The Constitution while guaranteeing the right to every citizen to form associations or unions also provides separately 'to form or be a member of a political party' as its existence is essential for maintenance of other rights guaranteed to the individuals by the Constitution. Thus, every citizen has a fundamental right to be a member of a political party of his choice.<sup>1</sup>

The formation of political parties is governed by the Political Parties Act, 1962. Political right or political justice does not end with the election to the Assemblies, but it is an on-going process which starts with the formation of the political parties, participation in the elections and thereafter to operate and participate in governance of the country by the majority rule; provisions of Articles 51, 52, 91 and 92 of the Constitution will not put an end to the fundamental rights which have started with the formation of political parties. Any unlawful order which results in frustrating such activity, by removing such party from office before the completion of its normal tenure would, therefore, constitute an infringement of fundamental right guaranteed in the Article. Illegal and unconstitutional denial to run the government as long as one enjoys the support of the

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<sup>1</sup> Wahabul Khairi v Federation of Pakistan PLD [1995] Lah. 27



majority in the House will be the denial of political justice, guaranteed by the Constitution.<sup>1</sup>

### 11) Freedom of profession

Every citizen will have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business but this right is subject to qualifications, if any, as may be prescribed by law. However, this right can not prevent the regulation of any trade or profession by a licensing system; or the regulation of trade, commerce or industry in the interest of free competition therein; or the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.<sup>2</sup>

In the United States, the right to follow a profession, calling or occupation, or to carry on any trade or business, is inferred from the 'liberty and property' provisions of the Fourteenth Amendment to the Constitution of the United States of America, whereas in Pakistan, as well as in India, the exercise of the right is made subject to reasonable restrictions to be imposed by law.

It seems that the word 'lawful' has been intentionally used in Article 18 to indicate the position, though it is somewhat opposed to the conception of fundamental rights, that the legislature may by law, totally or partially, prohibit a trade, business, or profession, in the public interest.

The word 'qualification' means that which makes any person fit to do a certain act. However, the legislature,

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<sup>1</sup> Muhammad Nawaz Sharif v President of Pakistan PLD [1993] S.C. 473

<sup>2</sup> Article 18 of the Constitution

on the pretext of prescribing qualifications, cannot impose conditions, which are not related to the fitness or suitability of a person to enter a profession.

The government should, where a monopoly exists, regulate the trade or industry in the interests of free competition. In some cases, the public welfare may require limits of the number of persons who may carry on a certain business or of the places where it may be carried on. For instance, in the United States of America, a statute, which had granted exclusive franchise to a Slaughterhouse company, was upheld and the legislature was held clearly to have had the power to select, in the interest of public welfare, a person who should carry on the business.<sup>1</sup>

## **12) Freedom of expression**

Every citizen will have the right to freedom of speech and expression, and there will be freedom of the press but these rights are subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court.<sup>2</sup>

The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write, and such rights, as well as the right of privacy, or the right to speak only when one may speak freely, are insured under Article 19. The right of the citizenry to receive information can be spelt out from the 'freedom of expression' guaranteed by the Article subject to inhibitions specified therein and such right must be preserved.<sup>3</sup>

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<sup>1</sup> Slaughter House Case, 21, Law Ed. 394

<sup>2</sup> Article 19 of the Constitution

<sup>3</sup> Muhammad Nawaz Sharif, op. cited., 473

Freedom of speech and liberty of press are not absolute and unqualified rights, but are relative i.e. it does not mean that one can talk or distribute where, when and how one chooses. However, there can be no absolute test of the reasonableness of restrictions, and it is for the court to decide whether a restriction in the circumstances of the case should or should not be held to be reasonable. Freedom of expression implies freedom of communication by all lawful means, and freedom to receive the communication.

'Public order' includes public safety and speeches likely to affect the public safety will not receive any constitutional protection. The various Public Safety Acts, to the extent that their object is the maintenance of public order, are proper restrictions on freedom of speech.

The conceptions of decency and morality, not being static phenomena, have differed not only in different societies, but also in the same society at different times of its social and ethical history. Therefore, questions relating to such matters should be approached in the light of the existing and generally accepted notions.

In Pakistan, the penal law punishes obscene literature and songs<sup>1</sup> and lottery offices<sup>2</sup> on the ground that the former constitutes an offence against public decency and morals and the latter against public morals. The word 'obscene' in these provisions has been held to mean anything expressing or suggesting ideas that are unchaste, lustful, impure, indecent and lewd, or calculated to inflame the passions.

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<sup>1</sup> Section 292 and 294 of PPC

<sup>2</sup> Section 294 A of PPC

### **13) Right to information**

The free flow of information is must for a democratic society because it helps the society to develop. It is now universally recognized that the right to information is vital to democracy for ensuring transparency and accountability in governance. It ensures that governance is participatory. Even otherwise, a democratic society or a mankind survives by accepting new ideas, experimenting with them, and rejecting them if found unimportant. Therefore, it is necessary that whatever ideas the government or its other members hold must be freely put before the public.

The right to information is included in UDHR and in International Covenant on Civil and Political rights 1966, that "Everyone shall have the right to freedom of expression, the freedom to seek and impart information and ideas of all kind, regardless of frontiers".

Normally, the Executive carries out its work in secret chambers and people or press hardly have an access or control over it. The jurists argue that "a government which functions in secrecy not only acts against democratic decency, but also buries itself with its own burial". Therefore, a right to know is necessary to handle the affairs related to executive and provides a platform for people to participate in governance with proper knowledge.

Therefore, in 18<sup>th</sup> Constitutional Amendment passed in 2010, a new Article 19-A was added and the Article guarantees that every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law. In other words, this 'right to information' is not absolute but it can be limited and abridged by

properly made regulations and the regulation has to be reasonable otherwise it can be challenged in a court of law.

#### **14) Freedom of religion**

Every citizen will have the right to profess, practise and propagate his religion but this right is subject to law, public order and morality. Every religious denomination and every sect will have the right to establish, maintain and manage its religious institutions.<sup>1</sup>

The freedom extends not only to beliefs, but also to religious acts and observances, e.g., modes of worship, rituals, etc.

The right is subject to three important restrictions, viz. law, public order and morality. Therefore, in accordance with the principle that a Constitution should receive liberal interpretation in favour of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship, the words 'subject to law' cannot mean that the right to profess, practise and propagate religion may completely be taken away by the law.

The right to freedom to propagate religion has to be exercised subject to the requirements of public order and safety; it does not extend to the activities, which are a crime under the law.

#### **15) Religious taxation**

No person can be compelled to pay any special tax, the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own.<sup>2</sup>

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<sup>1</sup> Article 20 of the Constitution

<sup>2</sup> Article 21 of the Constitution

In contrast to Pakistan, in India, there is complete ban against taxation for promoting any particular religion.<sup>1</sup>

### **16) Religious education**

No person attending any educational institution can be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

No religious community or denomination can be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and no citizen can be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth. Nevertheless, these rights are subject to valid laws.

However, these rights can not prevent any public authority from making provisions for the advancement of any socially or educationally backward class of citizens.<sup>2</sup>

The donations made to religious institutions may under fiscal statutes be exempted from tax, and where such exemption has been granted, the concession will be available to all donors irrespective of the religion to which they belong.

If an educational institution receives aid from public revenues, it cannot refuse admission to a student merely on the ground of his race, religion, caste or place of birth. It may, however, regulate the admission on the ground of

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<sup>1</sup> The Constitution of India, Article 27.

<sup>2</sup> Article 22 of Constitution of Pakistan

other factors, *e.g.*, merits or residence. Fundamental right of admission to educational institutions is available in case of only those institutions, which receive aid from public revenue. Similarly, allocation of seats to various communities, according to their ratio in population, is a valid method for regulating admission to medical colleges.

Article 22 is not applicable to socially and educationally backward classes, and a public authority may make special provisions for the advancement of any such class of citizens. The government may, therefore, make a regional classification for admission to an educational institution.

### **17) Right to property**

Every citizen has the right to acquire, hold and dispose of property in any part of Pakistan. This right is subject to any reasonable restrictions in the public interest imposed by the Constitution or any other law.<sup>1</sup>

The term 'property' includes an interest in property, like that of a mortgagee or lessee, patents, copyrights and every other thing of exchangeable value. For instance, the right of a *jagirdar* to land revenue assessed on the land is property and so is the right of an advocate to gain livelihood by legal practice.

The right to acquire, hold and dispose of property is subject to reasonable restrictions in the public interest and the question whether a restriction imposed by law is or is not reasonable or in the public interest is for the court to determine. Any law imposing unreasonable restrictions is, therefore, void. Where Summary Military Court had no jurisdiction to order confiscation of property of convicts,

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<sup>1</sup> Article 23 of the Constitution

order of confiscation was *coram non-judice* and confiscation of property violated Article 23.

### **18) Property rights**

No person can be compulsorily deprived of his property except in accordance with law. No property can be compulsorily acquired or taken possession of except for a public purpose and by the authority of law which provides for compensation for it; and the law either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

However, the above mentioned rights can not affect the validity of any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or any existing law or any law made in pursuance of Article 253; or any law providing for the acquisition of any class of property for the purpose of:

- (1) providing education and medical aid to all or any specified class of citizens; or



- (II) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or
- (III) providing maintenance to those who, on account of unemployment, sickness, infirmity or old age is unable to maintain it for themselves.<sup>1</sup>

The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court.

The State cannot deprive a person of his property merely by executive action; it must show a valid law and compliance with it in support of the action. Hence, laws depriving a person of right to gain livelihood by legal practice are within the ambit of Article 24 and, therefore, invalid.

Article 24(2) imposes constitutional restrictions on the law of eminent domain, *i.e.* the power of the State to acquire the property of its subjects, and deals with only one class of deprivation of property, all other forms of deprivation being governed by Article 24(1).

The question whether property is being acquired for a public purpose is a justiciable issue, and it is for the court to decide whether the acquisition is for a purpose which may properly be a public purpose, because if the underlying reason for the acquisition is not a public purpose, the acquisition will be invalid.

Although the word 'compensation' is not preceded by the adjective 'just' as in the Constitution of the United

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<sup>1</sup> Article 24 of the Constitution

States of America,<sup>1</sup> it can only mean full and fair money equivalent of the property.

### 19) Equality before law

All citizens are equal before law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone but it will not prevent the State from making any special provision for the protection of women and children.<sup>2</sup>

There is a subtle distinction between 'equality before law' and 'equal protection of law': the former means that every citizen, whether man or woman, rich or poor, educated or illiterate, Muslim or non-Muslim, stands on an equal footing before law while the latter means that no citizen can be put beyond the pale of law and no bill of outlawry can be passed against him. Thus, equality before law can have no content other than the one, which is compatible with the due maintenance of the guarantee of equal protection of law.<sup>3</sup>

The rule of equality before the law was enunciated by Dicey as part of his thesis on the rule of law, which, in comparison with other contemporary Constitutions, was a characteristic feature of the Constitution of the United Kingdom. By asserting that under that Constitution all men were equal before the law, what he meant to convey was that all citizens were equally subject to the ordinary law of the land administered by the ordinary courts and that the rule of law in this sense excluded the idea of any exemption of officials or others from the duty of obedience to the law

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<sup>1</sup> The Fifth Amendment

<sup>2</sup> Article 25

<sup>3</sup> Brohi, A. K., 'The Fundamental Law of Pakistan' Din Muhammad Press, Karachi, 1958, p. 34

which governed other citizens or from the jurisdiction of the ordinary tribunals.<sup>1</sup>

In Pakistan, every official is under the same responsibility, for every act done without legal justification, as any other citizen, and if he commits a tort, he is liable for it in the ordinary civil courts.<sup>2</sup> Similarly, any law made or action taken in violation of principles contained in Article 25 is liable to be struck down. The equality provision of the Fourteenth Amendment to the Constitution of the United States of America forbids the States from denying to any person within their jurisdiction the equal protection of the laws.

Indeed, the right of 'access to justice' is an inviolable right enshrined in the Constitution, which is equally found in the doctrine of due process of law. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal. However, without having an independent judiciary, the fundamental rights enshrined in the Constitution will be meaningless and will have no efficacy or beneficial value to the public at large.<sup>3</sup>

Further, it is a generally accepted doctrine that the 'equal protection of the laws' clause permits classification, and all classifications proceed on inequality. Inequality is permissible if the same is based on classification, which in turn must be reasonable and must not be arbitrary. Such classification must be based on a defined criterion and must

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<sup>1</sup> Dicey, 'An Introduction to the Law of the Constitution' Macmillan & Co., London, 10<sup>th</sup> ed. 1959, at p. 193-4

<sup>2</sup> Jibendranath Kishore Acharya Choudhry v Province of East Pakistan, PLD, [1957] S.C. Pak 9.

<sup>3</sup> Al-Jehad Trust v Federation of Pakistan, PLD [1996] S.C. 324.

have a nexus with the objective for which the classification has been necessitated but may not be made with mathematical nicety or scientific exactness.

Generally, the equal protection clause does not forbid discrimination with respect to things that are different. 'The validity of classification,' says Lord Rottschaefer in his treatise on constitutional law, 'thus depends on whether the legislature had reasonable grounds for its restriction of the class upon which burdens are imposed or benefits conferred.'<sup>1</sup>

A variety of rights are included in the guarantee of equal protection of the laws. For example;

- (i) As the equality clause does not prohibit different laws for those differently circumstanced, it is not contravened, if, as compared with men, women are assigned a lesser number of seats on a District Board, or reasonable classification on territorial basis is adopted for bye-elections to the same legislative body.
- (ii) Communal electorates do not offend against the Article.
- (iii) A university may in preference to one regional language rightly make another language the medium of examination.
- (iv) A scheme reserving seats in a medical college for students from particular areas is a justifiable classification.
- (v) The allocation of seats to various communities according to their ratio in population, is a valid method for regulating admission to medical colleges.

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<sup>1</sup> Lord Rottschaefer, 'constitutional Law' quoted in Brohi, A. K. op. cited. P. 353

- (vi) State can make any special provision under Article 25(3) for protection of women and children and fix quota of seats for women candidates.
- (vii) On one occasion, a lady, who appeared to be incapable of conducting a complicated case of inherited property herself, was ordered by Supreme Court to be provided with assistance of a competent experienced lawyer, which assistance would be deemed to be in pursuance of fundamental right contained in Article 25(3).

#### **20) Right to education**

The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law. This right to education has been recently added through 18<sup>th</sup> constitutional amendment in 2010.

The right to education is recognized as a fundamental human right. According to the International Covenant on Economic, Social and Cultural Rights, the right to education includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education.<sup>1</sup> The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. In addition to

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<sup>1</sup> (Article 13 and 14)

these access to education provisions, the right to education encompasses the obligation to rule out discrimination at all levels of the educational system, to set minimum standards and to improve quality of education. Similarly, this right is guaranteed in the Universal Declaration of Human Rights, UNESCO Convention against Discrimination in Education and Convention on the Elimination of All Forms of Discrimination Against Women and the European Convention on Human Rights.

The term, 'Education' is normally used or formal institutional instructions. However, the 1960 UNESCO Convention against Discrimination in Education defines education in Article 1(2) as: "all types and levels of education, (including) access to education, the standard and quality of education, and the conditions under which it is given."<sup>1</sup> In a wider sense education may describe "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable the group to subsist". In this sense education refers to the transmission to a subsequent generation of those skills needed to perform tasks of daily living, and further passing on the social, cultural, spiritual and philosophical values of the particular community.<sup>2</sup> Education means the 'entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge."

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<sup>1</sup> Beiter, Klaus Dieter (2005). *The Protection of the Right to Education by International Law*, The Hague: Martinus Nijhoff, p. 19. ISBN 90-04-14704-7.

<sup>2</sup> Article 1(a) of UNESCO's 1974 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

The right to education can be assessed using the 4 As criterion, which asserts that for education to be a meaningful right it must be available, accessible, acceptable and adaptable. This criterion was developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski. The 4 As are as follows:

- **Availability** – funded by governments, education is universal, free and compulsory. There should be proper infrastructure and facilities in place with adequate books and materials for students. Buildings should meet both safety and sanitation standards, such as having clean drinking water. Active recruitment, proper training and appropriate retention methods should ensure that enough qualified staff is available at each school.
- **Accessibility** – all children should have equal access to school services regardless of gender, race, religion, ethnicity or socio-economic status. Efforts should be made to ensure the inclusion of marginalized groups including children of refugees, the homeless or those with disabilities. There should be no forms of segregation or denial of access to any students. This includes ensuring that proper laws are in place against any child labour or exploitation to prevent children from obtaining primary or secondary education. Schools must be within a reasonable distance for children within the community, otherwise transportation should be provided to students, particularly those that might live in rural areas, to ensure ways to school are safe and convenient. Education should be affordable to all, with textbooks, supplies and uniforms provided to students at no additional costs.
- **Acceptability** – the quality of education provided should

be free of discrimination, relevant and culturally appropriate for all students. Students should not be expected to conform to any specific religious or ideological views. Methods of teaching should be objective and unbiased and material available should reflect a wide array of ideas and beliefs. Health and safety should be emphasized within schools including the elimination of any forms of corporal punishment. Professionalism of staff and teachers should be maintained.

- **Adaptability** – educational programs should be flexible and able to adjust according to societal changes and the needs of the community. Schools should respect observance of religious or cultural holidays in order to accommodate students, along with providing adequate care to those students with disabilities.

The fulfillment of the right to education on a national level may be achieved through free and compulsory education, or more specifically free compulsory primary education, as stated in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Constitution of Pakistan follows this model; hence make education free and compulsory from the age of 5 (five) to 16 (sixteen) and the details of the education have to be prescribed by law.

### **21) Access to public places**

There can be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth in respect of access to places of public entertainment or resort. This right does not extend to the places intended for religious purposes only. However, this



right will not prevent the State from making any special provision for women and children.<sup>1</sup>

It means that all citizens have equal rights in respect of access to places of public entertainment or resort. No one would be barred.

## **22) Discrimination in services**

No citizen can be discriminated against in respect of any appointment on the ground only of race, religion, caste, sex, residence or place of birth if he is otherwise qualified for appointment in the service of Pakistan. However, certain posts may be reserved for a period not exceeding twenty years from the commencing day (i.e. 12 April 1973) for persons belonging to any class or area to secure their adequate representation in the service of Pakistan. Furthermore, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions, which cannot be adequately performed by members of the other sex.<sup>2</sup>

This section intends to afford fair protection to the people belonging to different languages or cultures. They are entitled to preserve entry on the basis of race, religion, caste or domicile as was done under apartheid in South Africa. However, the state intervene to protect women or children who normally are in a disadvantageous position e.g. certain areas or times may be fixed for women or children.

These rights explain the principle of equal opportunities i.e. equal citizen will have equal opportunities and there shall be no discrimination based on religion, race,

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<sup>1</sup> Article 26

<sup>2</sup> Article 27

sex and caste etc. However, state as a guardian of disadvantaged class may fix quota for certain classes or areas. For example in federal services, quota has been fixed for people of different provinces. Furthermore, in most of the departments, 2% seats are reserved for disabled people or nursing profession is declared the domain of women. This is a positive discrimination to give an advantage to the people of less privileged areas or segments of society and promote their district languages, script or culture and can establish special institutions for that purpose.

The quota system was originally planned for 20 years to be expired in 1993 but the Federal Government has extended its operation for another 20 years.

### **23) Languages and culture**

Any sections of citizens having a distinct language, script or culture have the right to preserve and promote the same and subject to law, establish institutions for that purpose.<sup>1</sup>

This is subject to the operation of Article 251. Under this Article, Urdu has been declared the National language of Pakistan and arrangements shall be made for its being used for official and other purposes. In addition, without prejudice to the status of the National language, a Provincial Assembly may, by law, prescribe measures for the teaching, promotion and use of provincial languages.

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<sup>1</sup> Article 28 of the Constitution

## Chapter Nineteen

# PRINCIPLES OF POLICY IN PAKISTAN

### 1. Introduction

The Principles set out in Chapter Two of the Constitution of Pakistan are called the Principles of Policy. It is the responsibility of each organ and authority of the state, and each person performing functions on behalf of an organ or authority of the state, to act in accordance with these Principles in so far as they relate to the functions of the organ or authority. The observance of these Principles is subject to the availability of resources.

The President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before the National Assembly or the Provincial Assembly a report on the observance and implementation of the Principles of Policy.<sup>1</sup>

The Principles themselves are not rules of law. Their true position has been determined by the Constitution<sup>2</sup> itself, which provides that the responsibility of deciding whether any action of an organ, authority or an official is in accordance with the Principles of Policy is that of the organ or authority, or of the person concerned. In other words, these Principles of Policy in contrast with the Fundamental

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<sup>1</sup> Article 29 of the Constitution of Pakistan

<sup>2</sup> Article 30

Rights discussed in the previous chapter are not mandatory or justiciable but are only of recommendatory nature.

## **2. Over view**

Articles 31 to 40 deal with the following substantive Principles of Policy:

1. Promotion of Islamic way of life (Article 31)
2. Promotion of local government institution (Article 32)
3. Parochial and other similar prejudices to be discouraged (Article 33)
4. Ensuring the full participation of women in national life (Article 34)
5. Protection of marriage and family (Article 35)
6. Protection of rights of minorities (Article 36)
7. Promotion of social justice (Article 37)
8. Promotion of social and economic well-being of the people (Article 38)
9. Participation of people in Armed forces (Article 39)
10. Strengthening bonds with Muslim world and promoting international peace (Article 40)

### **1) Islamic way of life**

The government will take steps to enable the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

The state have to endeavour, as respect the Muslims of Pakistan, to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran; to promote unity and the observance of the Islamic moral standards; and to

secure the proper organization of Zakat, Ushr, auqaf and mosques.<sup>1</sup>

## 2) Local Government

The state have to encourage local government institutions composed of elected representatives of the areas concerned and in such institutions special representation will be given to peasants, workers and women.<sup>2</sup>

Pakistan has a three-tier system of government: federal, provincial and local. For urban areas, there are metropolitan Corporations, Municipal Corporations, Municipal Committees and Town Committees, whereas for rural areas, there are District Councils and Union Councils. This is a very elaborate system but their powers and functions are limited.

## 3) Discouraging the prejudices

The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.<sup>3</sup>

## 4) Women participation

Steps shall be taken to ensure full participation of women in all spheres of national life.<sup>4</sup>

Separate ministries have been established at Federal and Provincial levels to work for the full participation of women in national life. Nevertheless, women are underrepresented in all spheres of national life.

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<sup>1</sup> Article 31

<sup>2</sup> Article 32

<sup>3</sup> Article 33

<sup>4</sup> Article 34

**5) Marriage and family**

The State shall protect the marriage, the family, the mother and the child. <sup>1</sup>

**6) Minority rights**

The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services. <sup>2</sup>

**7) Social justice**

The State shall promote, with special care, the educational and economic interests of backward classes or areas; remove illiteracy and provide free and compulsory secondary education within minimum possible period; make technical and professional education generally available and higher education equally accessible to all on the basis of merit; ensure inexpensive and expeditious justice; make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment; enable the people of different areas through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan; prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements; prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and decentralize

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<sup>1</sup> Article 35

<sup>2</sup> Article 36

the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.<sup>1</sup>

The principles of policy contained in Article 37 can be invoked in aid of the provisions of other Articles. In other words, the provisions of the Article are not directly enforceable, but are enforceable indirectly as an aid in interpretation of other provisions of the Constitution and of legislation.<sup>2</sup>

Once an action is taken or an organ or authority of the State promulgates a law in pursuance of Article 37, it is that action or that law only, which must be examined to see whether any right has thereby been created in any person.<sup>3</sup>

#### **8) Well being of the people**

The State shall secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure; provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means; provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently

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<sup>1</sup> Article 37

<sup>2</sup> *Zohra v Government of Sind*, PLD (1996) Kar. 1

<sup>3</sup> *ibid.*

or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment; reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; and eliminate *riba* as early as possible. <sup>1</sup> In a recent judgement, the Shariat Appellant Bench of the Supreme Court of Pakistan has declared *riba* (interest) un-Islamic and has suggested various ways to Islamize the economy.

The provisions of Article 38 are not directly enforceable, but are enforceable indirectly as an aid in interpretation of other provisions of the Constitution and of legislation. <sup>2</sup>

#### **9) Participation in forces**

The State shall enable people from all parts of Pakistan to participate in the Armed Forces of Pakistan. <sup>3</sup> This was necessitated due to the fact that the Punjab dominated Pakistan Army and the other Provinces especially Sind and Baluchistan were poorly represented. Since the promulgation of the Constitution quarter a century ago, the situation has not changed.

#### **10) International relations**

The State shall endeavor to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity, support the common interest of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations and encourage the settlement of international disputes by peaceful means. <sup>4</sup>

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<sup>1</sup> Article 38 of the Constitution

<sup>2</sup> *J. J. Tajak v government of Baluchistan* [1993] S.C. 445

<sup>3</sup> Article 39

<sup>4</sup> Article 40 of the Constitution





## **Annexures**



## Annexure A

# UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

### Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

*Now, Therefore,* THE GENERAL ASSEMBLY *proclaims*

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

**Article 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**Article 3**

Everyone has the right to life, liberty and security of

person.

**Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 6**

Everyone has the right to recognition everywhere as a person before the law.

**Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9**

No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11**

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) 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.

**Article 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**Article 13**

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

**Article 14**

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

**Article 15**

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

**Article 16**

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 17**

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

**Article 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**Article 19**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.



**Article 20**

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

**Article 21**

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23**

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and

supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

#### **Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

#### **Article 25**

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

#### **Article 26**

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27**

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29**

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

## **Annexure B**

# **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966**

### **Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## **PART I**

### **Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political

status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## PART II

### Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective

remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### **Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same

intermediary, on the date on which it terminates such derogation.

**Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

**PART III**

**Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the

provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;



- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

### **Article 9**

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 for 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 a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, 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 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

**Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

**Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

**Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

**Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
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 counsel of his own choosing;

(c) To be tried without undue delay;

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

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

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

(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 to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been 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**

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. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall 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 the community of nations.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to

have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. 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 print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that

constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

#### **Article 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the

State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

#### **Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

#### **Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

#### **Article 26**

All persons are equal before the law and are entitled



without any discrimination to the equal protection of the law. In this respect, 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.

**Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

## Annexure C

# INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

### **Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## PART I

### Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## PART II

### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### **Article 4**

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### PART III

#### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d ) Rest, leisure and reasonable limitation of working

hours and periodic holidays with pay, as well as remuneration for public holidays

**Article 8**

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

**Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

**Article 10**

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

**Article 11**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to

ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources:

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

### **Article 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.



**Article 13**

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching

staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

#### **Article 14**

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

#### **Article 15**

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material

interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

## Annexure D

# CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

### *The States Parties to the present Convention,*

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the

principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development

of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### **Article 1**

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### **Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and

without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of

equality with men.

**Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

**Article 5**

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

**Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.



## PART II

### Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

### Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

### Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

### PART III

#### Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programs of continuing education, including adult and functional literacy programs, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including

information and advice on family planning.

### **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of

marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

### **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
- (c) To benefit directly from social security programs;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal

treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

## PART IV

### Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

### Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents,

irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## Annexure E

# CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:



## PART I

### Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

### Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

### Article 3

1. No State Party shall expel, return ("refouler") or

extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

#### **Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

#### **Article 5**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal

jurisdiction exercised in accordance with internal law.

#### **Article 6**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### **Article 7**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its

competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

### **Article 8**

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

**Article 9**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

**Article 10**

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

**Article 11**

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

**Article 12**

Each State Party shall ensure that its competent authorities

proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

**Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

**Article 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

**Article 15**

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

**Article 16**

1. Each State Party shall undertake to prevent in any

territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

## Annexure F

# THE CONVENTION ON THE RIGHTS OF THE CHILD, 1989

### Preamble

The States Parties to the present Convention,

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Bearing in mind* that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person and have determined to promote social progress and better standards of life in larger freedom,

*Recognizing* that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling* that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

*Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,



*Recognizing* that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

*Considering* that the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

*Bearing in mind* that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration Convention on the Rights of the Child of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

*Recalling* the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency

and Armed Conflict,

*Recognizing* that, in all countries in the world, there are children living in exceptionally difficult conditions and that such children need special consideration,

*Taking due account* of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

*Recognizing* the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

*Have agreed as follows:*

## **Part I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social

Convention on the Rights of the Child welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

#### **Article 4**

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

#### **Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the

evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

**Article 6**

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

**Article 7**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

**Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

**Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review

determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in

a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### **Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and

administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **Article 13**

1. The child 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 print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

### **Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these

rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

#### **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines



for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

### **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and

for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

**Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

**Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be

considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the

family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

### **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical,

psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of

breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

#### **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

**Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

**Article 28**

1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every

child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

#### **Article 29**

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance,



equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

**Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment,
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

**Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.

**Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic

performances and materials.

**Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

**Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the

right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

### **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

**Article 40**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (i) To be presumed innocent until proven guilty according to law;
    - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
    - (iv) Not to be compelled to give testimony or to confess

guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### **Article 41**

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

## **Part II**

### **Article 42**

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

## Annexure G

# CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The governments signatory hereto, being members of  
the Council of Europe,

Considering the Universal Declaration of Human Rights  
proclaimed by the General  
Assembly of the United Nations on  
10th December 1948;

Considering that this Declaration aims at securing the  
universal and effective recognition and observance of the  
Rights therein declared;

Considering that the aim of the Council of Europe is  
the achievement of greater unity between its members and  
that one of the methods by which that aim is to be pursued is  
the maintenance and further realisation of human rights and  
fundamental freedoms;

Reaffirming their profound belief in those fundamental  
freedoms which are the foundation of justice and peace in  
the world and are best maintained on the one hand by  
an effective political democracy and on the other by a  
common understanding and observance of the human rights  
upon which they depend;

Being resolved, as the governments of European  
countries which are like-minded and have a common  
heritage of political traditions, ideals, freedom and the rule  
of law, to take the first steps for the collective enforcement  
of certain of the rights stated in the Universal Declaration,

Have agreed as follows:



### **Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

#### **Section I – Rights and freedoms**

##### **Article 2 – Right to life**

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

##### **Article 3 – Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

##### **Article 4 – Prohibition of slavery and forced labour**

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.

- 3 For the purpose of this article the term "forced or compulsory labour" shall not include:
- a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - d any work or service which forms part of normal civic obligations.

**Article 5 – Right to liberty and security**

- i Everyone has the right to liberty and security of person.  
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful

- detention for the purpose of bringing him before the competent legal authority;
- e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
  - 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
  - 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
  - 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

#### **Article 6 – Right to a fair trial**

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- 2 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 to 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 – No punishment without law**

- 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 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 recognised by civilised nations.

**Article 8 – Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 9 – Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

**Article 10 – Freedom of expression**

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

**Article 11 – Freedom of assembly and association**

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the

interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

**Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

**Article 15 – Derogation in time of emergency**

1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required

- by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
  - 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

**Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

**Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

**Article 18 – Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.



**Section II – European Court of Human Rights**

**Article 19 – Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

## Annexure H

### CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM, 1990

The Member States of the Organization of the Islamic Conference,

Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah;

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self-motivating force to guard its rights;

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and

their neglect or violation all abominable sin, and accordingly every person is individually responsible - and the Ummah collectively responsible - for their safeguard.

Proceeding from the above-mentioned principles,  
Declare the following:

### **Article 1**

(a) All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

(b) All human beings are God's subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

### **Article 2**

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and state to protect this right from any violation, and it is prohibited to take away life except for a Shari'a prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'a.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'a-prescribed reason.

**Article 3**

(a) In the event of the use of force and in case of armed conflict, it is not possible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

(b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

**Article 4**

Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death. The state and society shall protect his remains and burial place.

**Article 5**

(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.

(b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

**Article 6**

(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

**Article 7**

(a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.

(b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of Shari'a.

(c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'a.

**Article 8**

Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

**Article 9**

(a) The question for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable men to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.

(b) Every human being has the right to receive both religious and worldly education from the various institution of, education and guidance, including the family, the school, the university, the media, etc., and in such an

integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.

**Article 10**

Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

**Article 11**

(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.

(b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

**Article 12**

Every man shall have the right, within the framework of Shari'a, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which Shari'a regards as a crime.

**Article 13**

Work is a right guaranteed by the State and Society for

each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled without any discrimination between males and females - to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

**Article 14**

Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others. Usury (riba) is absolutely prohibited.

**Article 15**

(a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.

(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

**Article 16**

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the

right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari'a.

**Article 17**

(a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is incumbent upon the State and Society in general to afford that right.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.

(c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

**Article 18**

(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.

(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.



**Article 19**

- (a) All individuals are equal before the law, without distinction between the ruler and the ruled.
- (b) The right to resort to justice is guaranteed to everyone.
- (c) Liability is in essence personal.
- (d) There shall be no crime or punishment except as provided for in the Shari'a.
- (e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

**Article 20**

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

**Article 21**

Taking hostages under any form or for any purpose is expressly forbidden.

**Article 22**

- (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'a.
- (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'a.
- (c) Information is a vital necessity to society. It may not be

exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

**Article 24**

All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a.

**Article 25**

The Islamic Shari'a is the only source of reference for the explanation or classification of any of the articles of this Declaration.

## Annexure I

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