

**DIRECTORATE OF DISTANCE EDUCATION
UNIVERSITY OF NORTH BENGAL**

**MASTER OF ARTS-POLITICAL SCIENCES
SEMESTER -III**

**HUMAN RIGHTS
OPEN ELECTIVE 305
BLOCK-1**

UNIVERSITY OF NORTH BENGAL

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FOREWORD

The Self Learning Material (SLM) is written with the aim of providing simple and organized study content to all the learners. The SLMs are prepared on the framework of being mutually cohesive, internally consistent and structured as per the university's syllabi. It is a humble attempt to give glimpses of the various approaches and dimensions to the topic of study and to kindle the learner's interest to the subject

We have tried to put together information from various sources into this book that has been written in an engaging style with interesting and relevant examples. It introduces you to the insights of subject concepts and theories and presents them in a way that is easy to understand and comprehend.

We always believe in continuous improvement and would periodically update the content in the very interest of the learners. It may be added that despite enormous efforts and coordination, there is every possibility for some omission or inadequacy in few areas or topics, which would definitely be rectified in future.

We hope you enjoy learning from this book and the experience truly enrich your learning and help you to advance in your career and future endeavours.

HUMAN RIGHTS

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BLOCK 1: HUMAN RIGHTS

Introduction to the Block

Unit 1: This unit discusses the importance of human rights explaining how significant they are for the overall development of human personality.

Unit 2: This unit deals with different Political Ideology and Human Rights

Unit 3: This unit deals with the structure and functions of the UN treaty machinery

Unit 4: This unit deals with the history, importance, contents and justification of Universal Declaration of human rights

Unit 5: This unit discusses the type and nature of Civil and Political Rights as these have been provided in the International Covenant on civil and political Rights.

Unit 6: This unit focuses on the study of Economic, Social and Cultural Rights mentioned under the International Covenant on Economic, Social and Cultural Rights (hereinafter referred as ICESCR) and its implementation mechanism. Unit 7: This unit deals with seven core Human Rights Treaties

UNIT 1: HUMAN RIGHTS: THE CONCEPT – ORIGIN AND EVOLUTION

STRUCTURE

- 1.0 Objectives
- 1.1 Introduction
- 1.2 Meaning of Human Rights
 - 1.2.1 Some Definitions of Rights
- 1.3 Kinds and Nature of Human Rights
 - 1.3.1 Kinds of Human Rights
 - 1.3.2 Nature of Human Rights
- 1.4 Evolution of Rights - Developments at Domestic Level
 - 1.4.1 Important Declarations of Rights
- 1.5 International Efforts to Develop Human Rights Norms
 - 1.5.1 Humanitarian Intervention
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 - 1.5.5 Protection of Minorities under the League of Nations
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- 1.6 Let us sum up
- 1.7 Key Words
- 1.8 Questions for Review
- 1.9 Suggested readings and references
- 1.10 Answers to Check Your Progress

1.0 OBJECTIVES

This unit discusses the importance of human rights explaining how significant they are for the overall development of human personality: After going through this unit you will know:

- To define and meaning of the concept of rights;

- To know about the kinds or categories of human rights;
- To discuss the nature and characteristics of human rights;
- To know the origin of rights in some important States like England, United States, France and Soviet Union; and
- To know the international efforts to develop human rights norms.

1.1 INTRODUCTION

Have you heard of human rights and its violation? What are the human rights? Can you define them?

Human rights have emerged as the most powerful concept of our age. It has become, in the opinion of former Secretary-General of the United Nations, Boutros Boutros-Ghali, a common language of mankind and the ultimate norm of all politics. Adopting this language allows all peoples to understand others, and to be the authors of their own history. Human rights, by definition, are the ultimate norm of all politics. Today everyone talks about them and struggles for their recognition, promotion and protection. A statement of Sir Hersch Lauterpach, a noted protagonist of human rights and one of the most eminent international lawyers of the 20th century rightly captures the spirit of modern laws and functions of the States. He had observed in 1947: "The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international". Similarly, Adlai Stevenson of the USA once had remarked, "human rights are at the core of everything we do and try to do". These two statements - made by a jurist and a statesman - candidly reveal that the concept of human rights has acquired a significant place in human life/ civilization, as it is true that a large part of our time is devoted, in the ultimate analysis, to the promotion and protection of human rights. Moreover, it needs to be recalled that both the classical as well as contemporary political theories have affirmed and reaffirmed the significant principle that it is the "individual" for whom the State (or for that matter, any social or legal order) exists, and not vice versa. Since 1948, the United Nations has adopted more than 100 human rights documents covering the entire gamut of human relationships. These, among others, deal with the rights of women, children, refugees,

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migrant workers, stateless persons, minorities, indigenous peoples and prohibition of racial or religious discrimination, genocide, slavery, torture, stateless persons, minorities, and indigenous peoples. With the introduction of the international protection of human rights there appeared an institutional mechanisms of international human rights laws capable of becoming the basis and the framework for the full development of man's personality, represent for his standing as a human being and the equality of citizens before the law within the various States. The importance of human rights is such that it can truly be asserted that, with their emergence and the first steps taken to promote and protect them, human society has taken a qualitative leap forward. In any event, human rights represent a new element in the development of mankind, and in the life of human society, because they signify the end of a period and the beginning of a new era in national and international governance.

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.

- They apply regardless of where you are from, what you believe or how you choose to live your life.
- They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security.
- These basic rights are based on shared values like dignity, fairness, equality, respect and independence.
- These values are defined and protected by law.

1.2 MEANING OF HUMAN RIGHTS

In general terms Human Rights are entitlements due to every man, women and child because they are human. In other words certain inherent and inalienable rights are due to human beings simply of being human. The concept of human rights derives from human dignity and the inherent worth of a human being. Therefore, it is suggested that whatever adds to human dignity and the fundamental freedom of humans is a

human right. In other words Human Rights are what each human being is entitled to as human being to live a dignified, secure life of his/her choice. All human being 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. This assumption is derived from the natural rights theory according to which the right to liberty and equality is man's birthright and cannot be alienated; and that because man is a rational and moral being he is different from other creatures on earth and therefore entitled to certain rights and freedoms which other creatures may not enjoy. Formally Human Rights are proclaimed in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations Organizations on 10th December 1948 and put into legal form in a number of international acts and treaties. However, there are differences of opinion with regard to meaning, nature, and content of Rights. It is a concept very much contested not only between the East (Representing former socialist States) and the West (representing liberal-democratic States) but also between developed and developing countries. Each group of nations has a different perception of human rights. The so-called first world countries of the West believed in the supremacy of the individual, while the Communist countries of East focused on the community and the unconditional priorities of class interest. Hence, the individual benefited from these group rights, as his/her rights were better provided for, within the community. The Communists gave priority to economic, social and cultural rights and insisted that they could not be separated from the class character of society in which they existed, while the Liberal-democratic States of the West asserted the primacy of civil and political rights. This debate of priority of one set of rights over another continued to occupy the agendas of national and international governance during major part of the 20th century. The newly emerging States of the Third World, while adopting the Eastern or Western model of human rights paradigms in their constitutions, or a combination of both, focused on solidarity or group rights such as right to self-determination of peoples, including sovereignty over their natural resources, the right to , development, the right to a healthy and ecologically balanced environment, the right to

peace and the right to ownership of the common heritage of mankind. They also insist on interdependence and indivisibility of civil and political rights to economic and social rights. Thus, the modern concept of human rights is comprehensive in its nature and content. It includes three types of rights: civil and political, economic, social and cultural and the emerging collective or group rights. In fact, the catalogue of rights is expanding every day. Moreover, it must be noted that no catalogue elaborating specific human rights will ever be exhaustive or final. Its content goes hand in hand with the state of moral consciousness, or development of civilization at any given time in history.

1.2.1 Some Definitions of Rights

Let us discuss some important questions: What is the importance of rights? Why do we need them? How can we define rights? Which is the most appropriate term for rights? Whether terms such as natural rights, civil rights, political rights and fundamental rights are same or have different meanings? Here we explore answer to these questions. There exist definitional problems of the concept of rights. Many definitions of the concept of rights are found in the literature. Each of the following definitions may help us in understanding different facets of rights. Let us look at them.

- 1) According to Ernest Barker, "Rights are the external conditions necessary for the greatest possible development of the capacities of the personality."
- 2) Harold Laski defines rights as "those conditions of social life without which no man can seek, in general, to be his best". On their importance he remarked, "The state is known by the rights it maintains".
- 3) In the words of Bernard Bosanquet, "we have a right to the means that are necessary to the development of our lives in the direction of the highest good of the community of which we are a part".
- 4) Leonard Hobhouse says "Rights are what we may expect from others and others from us, and all genuine rights are conditions of

social welfare. Thus, the rights anyone may claim are partly those, which are essential to every man in order to be rational human person, and partly those, which are necessary for the fulfillment of the function that society expects from him. They are conditioned by, and correlative to, his social responsibilities".

- 5) Wilde considers that "Rights are reasonable claims to freedom in the exercise of certain activities". He further says: rights depend upon duties. "It is only in a world of duties that rights have significance". They are like the two sides of a coin.
- 6) Prof. Hohfeld calls the four things which the term 'a right' covers: "claims", "privileges or liberties", "powers" and "immunities". Examples of "claim rights" are the right of an old-age pensioner to a pension and an unemployed to get his social security benefits. Examples of "Liberty rights" are the right of a man to spend his leisure as he pleases, and to grow a beard if he wants to. A "Power right" entitles the right-holder to require other people to do certain things at his discretion. Examples are the right of a landlord to alter the rent paid by his tenants, and the right of a policeman to question eyewitnesses at the scene of a crime. An "immunity right" entitles the right holder to be exempt from something-an MP (Member of Parliament) to be exempt from the law of libel for what he says in Parliament, a conscientious objector to be exempt from military service.

In short, rights are nothing but claims against the State or government or individual persons. Rights are also used in a variety of ways indicating differences in ideological and philosophical perceptions. For some, rights are "normative attributes" that belong to a self-conscious person who perceives himself as an agent of purposive creative action. For others, rights are entitlements to choose from. McCloskey describes rights positively, as entitlements, to do, to have, enjoy or have done. For MacCormick rights "always and necessarily concern human goods", that is, concern with what is good, at least, in normal circumstances, for a person to have. Feinberg and White assert that rights can be "possessed, enjoyed, exercised and claimed, demanded and asserted". There are two

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other terms-legal rights and moral rights. The former refers to rights laid down in law and the latter refers to rights based on general principles of fairness and justice. Moral rights may or may not be enforced and supported by the law of the land. For example, a teacher may claim that he/she has a moral right to discipline their pupil, offer them advice about their academic and moral development or about their choice of career. Sometimes people claim certain rights because of what they earn through their work (by writing a book an author may gain both a moral and' legal right to a percentage of the proceeds from sales).

In other words, human rights are those conditions of life that allow us to develop and use our human qualities of intelligence and conscience and to satisfy our spiritual needs. We cannot develop our personality in their absence. They are fundamental to our nature; without them we cannot live as human beings. James Nickel rightly states that human rights aim to secure for individuals the necessary conditions for leading a minimally good life. According to Scot David, the concept of human rights is closely connected with the protection of individuals from the exercise of State, government or authority in certain areas of their lives; it is also directed towards the creation of social conditions by the State in which individuals are to develop their fullest potential. Plano and Olton have stated that human rights are those which are considered to be absolutely essential for the survival, existence and personality development of a human being. To deny human beings their rights is to set the stage for political and social unrest, wars, hostility between, nations and between groups within a nation-and that denial leads to urgent demands for a better life in larger freedom. Human rights, far from being an abstract subject for philosophers, political scientists and lawyers, affect the daily lives of everyone - man, woman, and the child.

The term "human rights" is all comprehensive - it includes civil-political (negative rights) and economic, social and cultural (positive rights) and collective or group rights.

It should also be acknowledged that rights and duties are two sides of the same coin. One's rights impose duties on others. Allegiance to the State, where a citizen resides, obeying the State laws, payment of taxes, exercising right to vote, rendering compulsory military service, parental duty towards their children when they are young and the duty of adult persons to take care of the needs of their old parents, etc. are some of the duties which have been recognized in different countries.

Check Your Progress 1

Note: Use the space given below for your answers.

1) Discuss the significance of human rights.

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2) What does the Universal Declaration of Human Rights say on the importance of human rights?

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3) Examine the Hohfeldian analysis of the concept of rights.

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1.3 KINDS AND NATURE OF HUMAN RIGHTS

Dear learners, now we have discussed the concept of and definitions of human rights, let us now have a look into various types of human rights?

Rights can be of many kinds, such as legal rights, moral rights, civil rights, political rights, social rights, economic rights, cultural rights and so on. Those rights which are provided in law and protected by it are called legal rights. Enforcement of rights is important. But it is quite possible to have a right to something without the right being enforced. For example, if my car is stolen and the thief is not caught or arrested, still have a right to car. Three kinds of human rights have emerged at the international level. They are: civil and political rights, economic, social and cultural rights and group solidarity rights. The UDHR and ICCPR recognize many civil and political rights, such as right to life, liberty and security of persons, prohibition of slavery, torture, arbitrary arrest, detention or exile, right to fair trial, freedom of movement, religion, freedom of expression, right to privacy, right to seek asylum, right to nationality. These rights are sometimes known as first generation rights, as they found their first formulation in the Western socio-political thought and governance in 17th and 18th centuries. In the 1970s another set of rights have evolved at the international level. They are known by different names - third generation rights, group rights and collective rights. Such rights are the following: The right to development, which, however, is also seen as a right of individuals.

- The right to peace;
- The right to clean natural environment;
- The right to one's own natural resources;
- The right to one's own cultural heritage.

It should be noted that the term "generation" of rights is a misnomer. It suggests a succession of phenomena, whereby a new generation takes the place of the previous one. That is, however, not the case with the three generations of human rights. On the contrary, the idea is rather that the

three "generations" exist and be respected simultaneously. Moreover, there is the curious phenomenon that one particular right - that of self-determination - belongs both to the first and the second generations. It needs to be noted that, according to the Vienna Declaration and Programme of Action, 1993, all rights are indivisible, interdependent and essential. In fact, the term generation of rights is not coined by the United Nations. It is suggested that the word "generation" should be replaced by "categories".

Human rights are a special sort of inalienable moral entitlement. They attach to all persons equally, by virtue of their humanity, irrespective of race, nationality, or membership of any particular social group. Human rights belong to an individual as a consequence of being human. The term came into wide use after World War II, replacing the earlier phrase "natural rights," which had been associated with the Greco-Roman concept of natural law since the end of the Middle Ages. As understood today, human rights refer to a wide variety of values and capabilities reflecting the diversity of human circumstances and history. They are conceived of as universal. Universality of human rights is controversial, applying to all human beings everywhere, and as fundamental, referring to essential or basic human needs.

The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination. Human rights differ from other rights in two respects. Firstly, they are characterised by being:

- Inherent in all human beings by virtue of their humanity alone (they do not have, *e.g.*, to be purchased or to be granted);
- Inalienable (within qualified legal boundaries); and
- Equally applicable to all.

Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals. One important implication of these characteristics is that human rights must themselves be protected by law ('the rule of law'). Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial and

independent tribunal, applying procedures which ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known to the public and openly declared.

The idea of basic rights originated from the need to protect the individual against the (arbitrary) use of state power. Attention was therefore initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as 'fundamental freedoms'. As human rights are viewed as a precondition for leading a dignified human existence, they serve as a guide and touchstone for legislation.

The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. The individual-state relationship is known as the 'vertical effect' of human rights vertical location has not elaborated to be clear for the students. While the primary purpose of human rights is to establish rules for relations between the individual and the state, several of these rights can also have implications for relations among individuals. This so-called 'horizontal effect' implies, among other things, that a government not only has an obligation to refrain from violating human rights, but also has a duty to protect the individual from infringements by other individuals. The right to life thus means that the government must strive to protect people against homicide by their fellow human beings.

1.3.1 Kinds of Human Rights

Economic, social and cultural rights

The International Covenant on Economic, Social and Cultural Rights entered into force in 1976. The human rights that the Covenant seeks to promote and protect include:

- the right to work in just and favourable conditions;

- the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being;
- the right to education and the enjoyment of benefits of cultural freedom and scientific progress.

Civil and political rights

The International Covenant on Civil and Political Rights and its First Optional Protocol entered into force in 1976. The Second Optional Protocol was adopted in 1989.

The Covenant deals with such rights as freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred.

1.3.2 Nature of Human Rights

Following **salient features** mark the concept of human rights.

- 1) Human rights are universal moral rights; they belong to everybody because they are human. By definition, rights are not earned, bought or inherited. They are inherent in human dignity. They are inalienable.
- 2) One of the guiding principles is that rights are available to all persons in the State irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status (Article 2 of the UDHR). They are universally applicable to all persons. In other words,

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nondiscrimination IS an important principle of contemporary human rights.

- 3) They are universal in the sense that they transcend the national boundaries or ideologies. They are designed to be culturally and ideologically neutral; they are not specifically liberal or socialist, Eastern or Western, Northern, developed or developing, Christian, Buddhist, Islamic or Hindu.
- 4) The concept of human rights is comprehensive in its nature and content. It includes all categories of rights, such as civil and political, economic, social and cultural and even the newly emerging group or collective rights like, rights of minorities, indigenous peoples, right to development, right to peace and right to clean environment etc. In fact, the catalogue of rights is very detailed and comprehensive. The list of rights is expanding every day. Moreover, no catalogue elaborating specific human rights will ever be exhaustive. The content of human rights goes hand in hand with the state of moral consciousness, or civilizational development at any given time in history.
- 5) Also, all rights and freedoms are indivisible and interdependent. The United Nations does not rank them in any hierarchy or any order of priority. Though we may classify rights in different categories, they are all complementary to each other. They are also inter-related. No set of rights has priority over the other.
- 6) Rights are not absolute or unlimited. Some of them can be suspended during war or public emergency. Justifiable and reasonable limitations can be imposed on their exercise, which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others.

Check Your Progress 2

Note: Use the space given below for your answers.

- 1) Explain the meaning of first generation or category of human rights.

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2) Clarify the concept of solidarity rights.

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3) List three important features of human rights.

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1.4 EVOLUTION OF RIGHTS - DEVELOPMENTS AT DOMESTIC LEVEL

The idea of "rights" and "duties" of citizens is as old as the concept of the State, in fact as old as human species. As man is a social being and cannot live outside society (since he/she is not self-sufficient for one's needs), the problem of rights arose involving man's relations with other individuals in a society, and his relations with State/government, Through these relationships men evolved certain norms of social behaviour, which got crystallized, over centuries' struggles, into what we call today as human rights. One may find their origin in ancient Greek and Roman political systems in Europe, Confucian system in China, the Islamic political system in the Muslim world and the "Panchayat" system in India. But the concept of rights in those systems was not fully developed and understood in the sense we know it today. Many important events and revolutions contributed towards the development of human rights, First, the earliest charters of human rights are to be found among the three British constitutional documents, namely, the Magna

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Carta (1215), the Petition of Rights (1628) and the Bill of Rights (1689) adopted after the Glorious Revolution of 1688. These three documents were the forerunners of the modern bills of rights. They imposed restrictions on the powers of the King and his arbitrary rules. It may be recalled that in the 17th century England there were conflicts and tensions between the Parliament and the King over the latter's arbitrary rule. These struggles led to the "Glorious Revolution" of 1688. This revolution is also known as Bloodless Revolution. James, the King was forced to abdicate the throne. Fearing for his life the King fled the country paving the way for the accession to the throne of William (of Orange) III and Mary II (the King's daughter who sided with the Parliament in this struggle). Following the revolution the Parliament passed the Bill of Rights in 1689. This Bill declared illegal the claimed suspending and dispensing powers of the Crown. It prohibited the levying of taxes or the intendants of standing army in peacetime by the Crown without Parliamentary consent. The Bill also provided that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted". It further provided that "jurors ought to be duly impaneled and returned" and that "all grants and promises of fames and forfeitures of particular persons before convictions are illegal and void". Moreover, it may be noted that the Glorious Revolution provided a precedent that rulers could be removed by popular will if they failed to observe the requirements of constitutional legitimacy.

1.4.1 Important Declarations of Rights

It was in the late 17th and the 18th centuries that the necessity for a set of written guarantees of human freedoms was felt as a new philosophy of governance. The dignity and rights of man was the dominant theme of political philosophy of the 18th century. This theme flowered into practical significance with such historic documents as the Virginia Declaration of Rights, 1776, the American Declaration of Independence, 1776, the French Declaration of the Rights of Man and Citizen, 1789 and of more lasting importance, the series of Amendments to the U.S.

Constitution, adopted in 1791 as the American Bill of Rights. Let us elaborate the rights proclaimed in these documents. The American Declaration of Independence contains ideas of human rights, such as: That all men are created equal, that they are endowed by their creator with certain unalienable rights that among these are life, liberty and pursuit of happiness ... that to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it. . The Virginia Declaration of Rights included specific liberties that were to be protected from State interference. These included 'freedom of press, the free exercise of religion and the obligation that no person should be deprived of their liberty except by the law of land or the judgment of their peers. The Virginia Declaration had a great influence on the drafters of the V.S. constitution (1787), as these minimum rights were included in it subsequently. The French Declaration of Rights of Man and Citizen, 1789, recognized many rights, such as, all men are born equal; the State shall preserve the natural rights of man, which are liberty, property, security and resistance to oppression; no one may be indicted, arrested or detained except in cases determined by law; all men should be presumed innocent until judged guilty; freedom of thought, opinion and press; freedom of religion; no taxes without consent of all citizens; no one shall be denied right to property except for an obvious requirement of public necessity, certified by law, and on condition of just compensation in advance. The Declaration proclaimed that liberty consists in the ability to do whatever does not harm others; hence the exercise of rights of each man has no limits except those which assure to other members of society for the enjoyment of the same rights. Law can only determine these limits. Therefore, it is generally said that my right to swing my hand ends where someone's nose begins.

The Bolshevik Revolution of 1917 of Soviet Russia was another milestone in the development of the modern concept of rights. It introduced socio-economic dimensions to the concept of rights, which were neglected in the events and documents of English, American and

French revolutions. While the three revolutions emphasized the first generation of civil and political rights (which are also called negative rights), the October revolution of Russia popularized socio-economic rights which are positive rights. These rights are called positive because their implementation requires resources and positive action by the State. Thus it should be acknowledged that each of these declarations, events and revolutions discussed above have made important contributions in advancing and shaping the concept of human rights. However, being product of their times and specific circumstances, they lacked totality of the concept and were narrow in their scope and applications. For instance, Magna Carta yielded concessions (not rights) only to the feudal lords, though it set limitations on arbitrary rule and laid the foundation for the rule of law. The American Declaration and Bill of Rights were applicable only to those who constituted what was abbreviated as WASP (White, Anglo-Saxon and Protestant). Slaves did not have rights in USA until slavery was abolished in 1864, and the rights of women were not part of the conception of rights at the time of American Revolution. Similarly, although French Revolution was more egalitarian than the American, the question of the rights of women was raised, only to be quickly suppressed, and slavery was abolished, only to be restored by Napoleon. Moreover, Western States like United Kingdom and France did not extend the notion of rights to the "subject" people in their colonies. In sum, human rights had not become universal during then.

1.5 INTERNATIONAL EFFORTS TO DEVELOP HUMAN RIGHTS NORMS

During the last 350 years many international efforts were undertaken in conferences and international organizations which contributed towards the evolution of human rights norms and standards. Following are some of the major landmark developments at the international level, which have brought the protection of human rights on the agenda of international politics and law. With these revolutionary developments the process of internationalization of the concept of human rights began. Let us discuss them in detail.

1.5.1 Humanitarian Intervention (HI)

The doctrine of HI has been expounded by many international lawyers, including Hugo Grotius, the father of international Law, in the-17th century. This doctrine recognizes as lawful the use of force by one or more States to stop the maltreatment by a State of its own nationals when that conduct was so brutal and large scale as "to shock the conscience of the community of nations". It is true that the principle of HI was frequently misused in the past and often served as a pretext for occupation or invasion of weaker countries. But it was the first to give expression to the proposition that there were some limits to the freedom States enjoyed under international law in dealing with their own nationals. Many great Powers have invoked the principle during the 19th century to prevent the Ottoman Empire from persecuting minorities in the Middle East and the Balkans.

1.5.2 International Humanitarian Law (IHL)

International Humanitarian Law (IHL) was developed through many treaties concerning laws of war. Treaties of 1864, 1906, and 1929 regulated the rights of the wounded in armies in the field, the wounded at sea in times of armed conflict. The 1864 treaty also protected medical personnel and hospitals. And also the protection to civilian population was provided by 1907 Hague Convention and prisoners of war were dealt with by treaty in 1929. From time to time the laws contained in these treaties have been revised and modernized. Much of that law is codified in four Geneva Conventions of 1949 and the two 1977 additional Protocols to these Conventions. It must be noted that the creation of the International Committee of the Red Cross (ICRC) in 1864 by Henry Dunant contributed greatly to the development of the laws of war. The four Geneva Conventions aim to protect the sick and wounded members of the armed forces, prisoners of war (POW) and civilian population. For instance, the Geneva Convention on POW requires that prisoners be treated "humanely" and that they not be subjected to physical or mental torture to secure from them information of any kind.

It prohibits "measures of reprisal against POW" and provides that all POW be treated alike by the detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinion. The fourth Geneva Convention, which, seeks to protect civilian populations, establishes a massive code of conduct for the Occupying Power. It prohibits "not only murder, torture, corporal punishment, mutilation ...of a protected person, but also ...any other measures of brutality whether applied by civilian or military agents." It outlaws the taking of hostages, collective punishment and reprisals as well as "individual or mass forcible transfers" of protected persons or their deportations to the territory of the Occupying Power.

1.5.3 Abolition of Slavery

The first international treaties concerning human rights were linked with the acceptance of freedom of religion (e.g., the Treaties of Westphalia of 1648) and the abolition of slavery. Slavery had already been condemned by the Congress of Vienna in 1815 and a number of international treaties on the abolition of slavery appeared in the second half of the 19th century (e.g. the Treaty of Washington of 1862, documents of the Conferences in Brussels in 1867 and 1890 and in Berlin in 1885). The practice of slavery was first condemned in the Paris Peace Treaty (1814) between Britain and France. Under the League of Nations the Convention to Suppress the Slave Trade and Slavery was adopted in 1926. This Convention still remains the basic document prohibiting the practice of slavery, although it was amended by a Protocol in 1953 and supplemented in 1956 to deal with problems of defining the acts which constitute slavery in the modern world.

1.5.4 International Labour Standards

International Labour Organization (ILO), which has been in existence since 1919 and became a Specialized Agency of the United Nations in 1946, seeks to achieve social justice through its activities in the social and labour fields. The basis of ILO action for human rights is the

establishment of international labour standards and the supervision of the implementation of these standards by ILO member States. ILO has adopted more than 150 Conventions and Recommendations on labour standards. These Conventions, when ratified by States, are binding upon them. The Conventions relate to the basic human rights concern of ILO, such as freedom of association, abolition of forced and child labour, freedom from discrimination in employment and occupations. They also lay down standards in such fields as conditions of work, occupational safety and health, the provision of paid holidays and social security, industrial relations, employment policy and vocational guidance, and provide for the protection of special groups, such as women, migrants and indigenous and tribal peoples.

1.5.5 Protection of Minorities under the League of Nations

The League of Nations was given a mandate to supervise the enforcement of the minorities' treaties emerging from the 1919 peace agreements with East European and Balkan States. These treaties included provisions relating to the protection of the minorities. The minorities' regime of the League consisted of five special treaties binding Poland, the Servo-Croat-Slovene State, Romania, Greece and Czechoslovakia; special minorities' clauses in the treaties of peace with Austria, Bulgaria, Hungary and Turkey; five general declarations made on admission to the League by Albania, Lithuania, Estonia and Iraq; a special declaration by Finland regarding the Aaland Islands and treaties relating to Danzing, Upper Silesia and Memel. The League agreed to serve as the guarantor of the undertakings that the Parties assumed in these treaties. It exercised those functions by developing a system for dealing with petitions by minorities charging violations of their rights. It is pertinent to note that during 1930-32 the League received 305 petitions from the minorities out of which only 153 were admitted. These petitions, among others, pertained to matters such as suppression of private schools, use of biased historical texts, restrictions on minorities' languages, agrarian reforms to the detriment of minority landlords,

discriminatory policies in a job placement, denial of pension rights, denial of citizenship and acts of violence, repression and terror on the part of the authorities. The League system for dealing with these petitions was relatively effective and quite advanced for its time. Although the League was quite effective in redressing the grievances of minorities on smaller issues and everyday friction, it failed to solve the wider problems of peaceful living and amicable cooperation. Nonetheless, its decision to ask the Permanent Court of International Justice (PCIJ) for Advisory Opinions on contentious issues of minorities rights were a welcome development in international law/relations. The decision of PCIJ on the Minority Schools in Albania Case (1935) is worth recalling here. The Court ruled that persons belonging to racial, religious or linguistic minorities were to be given the same treatment and the same civil and political rights and security as other nationals in the State in question.

1.5.6 United Nations and Human Rights

The charter of the United Nations (1945) perhaps, is the most important land mark in the development of modern principles of human rights. The charter makes repeated references to human rights. It considers that the international peace and security depends, among other things, on the recognition of observance of human rights. Its preamble states: "the peoples of the United Nations express their determination to reaffirm faith in fundamental human rights of men and women and of nations large or small."

One of the four purposes of the United Nations is the promotion and encouragement of human rights and freedoms for all without distinction as to race, sex, language or religion. In Article 55 and 56 of the charter, the U.N. members pledged to make joint and separate action in cooperation with the United Nations for the achievement of their goals. Since human rights were not defined in the charter for lack of time and agreement among nations, the task of elaborating them was left to the General Assembly. The Assembly completed its task by adopting the

Universal Declaration of Human Rights (UDHR) on 10th December 1948 which included both Civil and Political and Economic, Social and Cultural rights. Subsequently the General Assembly has adopted many conventions, covenants and declaration and the process continues. In the next unit you will read in detail the UDHR and in other units about some more declarations and conventions on Human Rights.

Check Your Progress 3

Note: Use the space given below for your answers.

- 1) Define the concept of "humanitarian intervention".

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- 2) Write down the rights proclaimed in the French Declaration of the Rights of Man and Citizen.

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- 3) What contribution the ILO has made to develop human rights standards?

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1.6 LET US SUM UP

In this unit you have learnt about the importance of human rights for the development of human personality. Various meanings or understandings

of the concept of human rights have been discussed. Important definitions of the concept of rights have been analyzed. The unit discusses the nature and features of human rights. We learn that human rights are universal, inalienable, indivisible, and interdependent. They are not absolute or unlimited. Reasonable restrictions or limitations can be imposed on their exercised. The most important part of our discussion is concerned with the origin of human rights - from Magna Carta in the 13th century to the League of Nations in the 20th century. In this journey of evolution of human rights, we discussed how the English, American, and French revolutions and Bills of Rights have contributed towards evolving a comprehensive concept of human rights. The contributions of League of Nations, ILO, ICRC, and the Bolshevik Revolution of 1917 have been essayed. All major national and international developments concerning the evolution of rights have been examined.

1.7 KEY WORDS

Human Rights: Human rights are moral principles or norms that describe certain standards of human behaviour and are regularly protected as natural and legal rights in municipal and international law.

Declaration: A written affirmation, which is morally but not legally binding on the States who have approved it.

Covenant: A treaty or agreement which is binding on ratifying States.

Bolshevik: A Russian word, which means "majority". The majority in the Communist party of Russia brought socialist revolution through Armed struggle to overthrow capitalist rulers disregarding the opinion of Mensheviks (minority) of the party.

1.8 QUESTIONS FOR REVIEW

- 1) Explain the meaning of first generation or category of human rights.
- 2) Elucidate the concept of solidarity rights.
- 3) List three important features of human rights.
- 4) Define the concept of "humanitarian intervention".

- 5) Write down the rights proclaimed in the French Declaration of the Rights of Man and Citizen.
- 6) What contribution the ILO has made to develop human rights standards?

1.9 SUGGESTED READINGS AND REFERENCES

- Baehr, Peter R., Human Rights-Universality in Practice (London: Macmillan, 1999).
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- Ishay, Micheline R, The History of Human Rights, New Delhi, Orient Longman, 2004 '
- Levin, Leah, Human Rights-Questions and Answers (Paris: UNESCO, New Delhi: National Book Trust, India, 1998)
- South Asia Human Rights Documentation Centre Introducing Human Rights, Delhi, Oxford University Press, 2006
- Vijapur, Abdulrahim P. Human Rights in International Relations (New Delhi: Manak Publications, 2008).

1.10 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

- 1) See section 1.2
- 2) See section 1.2
- 3) See section 1.2, point 6.

Check Your Progress 2

- 1) See section 1.3
- 2) See section 1.3

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3) See Sub section 1.3.1

Check Your Progress 3

1) See section 1.6

2) See section 1.5

3) See section 1.6

UNIT 2: THEORETICAL PERSPECTIVES OF HUMAN RIGHTS- LIBERAL, MARXIST, FEMINIST

STRUCTURE

- 2.0 Objectives
- 2.1 Introduction
- 2.2 Liberal Human Rights Theory
- 2.3 Marxism and Human Rights
- 2.4 Political Ideology and Human Rights
- 2.5 Populism and Progressive Social Change
 - 2.5.1 Limitations of Populism
 - 2.5.2 Chávismo Populism
 - 2.5.3 Human Rights and Chávismo
- 2.6 Feminism and Human Rights
- 2.7 Let us sum up
- 2.8 Key Words
- 2.9 Questions for Review
- 2.10 Suggested readings and references
- 2.11 Answers to Check Your Progress

2.0 OBJECTIVES

After this unit we can able to comprehend:

- To know about the Liberal Human Rights Theory
- To discuss the Marxism and Human Rights
- To compare different Political Ideology and Human Rights
- To describe the Feminism and Human Rights

2.1 INTRODUCTION

“Human rights” is a concept so deeply intertwined into the modern discourse that it seems almost impossible to question it or refer to any standard beyond it. The problematic nature of this issue is not so much

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that people have different conceptions of “human rights”--”right” is pretty straightforward in theory, considering the “right to free speech,” the “right to freedom of association,” the “right to property,” or the “right to a minimal means of subsistence”--but instead the way in which they mask particular interests and ideological motives when demanded or applied in real situations.

How and why the domination of the “human rights” discourse in reference to social ills or malfeasance came to where it is today is beyond the scope of this paper. But two more pressing sets of questions may be asked. Firstly, how does the dominant discourse of “human rights” function when put in practice and not just a theoretical or philosophical abstraction? In other words, what pragmatic functions do claims of “human rights violations” or “adherence to human rights” holds? If human rights are linked to a specific institutional apparatus that is required for their “realization,” then what effect does the human rights discourse have on a society undergoing a substantial social and institutional transformation? Secondly, if the discourse of human rights cannot incorporate a theory of radical social change, what justification, if any, is there for abandoning it? If the horns of “human rights violations” are to be sounded every time a society attempts to move beyond the institutions connected to liberal human rights theory, can it be legitimate to ignore them? These two sets of questions are connected, but I intend to make a contribution to the second set before I elucidate the first. This paper will discuss these questions through a case study in one specific context: Venezuela in the period of 1999-2009.

The argument, briefly, is as follows: human rights institutions, groups, and actors promote their own form of discourse, and this discourse concurrently has the effect of eliminating from the conversation a certain element; from one perspective, limiting, a priori, the option for a possibly necessary radical social change and, from another perspective, excusing, in a roundabout way, violations of general human dignity. The resultant deadlock is the hallmark of progressive or radical politics today and can be identified in the discourse which has embroiled the “Bolivarian

Revolution” in Venezuela. Following Slovenian philosopher Slavoj Zizek, this project is intended to contribute towards an illumination of what Zizek has termed “the double blackmail,” where if one supports human rights, and interventions intended to support them, they are accused of supporting international imperialism, while if one rejects human rights, they are accused of excusing authoritarianism. This paper will make the argument that the political nature, ideology and theory of a radical, progressive movement is the determining factor in discussing human rights as applied to social change.

It may seem that this argument presents a reading in which human rights ideology is somehow false and does not apply to Venezuela or other countries because that are undergoing a certain type of revolutionary social change. While this interpretation is initially understandable, it would be a serious misreading of the argument. Many of the ideas about Venezuela put forth by the human rights discourse are not accurate while some are, and it will be a component of this paper to point them out. But the point is not to show that human rights are themselves “wrong,” but to show that the production of ideas about Venezuela and human rights, through their violation, adherence or interpretation, has important effects, and that the production of such effects plays a significant role in the impediment of social, institutional and structural change.

It is my intention here not to excuse human rights violations or accuse anyone of perpetrating them. It is my position that human rights, both in theory and practice, are positive conceptions but that there exists a possible future in which they can be transcended for something better, which is what makes the discussion of political ideology and projects that much more important. In order to move forward, we must face the deadlock, recognize its character and attempt to overcome it. It is here that find the human rights discourse is its most limiting when it comes to social change and agree entirely with Zizek when he states that his,

"problem with this new discourse on human rights [is] that it is part of a precisely concrete universality of a situation where certain questions are

no longer permitted to be asked [...] This is the reason I am skeptical about so-called modern liberal politics. Did you notice how the very same people who are deep into this poetry of human rights, the moment you propose a certain political measure which is a little bit utopian or radical, they use a kind of a totalitarian blackmail. They claim; ‘But didn't we learn the lesson [that] this necessarily ends up in a new form of totalitarianism?’ That is to say, the political message of the very people who go into this depoliticized poetry of human rights is to denounce every radical political measure as potentially totalitarian.

The claim of totalitarianism is not an empty one, but to say that all radical political projects will result as such is false. Human rights as it functions today, as a point of departure and the ultimate debate for the viability of political change, contributes to this falsity and needs to be unmasked and analyzed. Therefore, what is most important when discussing radical social change is the political ideology and project of any movement or state.

This paper is divided into three parts. The first part will identify liberal and marxist theories of human rights and show how their methodology and application create the conditions for the “double blackmail.” It will highlight the idea that the political nature of the subject of a human rights claim, whether claiming violation or defending against it, is the key point of analysis. The second part will introduce the situation in Venezuela, the political nature of the Venezuelan Chavista movement; its version of radical socialist/populist ideology and attempt at social change. Part three will consist an analysis of the debate between defenders of the Venezuelan project and its detractors and finally part four will focus on the conclusion that the liberal and marxist theories of human rights are in full swing in the Venezuelan human rights discourse and that the limitations of the Venezuelan project show that only with a more concerted effort to develop a modern and comprehensive political theory of social change can the effects of the “double blackmail” be overcome.

2.2 LIBERAL HUMAN RIGHTS THEORY

The modern liberal conception of human rights is guided generally by two different viewpoints competing between human rights as needs-based morality and human rights as political commitment to individual liberty. Following Isaiah Berlin, in his essay *Two Concepts of Liberty*, these can also be seen as “positive” and “negative” rights.³ The former is a contemporary theory and practice premised upon the interests and needs of an individual holder of rights and the necessity to protect them through “active,” or “positive,” intervention. The latter is based upon the moral agency and liberty of the individual as a holder of rights, or a “passive” recognition of the right to noninterference.

What both these theories seem to rely on is an external institution or agent that allows the rights to be “given” or “ensured” to the rights holder. Moreover, both rely heavily upon a theory of individualism. But it can be said that the contemporary human rights movement “lost” something from the past, classical liberal position on rights. As David Chandler puts it:

What was lost in the promulgation of human rights theory in the 1990s was the connection between rights and the subjects who can exercise those rights [...] This separation of rights from their subjects leads to the redefinition of both rights and subjects through the human rights discourse. In fact, the logical conclusion of human rights policy would be the end of politics as a sphere for the resolution of social questions of the distribution of goods and policy making.

This is seen as the departure from the “negative rights” liberal viewpoint and a move towards the “positive rights” position. But was this ever the case? Was this connection ever “there” in the first place in order for it to be “lost”? The conception of rights in and of themselves seem to presuppose a relationship between a certain type of institution--one that can bestow or grant rights--and the subject and thus a certain apolitical morality and ethics.

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The “positive” conception holds that liberty of the individual is not a fundamental aspect of human rights but instead places a premium upon the needs that rights protect. The “negative” conception argues along the lines of the classical conception of liberal thought and references “natural rights.” This recognition of rights assign a certain type of moral agency to the individual and are based on a certain interpretation of human nature. What follows from this conception is a society that creates institutions that are arranged upon the assumption of an individualist conception of moral agency. As Steven B. Smith, speaking on Hegel’s critique of Liberalism puts it:

In fact, to speak about rights is not to assert a simple proposition but is implicitly to make a complex set of interlocking claims that can be reduced to five parts: who shall enjoy which rights under what circumstances and for what purposes, and which kinds of restraints need to be imposed to make the enjoyment of those rights possible? An appeal to rights necessarily involves an appeal to the social and political institutions and institutions that make the protection of rights possible.

What is problematic about this position is that assumes a monopoly on what human nature is and builds a society and its institutions around that conception.

The theory of natural rights emerged from a specific historical condition. In the time which most classic liberal writers emerged and propagated their theories the conception of “man,” the essential rights holder, was quite literal if not more so. In fact, “man” basically meant white, property owning man. Women, blacks and propertied laborers were not part of the equation due to their material dependence as a condition for limiting their inclusion and use of reason. Thus, it is argued that the theory of “natural rights” was simply an empirical view of the world as opposed to a natural theory. Hegel was one of the first philosophers to point out that the universality of theorists like Locke and Hobbes were not really empirical, but based on preconceived, “theory loaded” conceptions:

Thus, despite the empiricists' claims to have built their theories of natural rights on the simplest and most elementary needs, their methods of determining these needs is already "theory loaded." Their descriptions of these needs are not simply neutral but invariably commit them to adopting a particular view of society and the future.

As such, the historical conditions of the time of the writing of the classic liberal writers largely influenced their view of society. It would be a fallacy to assume that modern liberal human rights theory has somehow overcome that era and are not themselves a reflection of modern historical conditions.

Furthermore, liberal theorists like John Rawls see certain political issues as being "settled once and for all:"

[W]hen certain matters are taken off the political agenda, they are no longer regarded as appropriate subjects for political decision by majority or other plurality voting. For example, in regards to equal liberty of conscience and the rejection of slavery and serfdom, this means that the equal basic liberties in the constitution that cover these matters are reasonably taken as fixed, as correctly settled once and for all. They are part of the public charter of a constitutional regime and not a suitable topic for ongoing public debate and legislation, as if they can be changed, one way or the other by the requisite majorities.

As Rawls puts it, there are some issues which are off the table. Political representations of those who advocate for "slavery" or "feudalism" do not enjoy a representation in the congresses of Western nations. But the limit of liberal theory is that it does not recognize how we got to this point. The fact is that these constituents did not simply retreat from the political sphere. In most cases they were forcefully suppressed and following this, the ethical and moral coordinates of political society continued to exert pressure on the social and cultural norms that made "slavery" and "Feudalism" no longer part of rational, reasonable discussion.

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Another problem with the “negative” view of human rights is that it has been largely seen as the political component of laissez faire free market capitalism in the economic realm. In other words, the liberal “negative rights” holding “individualist” position on human rights is one of political and civil rights as opposed to material ones. The necessity of material subsistence is seen as something to be achieved through means of “self-preservation” which certain political and civil rights--such as the right to freedom of association or the right to property--are to facilitate.

Moreover, this position advocates a distinction between those rights which are decided upon “politically” and those that are decided upon “morally.” In this sense, the rights holder contributes to the process in which rights are enforced an articulated instead of being a “passive receiver” of human rights that are entitled to him from a higher moral authority. This position has been seen as largely discredited especially seeing as how almost no modern democratic liberal government functions on this level of rights. Although there may have been a time when non-interference was enough in respect to liberty, the conditions of industrialization and the progression of capitalism has forced a re-conceptualizing of what human rights entail. Part of the de-legitimization of this position rests on the issue regarding that in order to exercise the right to participate in the process certain preconditions are necessary such as material security and those with more of it tend to exercise the “right to participation” unequally than those with less. Furthermore, this “individualist” position seems to be wholly incapable of taking into account and acting upon conceived morally desperate situations--especially in the international arena given cases of genocide and ethnic cleansing.

This again can be seen as a limitation on the theory and conception of liberal human rights theory and the political institutions it entails in the face of changing historical conditions. In a world of globalization, interdependency, transnational corporations and a myriad of other

international concerns that did not underscore the fabric of society during the heyday of classic liberalism, the conception of the “individualist” human rights theory seems entirely outdated and inadequate to deal with these problems. If it were to be truly enacted in practice, it would amount to a political position of sitting by and watching as one group of people committed genocide upon another and excused as an example of “the rights struggle”--as people exercising their moral agency in a battle to claim their rights.

The “positive” view of human rights encounters its own contemporary problems and is at the heart of the debate within liberalism. The question regarding the “positive” view is that it is uncertain of who is to ensure that rights are fulfilled. If the “negative” position cannot adequately deal with the problems of new historical conditions, then perhaps the “positive” position can. But even if this conception is seen as advancing the interests of the downtrodden masses of the world in situations where intervention was seemingly necessary because the situation could not allow a waiting period for those people to exercise their own sovereignty and claim their rights for themselves, it is not hard to see how this can be seen as a position which advocates for the “victimhood” of those who are “powerless” and paints them as needy and pitiful. This position obviously defends a conception of human rights that requires moral intervention on behalf of these “powerless” in the name of a higher moral authority and ethical superiority. What this amounts to is essentially a form of “humanitarian imperialism.”

But is this position so different from the “negative” one? Why is it that when material right come into the picture we are suddenly faced with a conception of the “paternalist” institution that must mediate the position of the starving masses with those whose responsibility it is to provide food? Thus, where both these seemingly competing theories converge is the role of a mediator, or, as I shall put it, the role of the political institutions that emerged directly from the theory of human rights. If a person is somehow restricted from entering the voting booth, or has his private property confiscated by his neighbor then an external mediator must enter the picture the same way it must when material human rights

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are to be fulfilled. What follows from this picture is a classic, and contemporary, view of the liberal state.

Within liberal human rights theory there must allow to exist the mediator that is the state and thus there always exist a conflict with democracy since rights always entail a restriction on political action. Even more importantly, the liberal state is founded upon a certain moral condition--a certain monopolization of a concept of human nature and approaches its intervention into civil society from a standpoint of "moral legitimation" since it is in possession of an absolute moral truth. Under the liberal state the rights holder is seen as an individual and political institutions are then organized around this conception of human nature and influences the types of relations that can be established. Basing political institutions on the rights of individuals is a way of saying that institutions are only legitimate as long as they secure the liberty and freedom of the individual. Within liberalism rights are given the significance of claiming them against the state and thus developing a conception of human rights as a theory of government and political legitimacy.

Liberalism is a historical movement the same as any. It began as a political movement aiming to replace the institutions of feudalism and monarchism with ones based on individual liberty. It has evolved into something different which can best be seen as two different positions; a moralistic and ethical superiority discourse that seeks to impose itself in a form of humanitarian imperialism or a liberalism with a libertarian tinge that advocates nonintervention and thus excuses gross misery on the basis of the subjects "struggle for rights." The contemporary human rights movement thus acts as an obscurant for the relations of power and the interests they represent. The agency is not in the individual, but in the institutions that do the empowering actions of intervention, defense or assistance that is portrayed as an exercise of moral duty or protects the rights of the holder within a certain border. Using the US intervention in Iraq as an example:

It is clear [...] that the US overthrow of Saddam Hussein, legitimized in terms of ending the suffering of the Iraqi people, was not only motivated by other political-economic interests (oil), but also based on a specific idea of the political and economic conditions that should open up the perspective of freedom to the Iraqi people (Western liberal democracy, guarantee of private property, inclusion in the global market economy, and so on). Thus the purely humanitarian antipolitical politics of merely preventing suffering amounts in effect to the implicit prohibition of elaborating a positive collective project of sociopolitical transformation.⁸

When power is used from a position of moral truth, it does not have to use the more discomforting language of the political or economic type. While the classic liberal position would like to encourage more transparency, more checks and balances, more individual liberty and less state intervention, it is obvious that this position is naive. The liberal state itself is founded on position of moral supremacy, not just political action, and will continue to exercise this supremacy. Moreover, the idea that the ideal liberal state is constituted upon a political relationship of reciprocal responsibility to its liberty practicing, rights-bearing, politically active constituents who are constantly in a position to check a “morally superior” exercise of state power and intervention is equally naive. It does not adequately take into account an important issue regarding issues of class and economic relations.

If one defends human rights the liberal perspective today, one is defending a status quo situation of specific types of institutions and more or less defending the high jacking of the theory in the interest of modern power relations. Liberal human rights theory was once a progressive calling designed to check and eventually overthrow the whimsical institutional powers of theocratic and monarchist regimes and give a voice to oppressed, but this is not the case today. One of the first theoretical attempts to deconstruct and transcend liberal human rights theory is Marxism. It is to this theory the paper now turns.

2.3 MARXISM AND HUMAN RIGHTS

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If the blackmail against liberal human rights theory is that supporting it is tantamount to imperialism, then the only logical counterpart is the rejection of human rights. The blackmail in this regard can be most succinctly described as being that if one rejects human rights; one is in effect acting to mask injustice or pardon authoritarianism and repression. The rejection of human rights has been used many a time by those seeking to avoid responsibility for their crimes, but these rejections have almost entirely been entirely pragmatic and based on specific situations instead of any sort of theoretical founding (although, as we will see, one can beget the other). The most comprehensive and theoretically sound rejection of human rights has undoubtedly come from the canon of Marxism--with its rejection of capitalism, its emphasis on collectivity and its position that the institution of private property is the foundation for exploitation, alienation and the subsequent distance between “formal rights” and real human security and fulfillment.

Liberal human rights theory is individualist and property centered. To Marx, freedoms in liberal democracies are illusory in that the individual value advocated by the liberal regime is market value, not human dignity. For Marx, the fundamental rights capitalism defends are not universal human rights but rather the rights of capitalists to property and legal structures that follow. The Marxist critic of human rights asserts that the rights and freedoms of bourgeois democracies are but illusions, empty of meaning and purely formal, at most procedural. The working class, lacking economic means, consciousness and intellectuals to enforce its rights, is subject to the principles of equality and legality in theory only, masking de facto inequalities that are the result of the struggle between different social classes.

Thus, Marx’s criticism is a global condemnation of liberal regimes generally and the premise through which they were founded as insufficient and able to see man only as a limited political subject whose “civil” needs are to be tended to privately. For him, the state is concerned about the protection of capitalist interests, while ignoring those of workers, because the state is only concerned with equality in the political

sense and not with that of civil society. Therefore, liberal human rights theory and capitalism,

"recognizes no class differences, because everyone is only a worker like everyone else; but it tacitly recognizes unequal individual endowment, and thus productive capacity, as a natural privilege. It is, therefore, a right of inequality, in its content, like every right. Right, by its very nature, can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard insofar as they are brought under an equal point of view, are taken from one definite side only -- for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored."

The Marxist critique is relative, recognizing that as a part of historical development the limited protection of human rights in the capitalist system of production is still higher than the previous feudal stage. However, according to Marx, to achieve the next step forward in civilization, proprietary relations must be suppressed and replaced with real, human relations that take into account the conditions of civil society.

Far from being the means by which freedom is exercised, which is the usual liberal conception, Marxism sees private property as the final mechanism of oppression and a source of separation between men. The resolution of these inequalities would occur, for Marx, via a revolution aimed at the implementation of a temporary dictatorship by the proletariat as a step towards the disappearance of the state and its replacement by society. It would be with this act that the formal and procedural logic of human rights would wither away along with the state. With this transitional phase and subsequent development, the "narrow horizon of bourgeois right" would be "crossed in its entirety:"

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"...after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor, has vanished; after labor has become not only a means of life but life's prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly -- only then then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!"

Marx's theory of human rights thus coincided with a theory of economic development and the idea that socialism would bring about not only political emancipation of the working class but also the unfettered growth of economic abundance through a new organization of the relations of production. In most situations where Marxists have taken power, this has not been the case.

While seemingly sound in theory, Marxism's historical sore thumb has been the use of its rejection of human rights as "formal" or "bourgeois" when its advocates have been in positions of power. The rejection of human rights as an illusory product of private property relations and the capitalist system has led to situations in which the repression of human beings has been excused in the name of "means to an end." At the level of practice, a valid liberal criticism of Marxism is that the proletarian dictatorship, which in theory had been intended only to be a temporary transitory phase, were ossified and institutionalized.

As the Russian Revolution was arguably the high water mark for historical Marxism, it is arguably the most important reference to theories of human rights and the policies and practices that the architects of this event adhered to and implemented. When looking at the Russian Revolution, it could be counter-argued that the capitalist countries were the aggressors that forced Russia into authoritarianism. Additionally, it could be argued that all states--especially revolutionary ones--were founded on violence and suppression of dissent, notwithstanding the

bloody birth of liberalism which, as some authors have pointed out, were not inherently democratic but were made so only after a protracted struggle. But if a closer look is taken, the theories of Marxism, especially after the Russian revolution, are imbued with not only a willingness to use violence and repression, but a willingness to do so brutally and with little to no moral restrictions.

Marxism is rather straightforward in its approach to revolution. Lenin was arguably the first to truly grasp and implement the implications of revolutionary Marxism and the active engagement in terror and suppression of the previous holders power--such as landowners, capitalists and those who had an active interest in taking up armed struggle against the revolution. Writing his classic *The State and Revolution*, on the eve of the revolution in 1917, Lenin put it quite bluntly when he wrote that,

"the dictatorship of the proletariat imposes a series of restrictions on the freedom of the oppressors, the exploiters, the capitalists. We must suppress them in order to free humanity from wage slavery; their resistance must be crushed by force."

While this statement is contextualized with a discussion of increased democracy of the underprivileged and the full realization that it is transitory policy that acknowledges the lack of freedom inherent in it, the implications are obvious and straightforward. His revolutionary counterpart, Leon Trotsky, in a polemic against Karl Kautsky written in 1920 entitled *Terrorism and Communism*, put it in even more direct terms:

Who aims at the end cannot reject the means. The struggle must be carried on with such intensity as actually to guarantee the supremacy of the proletariat. If the Socialist revolution requires a dictatorship --"the sole form in which the proletariat can achieve control of the State" (from Kautsky)-- it follows that the dictatorship must be guaranteed at all cost.

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What Lenin and Trotsky's quotes point to is an honest admittance of the need to use force at any cost to guarantee the ushering in of the a socialist revolution. It this theory, inscribed into the practical application of Marxist revolution, through which the rejection of human rights and the following authoritarianism and repression is used.

The way in which Marxism treats human rights follows a very distinct ideology of radical social change. The first idea is that liberal human rights are premised on inequality and injustice and should be seen as simply a theory natural to capitalism and therefore open to complete rejection. The second idea is that if a movement has an emancipatory plan and ideology that conforms to the rejection of capitalism and the desired institution of socialism, then terror and abuses to human dignity can be accepted for a certain transitional period in order to suppress those who are opposed to seeing this plan come to fruition. The rejection of human rights is to be tolerated under the guise of necessity and a rejection of "bourgeois morality."

Marxism's rejection of human rights has amounted, when in power, to the equivalent of ignoring true political social redresses, suppressing civil and political freedoms while giving a free hand to forces of authoritarianism and indiscriminate terror. It cannot be said that this was the intention, nor can it be said that this was the logical, determined, path of Marxist theory, but there is simply no way to get around the fact that Marxist regimes and movements that have rejected human rights have also been historic failures at using transitory force to bring in radical social change--and that the Marxist theory of human rights played a large role in this disaster.

Check Your Progress 1

Note: Use the space given below for your answers.

- 1) Discuss about the Liberal Human Rights Theory.

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2) Relate the relation between the Marxism and Human Rights.

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2.4 POLITICAL IDEOLOGY AND HUMAN RIGHTS

With a grasp of the implicit ideology of liberal and Marxist human rights theory; that of the double blackmail, we can move on towards an analysis of the current situation world wise. But before moving on, it is important to restate the purpose of this section and identify the logic behind the progression of the next ones. This involves framing the most important claim of this paper; that the key to understanding any human rights discourse is the implied or admitted political ideology and project that is behind it. This is important for two reasons.

The first reason is that it must be admitted that all states are effectively dictatorial because of the fact that they are institutionalized monopolies of the means of the legitimate violence that predicates the legal system. This could be said to be waning in the era of globalization, and not an important factor in Third World countries whose states are in effect owned by multinational corporations, but apart from who is controlling the state, and as long as borders differentiate one government from the next, this point holds in theory. Since this is so, it is absolutely imperative to identify the political ideology and project of the state so one can understand the reasoning behind its policies and attempt to predict its future actions.

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The second reason is connected to the first. By recognizing the dictatorial nature of the state and identifying its political ideology and project, while analyzing its policies and attempting to predict where it is headed, one must make take the somewhat reluctant, but honest, position that all states are going to violate human rights, in some way, as they are understood today.

When one speaks of liberal human rights theory, one is implying that human rights are to be respected insofar as they are reflections of a certain organization of society. What this amounts to, whether admitted or not, is a universal, global project of liberalism and the institutions it corresponds with. As such, it is a political project. What is important to highlight is that a political project is always proactive. The use of human rights in liberal human rights theory is effectively the right of intervention, whether it be upon the domestic civil population, or a foreign country. When the United States invades Iraq or Afghanistan, it is not based solely and naively on some abstract principle of human rights (human rights are no doubt being violated solely through this act--houses are being bombed, people are being killed and arrested, civil liberties are being suspended, etc. as is a necessary aspect of war). There are also obvious interests involved (why not invade multiple other countries who are equal, if not worse, human rights violators?).

The “defense” of human rights by force in these cases is objectively an element of a proactive political project--one which sees the United States as the guarantee of some sense of global harmony, freedom and liberty with the right to intervene in countries that do not recognize its conception of human rights and do not have the “appropriate” corresponding institutions. As mentioned earlier, this has the effect of in almost every case seeing a country that does not have the institutions associated with liberal human rights theory as an a priori violator of human rights.

Thus, liberal human rights theory can stand to block any sort of progressive radical change because it sees itself as the culmination of

human being, with all that is necessary being gradual reforms and perfections as opposed to complete overhaul. Moreover, in a sort of ideological cul-de sac, an intervention to stop human rights abuses is allowed to engage in human rights abuses of its own in order to fulfill and institute a certain political ideology and institutions that correspond more favorably with liberal human rights theory--but without actually recognizing or admitting this.

If liberal human rights theory hides its ideology of a proactive political project by claiming to only be unprejudiced and objective in its claim of human rights violations and subsequent intervention, then Marxism is its polar opposite. Unlike liberalism, Marxism is upfront in its commitment to intervening and actively supporting a political ideology and project; the upheaval of capitalism and institution of socialism through the use of the dictatorship of the state in the name of the working class.

But this, obviously, does not tell the entire story. Just because a political project is honest about its ideology and direction does not somehow make it justifiable. In fact, this “honesty” has tended to legitimize dictatorship in the eyes of its beholders to the point of ossification and institution instead of a means to an ends. The political ideology of Marxism, in its upfront desire to use dictatorial suppression and terror, is thus a project that not only rejects human rights out of fidelity to an idea or theory of emancipation, but can do so as an opportunity to exercise corruption and abuse of power.

To put it in other terms, there is no guarantee that just because a theory is honest that the person who adheres to it will also be, thus bringing into play an observation made earlier that theoretical founding can beget pragmatic corruption and abuse of power or, alternatively, pragmatic corruption and abuse of power can make use of theory. Therefore, Marxist human rights theory can stand to excuse and legitimize any and all abuses of power because it sees its political project as one of necessary radical social change that should be brought about by any means necessary.

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To restate the key points of this section; it is important to see human rights through the recognition that the necessary aspect of understanding any discourse on human rights is the implied or admitted political ideology and project that is behind it; and that all states are going to violate human rights as they are understood today. Thus, in order to understand the discourse in Venezuela on human rights theory, one must also analyze the political ideology and project to the extent of whether or not such an ideology and project is viable, worthwhile and legitimate. It is this position that will determine the rest of this paper, as the claims of human rights abuses in Venezuela will be contextualized within the framework of its political project and ideology.

The following part will consist of the bulk of the paper; an analysis of the political ideology, nature and project of the Venezuelan state, and the political movement that is characterize as Chávismo, following the beginning of the Bolivarian Revolution of 1998. This can be most accurately identified as populist in nature while utilizing Marxist rhetoric. The third part will consist of an analysis and generalization of the human rights discourse and debate that has embroiled Venezuela. It will identify the interests involved, describe some of the claims and counterclaims, and group these two parties into general opposing theoretical camps; those who objectively support the liberal human rights theory and those who objectively support the Marxist theory of human rights.

The intention is to show that the human rights discourse should be seen as both employment of a Marxist theory of human rights by defenders of the Venezuelan state on one side, excusing the abuses of an inevitable political project under the guise of social change, and employment of a liberal theory of human rights by accusers of violations, who see liberal institutions as the only guarantors of human dignity, on the other. It is intended to show that populism is not a viable, worthwhile or legitimate political ideology and project and that the abuses to civil freedoms and human dignity cannot be justified. But since the accusers are already

biased towards opposing radical social change, their position should be rejected as well. This paradoxical reversed “double blackmail,” in which no position can seemingly be supported, will be addressed in the final part.

2.5 POPULISM AND PROGRESSIVE SOCIAL CHANGE

Before delving into the details of the Venezuelan political ideology of progressive populism following the 1998 election of Hugo Chávez, an analysis and theory of populism must be illustrated. Populism is a controversial phrase when it is associated with progressive political and economic movements. As it is most commonly used, populism is what Western governments and academics like to call movements and governments that are somehow not subscribed to the dominant ideology and by one way or another are existing outside of their means. This way of looking at populism is largely denigratory and used to mask certain power dynamics and the vested interests that accompany them. This way of looking at populism is fundamentally false.

Conventional academic wisdom associates populism in Latin America with the rise of mass politics in the middle of the 20th century, when traditional forms of oligarchic domination connected to the latifundio based commodity export model were overshadowed by the social mobilization that came with the early stages of industrialization. Following the Great Depression, this export model was replaced by a state-led industrialization effort that transformed the socioeconomic landscape of the continent.

2.5.1 Limitations of Populism

Progressive populism’s strength lies in how it often ushers in a new mass democracy that transcends the old, traditional, and oligarchical politics, providing a new sense of dignity and self-respect for lower class sectors of society, who are encouraged to recognize that they possess both social

and political rights. Populist leaders are often wildly popular and capable of winning any free and open democratic contest.

Because populists have no single doctrine (drawing from existing sociopolitical models such as socialism, corporatism or democratic capitalism) their ideas remain inconsistent and their ideas change frequently over time. The flexibility of these ideas allows them to appeal to the largest amount of voters at any given time. The electoral victories of populist leaders show a clearly expressed public discontent with the way things were and a desire for major political change. They give hope to the democratic principle that an alternation in power could bring about a change in policies and government and that had failed to articulate popular demands in the past and were viewed largely as corrupt.

2.5.2 Chávismo Populism

Latin American history has no shortage of Left-wing military coup attempts, but Chávez' case is unique. Following a failed coup attempt in 1992 that he personally led, Chávez' name was catapulted to political prominence and he was democratically elected on a ticket to transform the national constitution in 1998 with close to 60% of the vote. Using a discourse of nationalism, anti-imperialism and claiming to support a "Third way" that was not completely socialist/communist or completely capitalist, Chávez discredited the institutions associated with neoliberalism while employing a charismatic personality that marginalized masses associated with.

2.5.3 Human Rights and Chávismo

In regards to democracy and human rights, there are several pivotal areas of Chávismo that warrant concern. As highlighted earlier, populism heralds a large mass democratic movement that makes an effort to include the voices of marginalized sectors of the population that could not be done by traditional politics. Relying on mass rallies and constant

calls to the voting booth, Chávismo displays all the characteristics of this type of populism.

Check Your Progress 2

Note: Use the space given below for your answers.

1) Write about Political Ideology and Human Rights

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2) Compare Populism and Progressive Social Change

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3) Discuss the Limitations of Populism

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4) What is Chávismo Populism

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5) Discuss about the Human Rights and Chávismo

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2.6 FEMINISM AND HUMAN RIGHTS

All of us who have worked in human rights and in women's rights have experienced the gaps, and we have all attempted to fill them. We have tried to mold and shape both the periphery and the core to make them fit together. We have fought hard to end injustices in the world with tools that are either unable or unwilling to repair the injustices. And yet we continue to fight. While sometimes it seems we are suppressing our doubts about the inability of the tools to work, we often end up expressing them in other ways. The doubts ooze out in our decisions to try more specialized tools (such as the Women's Convention or CEDAW) and sometimes to try different tools altogether (such as education). Similarly, sometimes we think we are expressing doubts and we actually suppress them, for example, by trashing rights rhetoric and then returning to it. The literature and movement surrounding women's human rights has possibly challenged the human rights core more than any other literature or movement. At the same time, it has become one of the core's staunchest defenders. Even as every author identifies and conveys difficulties with the discourse, they all make it somehow work for them. The core is shaken but it remains. Women are still on the periphery.

As long as the Women's Convention is to be enacted and enforced in its current form, then, Meron warns of some absolute contradictions between women's rights and human rights. He softens the blow, however, in three ways. First, he suggests that the Women's Convention could have been drafted to avoid much of the conflict. Second, in one case he reinterprets the private sphere to make it public. Third, he recommends the use of extralegal means such as education and incentives rather than absolute legal enforcement. Throughout his

discussion, though, he assumes that there is something inherently disturbing about guaranteeing private sphere rights (for women). As a consequence, he toes the public/private line, even while recognizing that to do so might preclude women's equality.

At the same time, though, doctrinalists unquestioningly rely on positive international law and rights discourse, acknowledging only through their move to strategy that a right's existence in positive law does not guarantee its recognition or enforcement. Even though they acknowledge cultural differences among women, they use those differences to guide their strategies, rather than opening themselves to the potential disruptions that might occur from a real encounter with those who are different, those who are most affected by the issues they discuss. Doctrinalists also do not account for the power that comes from defining and deploying discourse. They perhaps naively believe that all rights derived from positive law will be treated equally. Finally, they do not recognize the effect that the perceived distinction between the public and private spheres might have on the guarantee of women's rights. Hence, the work of Meron, the institutionalists, and the external critics could sharpen the analysis and advocacy of the doctrinalists.

Check Your Progress 3

Note: Use the space given below for your answers.

- 1) Discuss about the Feminism and Human Rights.

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2.7 LET US SUM UP

Marx's criticism of human rights is premised on the distinction between the political man, which due to a propensity for liberal states to highlight

tends to be regarded as “natural” man, and man as a member of civil society.

The doctrinalists, too, have their strengths. They tend to avoid an essentialist view of women, recognizing and responding to the existence of cultural disagreements among women. And, in their attempts at guaranteeing women's rights, they do not accept the limitations of human rights doctrine. Even in their moves to strategy, they give content to doctrine and, in some ways, begin to break down the distinction between law and society.

2.8 KEY WORDS

Liberalism: Liberalism is a political and moral philosophy based on liberty, consent of the governed, and equality before the law.

Marxism: Marxism is a method of socioeconomic analysis that views class relations and social conflict using a materialist interpretation of historical development and takes a dialectical view of social transformation. It originates from the works of 19th-century German philosophers Karl Marx and Friedrich Engels.

Feminism: Feminism is a range of social movements, political movements, and ideologies that share a common goal: to define, establish, and achieve the political, economic, personal, and social equality of the sexes.

Ideology: An ideology is a set of normative beliefs and values that a person or other entity has for non-epistemic reasons. These rely on basic assumptions about reality that may or may not have any factual basis.

2.9 QUESTIONS FOR REVIEW

1. Discuss about Liberal Human Rights Theory.
2. How Marxism and Human Rights are related?
3. Compare different Political Ideology and Human Rights.
4. Describe the Feminism and Human Rights.

2.10 SUGGESTED READINGS AND REFERENCES

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2.11 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

Notes

- 1) See section 2.2
- 2) See section 2.3

Check Your Progress 2

- 1) See section 2.4
- 2) See section 2.5
- 3) See Sub section 2.5.1
- 4) See Sub section 2.5.2
- 5) See Sub section 2.5.3

Check Your Progress 3

- 1) See section 2.6

UNIT 3: LEGAL ASPECTS OF HUMAN RIGHTS – THE U.N. MACHINERY: CHARTER AND TREATY BODIES

STRUCTURE

- 3.0 Objectives
- 3.1 Introduction
- 3.2 Charter Based Bodies
 - 3.2.1 Human Rights Commission
 - 3.2.2 Human Rights Council
 - 3.2.3 Special Procedures of the Human Rights Council
- 3.3 The UN Treaty Monitoring System
 - 3.3.1 Reports by States
 - 3.3.2 Inter-state Complaints
 - 3.3.3 Complaints by Individuals
- 3.4 Committee on the Elimination of Racial Discrimination
- 3.5 Human Rights Committee
- 3.6 Committee on the Elimination of Discrimination Against Women
- 3.7 Committee Against Torture
- 3.8 Committee on Economic, Social and Cultural Rights
- 3.9 Committee on the Rights of the Child
- 3.10 Committee on the Rights of All Migrant Workers and Their Families
- 3.11 Let us sum up
- 3.12 Key Words
- 3.13 Questions for Review
- 3.14 Suggested readings and references
- 3.15 Answers to Check Your Progress

3.0 OBJECTIVES

This unit will help you to:

- To understand the structure of the UN treaty machinery;

- To understand the features, similarities and uniqueness of the treaty bodies;
- To know about the functions, procedures, and effectiveness of each of the treaty bodies; and
- To appreciate the limitations and problems experienced by them.

3.1 INTRODUCTION

The United Nations human rights system consists of a plethora of bodies and offices established to monitor the implementation of human rights standards set by this international organization. The entire UN system concerned with human rights can be broadly divided into two kinds of bodies. One, those bodies and offices created under the UN Charter or outside the treaty system, which are usually known as Charter-based bodies or non-treaty bodies. The Commission on Human Rights and its Sub-Commission on Promotion and Protection of Human Rights, the Commission on the Status of Women, the Office of the UN High Commissioner for Human Rights, various thematic procedures like Special Rapporteur on Torture and the Working Group on Arbitrary Detention are some examples of this category of UN institutions concerned with human rights. One may note here that significant changes have been introduced to the Charter-based bodies in the recent years. The Commission on Human Rights has now been replaced by a smaller body called the Human Rights Council; the Sub Commission has become the Advisory Committee to the Human Rights Council and so on. Second are those bodies (committees) that have been created as part of the monitoring framework of the various human rights treaties concluded by the United Nations? These treaty bodies impose certain obligations on the member countries who accept their competence while acceding to the treaties. It is this category of human rights bodies that we will deal in detail in this lesson, that is, the treaty bodies established under seven core human rights conventions. Initially, when the human rights treaty system began, there was only one treaty body that was established under the Convention on the Elimination of All Forms of Racial Discrimination. The number of treaties and their monitoring bodies have grown gradually and steadily ever since to reach total of seven (as of December 2007). It

is to be remembered here that the Charter-based and treaty-based bodies coexist to form the complete human rights machinery of the United Nations and they work parallel to each other. Therefore, it would be difficult to prioritize one set of bodies over the other. Now we turn to the discussion on the treaty monitoring system.

3.2 CHARTER BASED BODIES

Charter based bodies are main bodies concerned with the task of promotion and protection of Human Rights in general. Their concern is not with any specific type or category of rights but to oversee that the states do their best to implement the Human Rights and not violate them. These bodies can recommend actions against states to the General Assembly through established procedures. Charter bodies include the former Commission on Human Rights, the Human Rights Council, and Special Procedures.

3.2.1 Human Rights Commission

The United Nations Commission on Human Rights (UNCHR) was established on 10 December 1946 by U.N. Economic and Social Council (ECOSOC). It was a functional commission within overall framework of the United Nations until it was replaced by the U.N. Human Rights Council in 2006. The Commission was intended to examine, monitor and publicly report on human rights situations in specific countries or territories as well as on major phenomena of human rights worldwide. The Commission consisted of 53 members elected by members of ECOSOC. The members served a three year term with one third retiring each year. Seats on the Commission were apportioned generally by region.

The UNCHR went through two distinct phases. From 1946 to 1967, it followed the policy of absenteeism, which meant that the Commission would concentrate on promoting human rights and helping states elaborate treaties, but not on investigating or condemning violators. In 1967, the Commission adopted interventionism as its policy. The new

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policy meant that the Commission would also investigate and produce reports on violations. To allow better fulfillment of this new policy, in 1970s, the possibility of geographically-oriented workgroups was created. These groups would specialize their activities on the investigation of violations on a given region or even a single country. In 1980s were created theme-oriented workgroups, specializing in specific types of abuses. The Sub-Commission on the Promotion and Protection of Human Rights was the main subsidiary body of the Commission on Human Rights. It was composed of twenty-six experts whose responsibility was to undertake studies, particularly in light of the Universal Declaration of Human Rights, and make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities. Membership was selected with regard to equitable geographical distribution. The Sub-Commission established seven Working Groups that investigate specific human rights concerns, including:

- Minorities
- Transnational corporations
- Administration of Justice
- Anti -terrorism
- Contemporary Forms of Slavery
- Indigenous Populations
- Communication
- Social Forum

In spite of well publicized working of UNCHR, it was generally felt that it was not as effective as desired. The Commission was repeatedly criticized for the composition of its membership. In particular, several of the member countries were alleged to have dubious human rights records. Representatives of some others countries were even elected to chair the commission. Another criticism was that the Commission did not engage in constructive discussion of human rights issues, but was a forum for politically selective finger pointing and criticism. On 15 March

2006 U.N. General Assembly approved the replacement of Human Rights Commission with a new body called U.N. Human Rights Council.

3.2.2 Human Rights Council

The Human Rights Council is an inter-governmental body within the U.N. system. Its stated purpose is to address human rights violation. The Council was created by the U.N. General Assembly on 15 March 2006. The Council replaced the United Nations Commission on Human Rights. The 53-member Commission) on Human Rights was an independent body. The Council has been elevated to the status of a subsidiary body of the General Assembly. The Council consists of 47 members. The 47 seats are distributed among the U.N.'s regional groups as follows : 13 for Africa, 13 for Asia, 6 for Eastern Europe, 8 for Latin America and the Caribbean, and 7 for the Western Europe and other group. The first election of members was held on 9 May 2006. The Human Rights Council is a forum empowered to prevent abuse, inequity and discrimination, protect the most vulnerable and expose perpetrators. The council has no authority or jurisdiction except to make recommendations to the D.N. General Assembly. The General Assembly has no authority or jurisdiction except to advise the Security Council. One year after holding its first meeting, on 18 June 2007, the Council adopted its "Institution-building package" providing elements to guide in its future work. Among the elements is the new Universal Periodic Review mechanism which will assess the human rights situations in all 192 U.N. member states. Other features include a new Advisory Committee which serves as the Council's "think tank" providing it with expertise and advice on thematic human rights issues and the revised Complaints Procedure mechanism which allows individuals and organizations to bring complaints about human rights violations to the attention of the council. The Human Rights Council also continues to work closely with the U.N. Special Procedure established by the former Commission on Human Rights.

3.2.3 Special Procedures of the Human Rights Council

"Special procedures" is the name given to the mechanisms established by the former United Nations Commission on Human Rights and continued by the Human Rights Council to monitor human rights violations in specific countries or examine global human rights issues. Special procedures can be either individuals (called "Special Rapporteurs", "Special Representatives" or "Independent Experts") who are leading experts in a particular area of human rights, or working groups usually composed of five members. In order to preserve their independence they do not receive pay for their work.

Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation and engaging in promotional activities. The special mechanisms are categories according to thematic mandates and country mandates. Currently, there are 29 thematic and 13 country mandates under special procedures. The Office of the United Nations High Commissioner for Human Rights provides staffing and logistical support to aid each mandate-holder in carrying out their work. During its first session (19-30 June 2006), the Human Rights Council decided to extend the special procedures mandates for one year, subject to further review. An intergovernmental working group has been established to assess the mandates and make recommendations for improving their effectiveness.

Special procedures also include Working Groups made up of legal experts who monitor and investigate specific human rights concerns. There are currently four such groups;

- Working Group on people of African descent
- Working Group on Arbitrary Detention
- Working Group on Enforced or Involuntary Disappearances
- Working Group on the use of mercenaries to impede the right of people to self-determination,

The UN Human Rights Council has been meeting to determine some of the fundamental procedures that will be used by the body in years to come. It is proposed that "country-specific "special procedures" - the special experts, representatives and rapporteurs who investigate human rights abuses in particular countries - be abolished, particularly those assigned to Cuba, Belarus, Burma and North Korea." Another issue being considered is "whether outside experts and nongovernmental organization will be able to play a key role in the review; currently, documents provided by the state in question appear to comprise the bulk of the evidence used for the review. While the U.N. Human Rights Council has started working and establishing its procedures, there have emerged some differences of opinions about the case it has been established, its structure and functions. How it will emerge as an effective body for promotion and protection of Human Rights is yet to be seen.

3.3 THE UN TREATY MONITORING SYSTEM

The UN treaty bodies developed to monitor the implementation of the core treaties have an important function. They contribute to the maintenance of an elaborate human rights regime which, in many ways, has become the defining feature of the United Nations system. Some functions and features are common to all the seven treaty bodies although each of them also have some unique and distinctive characteristics regarding their composition and working. Over the years, it is only natural that some treaty bodies have gained in stature and importance due to their style of functioning while others are seen as working slowly but surely towards achieving their objectives. Within the UN human rights treaty regime, the Human Rights Committee is widely seen as an important body that has developed and redefined the human rights standards through its general comments on the provisions of the International Covenant on Civil and Political Rights (ICCPR) and through its suggestions and recommendations on applications received under the individual communications procedure. Likewise, some committees are seen as innovative, NGO-friendly, and have been created

outside the relevant treaty. For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) did not initially provide for a monitoring body as 'the rights contained in it were sought to be implemented gradually and progressively over a period of time. Subsequently, the Committee on Economic, Social and Cultural Rights was created through a General Assembly resolution in 1986. There are some features common to all treaty bodies that can be identified in terms of their composition, functions and procedures. All the treaty bodies are composed of independent experts recognized for their competence in the field of human rights and they serve in their individual capacity. Most of them have one major function of monitoring the implementation of the treaty through three procedures: consideration of state reports, inter-state complaints and individual communications. Let us briefly discuss each of these procedures.

3.3.1 Reports by States

All the seven treaties provide for a compulsory procedure of periodic reporting by the state parties; The reports are required to indicate the legislative, institutional and other measures taken by the member states, and the difficulties experienced by them, in implementing the treaty. The committees issue guidelines and general comments to assist the states in the preparation of reports. Since 1993, there are common guidelines for the general basic information provided by the states in their reports to all the treaty bodies. This forms the initial part of a report and is known as the 'core document'. The core document reflects the institutional, legislative and policy measures in place in a country. These reports are a major source of information that helps the committees to appreciate the extent of implementation. The committees gather information from other sources such as NOOs while critically assessing the state reports. NOOs can make useful contribution through campaigning, criticism, questioning and publicity. However, the approach of the committees towards the state parties is non-adversarial; they merely suggest, comment, recommend and urge the states to take the steps for better implementation of the treaty. Thus, the committees seek to have a

constructive dialogue with the states and pass on the experience gained from considering other states' reports.

3.3.2 Inter-state Complaints

The inter-state complaint procedure allows one state to complain directly to another state or to one of the committees on the violations in that state. The complainant state may then use diplomatic pressure, criticism, public denouncement, embargoes and, in extreme situations, humanitarian intervention to force the erring party to redress the situation. Most treaties provide for this procedure (it can be either a compulsory or an optional procedure) but it has never been used for fear of retribution and retaliation from the opposing states. As a result, this mechanism has become almost redundant.

3.3.3 Complaints by Individuals

Lastly, the mechanism of individual communications allows persons living in a state that has acceded to this mechanism to bring their individual grievances to a committee after fulfilling certain conditions as exhaustion of domestic remedies; the specified time limit, non-duplication of procedures, etc. It is usually an optional procedure that has to be separately acceded to by a state party either through a declaration (as in ICERD, CAT and MWC) or through an optional protocol (as in ICCPR and CEDAW) after ratifying a treaty. So, it is important to note here that mere ratification of a treaty by a state does not confer on its people the right to approach a treaty body for the redress of violations in that state. Moreover, ICESCR and CRC do not provide for this mechanism at all. In some others, for example CEDAW, this mechanism has been added recently and one has to wait for a while to-see its efficacy.

Check Your Progress 1

Note: Use the space given below for your answers.

1) What do you understand by the Charter-based human rights bodies?

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2) In what way are the treaty-based human rights bodies are different from the non-treaty human rights bodies of the United Nations?

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3) Discuss the functions and features that are common to all seven human rights treaty bodies.

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3.4 COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The International Convention on Elimination of All Forms of Racial Discrimination (1965) was the first international treaty to provide for an implementation mechanism. Under Article 8, a Committee of 18 independent experts-known as the Committee on the Elimination of Racial Discrimination, (CERD) is established to oversee the implementation of the Convention through consideration of periodic reports submitted by the member states. This is a compulsory procedure

that obligates every state party to report on the measures taken to give effect to the provisions of the Convention. The Convention is also unique in the sense that it was the first international human rights treaty that incorporated, in Article 14 there is a provision for the individual communications system. However, this provision is optional and is applicable to individuals of only those states that have accepted this obligation through a declaration. (That is to be noted here that individual communications procedure does not require a separate protocol to be signed as' in the ICCPR). This Article recognizes the competence of the committee to receive and consider communications from individuals or groups of individuals who claim to be the victims of racial discrimination or any of the rights set forth in the Convention. The Convention also provides for inter-state complaint mechanism under Article 11. This allows a state party to bring complaints of racial discrimination against another state. Thus, the CERD allows for three procedures - state reports, inter-state complaints and individual complaints. While CERD has received and considered periodic state reports and individual communications, the procedure of interstate complaints has never been put to use. Hence, it has almost become redundant as a procedure. Besides these three procedures, CERD also issues General Recommendations (similar to General Comments issued by Human Rights Committee) in order to interpret the provisions of the Convention for the states and facilitate them in understanding the extent of their obligations. The mechanism of considering the state reports is central to the monitoring functions of the Committee. The CERD takes up the state reports for discussion in its annual sessions and gives its concluding observation". The end of the consideration of a report. These observations highlight the decisions of the Committee and the improvement required, if any, in the domestic regime of that state in ensuring the elimination of racial discrimination. The Committee lacks any power to enforce its decisions because it is not a judicial body, but its pronouncements have a moral force. State parties do not ordinarily wish to be criticized by the Committee and take the observations of the Committee rather seriously. In addition to the above mentioned procedures, the Committee has evolved another procedure to prevent

instances of racial discrimination. Since 1993, the Committee has begun an early-warning system wherein it identifies potentially volatile situations that require the international community to keep a watch on and act swiftly, if need be, so that such situations do not escalate into serious conflicts. There are also urgent procedures wherein the Committee responds to problems requiring immediate attention to prevent serious violations. The Committee has considered many country situations under urgent procedure. These two measures show that the Committee has moved from being a reactive body to a preventive one.

3.4.1 Problems

The Committee suffers from irregularity of state parties in submitting the reports. Overdue reports, and non-reporting, do not allow the Committee to understand the extent of adherence to its provisions by state parties. The onus is on the state party to report on time lest it should be seen as a defaulter. Part of the reason for the default is that CERD requires the states to submit the initial report within one year of accession and periodic reports every two years. Two years is a brief period for a state to compile the next periodic report, also reflect changes that were suggested in the previous report. In order to tide over this problem, the Committee has come up with an amendment in 2001 that allows a state party to submit a comprehensive periodic report every four years and a brief update every two years or whenever the report is taken up for discussion by the Committee. One encouraging fact is that the CERD has not built up a huge backlog of unconsidered reports. The gap between the submission of report by a state party and its consideration by the Committee is not long so that the information on the basis of which the Committee may assess a state party's performance is relatively up to date.

3.5 HUMAN RIGHTS COMMITTEE

It was established in 1976 as a monitoring body of the ICCPR. Like any other committee, it also performs two basic functions

- (a) monitoring the implementation of ICCPR through various mechanisms and
- (b) issuing of general comments on the provisions of the ICCPR.

The Human Rights Committee (HRC) has 18 independent experts as members who are elected for a period of four years. As the most prestigious and successful committee, the HRC meets thrice a year for sessions of three weeks. It has issued several general comments that have created a body of jurisprudence on issues related to human rights besides helping the implementation of the Covenant better. HRC has become very systematic in its pre-sessional work by establishing Country Report Task Forces that prepare list of issues and questions related to a state report and send them to the concerned state party ahead of its review sessions. In order to ensure impartiality, the member who is a national of the state report under consideration abstains from questions and answers. After the consideration of a state report, the Committee issues concluding observations specific to that state.

The concluding observations serve as an evaluation or 'value judgment' of the general human rights situation in that country. The concluding observations are comprehensive in that they include comments on the state report, positive developments, areas of concern, and difficulties in implementation, suggestions and recommendations. HRC also monitors the progress made on its concluding observations through a Special Rapporteur on Follow Up, whose job it is to request the state party to give information on the implementation of concluding observations and report the same to the Committee. This system evolved by HRC shows that the Committee believes in the continuous assessment and monitoring of a state party's compliance. HRC has been the most successful body in dealing with the consideration of individual communications brought under its First Optional Protocol. The proceedings are held in private and the decisions are quasi-judicial in nature. Although the Committee's decisions in individual cases cannot be enforced, the member states have, by and large, adhered to those decisions and implemented them. The system therefore relies heavily on the willingness of state parties to

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implement the decisions. It has been highly successful in the sense that the HRC (till 2004) has received 1245 communications of which it has concluded about 965 cases although the backlog of unconsidered communications is a cause of concern. Some countries have denounced or adversely reacted to this procedure whenever their country has been criticized by the Committee. On the other hand, some countries like Canada have largely complied with the Committee's recommendations and have even made the necessary changes in their domestic laws to give effect to HRC's decisions. It has been generally observed that those countries that have good domestic human rights regimes accept this procedure more willingly, abide by the Committee's decisions diligently, and thereby help in making the system in a success.

Problems In spite of good work being performed by HRC some areas of concern do remain. The Covenant text is such that it accords a very limited participation to the specialized agencies. There is not much cooperation and interaction with other treaty bodies either. Occasionally, there have been members of HRC who are also members on other committees. That apart, a formal mechanism to involve members of other committees in the work of HRC is missing. If other committees are to learn from the enriching experience of HRC, some avenues of coordination and participation will have to be etched out. The Committee has faced a serious problem of overdue reports or lack of reporting by the member states. Consideration of a state report by the Committee provides an opportunity for dialogue and the HRC has tried to encourage it rather than to consider the human rights situation in a country in the absence of a report. In view of this default by the state parties, the HRC introduced flexible rules of reporting wherein two overdue reports could be submitted as a combined report. However, it is worrisome to note that despite all these efforts, more than half of the states are in arrears. The Committee too, on its part, has not been able to consider the reports or individual communications on time. The Committee, as the most successful body to receive overwhelming number of communications, suffers from time constraints.

3.6 COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women provides for a Committee of 23 independent experts to monitor the implementation of the Convention. It is the largest body of experts in the UN human rights system. The Committee meets once every year for a two-week session in Vienna, Austria. These brief sessions have proved to be too little as the number of states parties have increased and the backlog of unconsidered reports begun to mount. In view of this, an amendment (in 1996) now allows CEDAW to meet in two sessions each year. It is also the only body that receives secretarial and other support from division for Advancement of Women in Vienna. CEDAW monitors the implementation of the Convention through consideration of initial and periodic reports submitted by the states parties. Originally, the mechanism of implementation in the Convention provided for only one procedure, i.e., the mandatory reporting procedure (Article 18) in which the states parties were to indicate the factors and difficulties affecting the degree of fulfillment of the obligations under the Convention. The states parties undertake to submit a report on the legislative, judicial, administrative or other measures that they have adopted to give effect to the provisions of the Convention and progress made in that regard. The initial report is due within one year of the entry into force of the Convention for the state concerned and the periodic report every four years.

There is also an additional procedure for receiving individual communications (introduced through an Optional Protocol in 1999). The individual communications can be sent to the Committee either by the victim herself or by groups of individuals and NGOs on her behalf. This protocol came into force in December 2000 but it has not been very widely ratified. If more countries were to agree to be bound by it, it can become a very effective tool to address the concerns of women. The Optional Protocol also provides for a procedure of inquiry. CEDAW and CAT are the only two bodies to have such a procedure. If and when the

Committee receives reliable information indicating grave or systematic violations of the rights set forth in this Convention, it asks the concerned state party to comment on that information. The Committee may also seek additional information from the state representatives, NGOs, individuals, and other UN bodies. Thereafter, the Committee may designate one or more of its members to conduct an inquiry. This procedure is confidential and the consent and cooperation of the state party is essential throughout the procedure. It is to be noted here that this procedure is not applicable for individual, isolated and frivolous incidents but one where systematic and grave violations are reported.

3.6.1 Problems

The implementation mechanism under the Convention has not been very effective in advancing women's rights. The Committee has been severely restricted by the time-constraint. The rapid rate of ratifications and the huge backlog of reports awaiting consideration by the Committee has been a matter of concern. As of 1998, CEDAW had 162 ratifications and 134 overdue reports. Following the Fourth International Conference on Women in Beijing in 1995, the General Assembly adopted an amendment to Article 20 to allow the Committee to meet for longer duration. However, this amendment would be effective when two thirds of the state's parties accept it. Till date this amendment has not entered into force. To redress the situation, the General Assembly has approved an extension and allowed the Committee to meet twice for three-week sessions every year. Like most other treaty bodies, many state reports to CEDAW are overdue, incomplete, inadequate and do not follow the reporting guidelines. Most states tend to report only on legislative measures without adequately reflecting the situation on ground. In order to overcome the backlog of overdue reports, CEDAW has allowed the member states to submit a combined report consisting of two periodic reports due from state parties. This practice allows the treaty body to reduce its backlog, workload and use its precious, limited time judiciously. It also additionally serves to save the states from the embarrassment of being dubbed as delinquent. Large number of

reservations filed by the states parties has greatly hampered the implementation of rights protected in the Convention. In this respect the Women's Convention is the first human rights treaty to have such a high number of reservations upon ratification. In contrast, few states have entered reservation to CERD Convention. Most reservations pertain to Article 2 of the Convention which obligates the states parties to adopt appropriate legislative and other measures to prohibit all discrimination against women and Article 16 concerning marriage and family relations (India has made reservation to Article 16). The large number of reservations to the Convention has become regrettably a notorious feature of the Convention'. The problem is serious because many reservations to Article 2 to be 'manifestly incompatible' with the object and purpose of the Convention.

3.7 COMMITTEE AGAINST TORTURE

Part II of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for monitoring body - a committee of ten experts elected for a period of four years (Article 18) as Committee against Torture (CAT). As such, this is one of the smallest treaty bodies. The Committee meets twice a year for two-week session each. CAT is empowered, like any other treaty body discussed so far, to receive and consider periodic reports from the state parties and individual communications from the nationals of the states that have accepted its competence. The obligations of the state's parties regarding the periodic report is to include information about the prohibition of human rights violations within their territory, punishment of the perpetrators, and protection of potential and actual victims. This Committee does not have an elaborate system of consultation and cooperation with other UN bodies or the specialized agencies. With NGOs too, its interaction has been minimal although it was one of the first committees to allow NGOs to submit information regarding all its procedures. However, it is a general practice to organize hearings with NGOs before the consideration of a country report but they have no official status. Only those NGOs that specifically deal with torture have strong links with the Committee. The Convention provides for an individual complaints procedure in Article

22. It is an optional procedure that requires the states parties to accept the obligation by making a separate declaration to that effect. In all other respects, the individual complaint procedure of CAT is modeled after the Optional Protocol to the ICCPR. However, very few member states have accepted this procedure. The number of individual complaints received by the Committee has been steadily increasing over the years. In view of this, a Rapporteur for new complaints and interim measures has been established in 2001. As soon as a complaint is received, if the alleged violation is of a serious nature, the Committee has an inherent power to request interim measures of a preventive nature. These measures are requested to avoid irreparable damage to the victims of alleged violations. One unique competence of this Committee is to undertake urgent action by making visits and to investigate alleged incidences of systematic practice of torture. However, this competence is applicable only to torture and not to cruel, inhuman or degrading treatment. Also, the urgent visits are undertaken only if the information received pertains to instances of systematic torture and not to isolated cases. Cooperation and consent of the state party concerned is crucial here. The Committee may subsequently launch inquiry by one or more of its members who may visit the country in question and prepare a report on the matter. The findings of the Committee along with comments and suggestions are then sent to the state party for further action. This is the most elaborate system of inquiry developed by a treaty body as yet. Because of the system of inquiry, the powers of CAT seem to be more intrusive and deeper in comparison to other treaty bodies. 16 The Convention also has an Optional Protocol that was adopted in 2002. The Optional Protocol is designed to put in place a system of regular visits to places of detention by independent international and national bodies. This would, by far, be the "most intrusive mechanism as it obligates the states parties to give access to all places of detention. The Optional Protocol also provides for the establishment of a new international body, the "Sub-committee on Prevention" of torture consisting of ten independent experts for this purpose. This Optional Protocol is yet to come into force [it requires 20 ratifications]. However, the monitoring procedure of CAT also suffers from certain shortcomings. The Convention empowers the Committee to

only work in a reactive way. It takes action only when acts of torture have taken place and are reported. There is very little emphasis in the convention on prevention of torture and the institutionalization of mechanisms of prevention. There is an optional protocol to the Convention that has been adopted by the General Assembly which provides for regular visits of international and national independent bodies to visit places of detention but it has not yet received requisite number of ratifications and hence it has not yet come into force.

Check Your Progress 2

Note: Use the space given below for your answers.

- 1) Examine the major problems faced by the CERD.

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- 2) Is the functioning of individual communication system under the ICCPR successful?

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- 3) What problems are encountered by CEDAW?

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3.8 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The CESCR is the only Committee that was not established by the treaty whose provisions it seeks to promote and monitor. The International Covenant on Economic, Social and Cultural Rights did not provide for a monitoring body in its text because of the nature of rights contained therein. It was felt that the economic and social rights were essentially group rights to be implemented progressively and gradually over a period of time and that they did not require a monitoring mechanism of the kind that was found essential for the individual rights' contained in the other Covenant, i.e., the ICCPR. In 1985, the Economic and Social Council (ECOSOC) adopted a resolution to establish the CESCR consisting of 18 independent experts elected directly by the ECOSOC for a term, of four years. The functions of this Committee are to monitor the implementation of the rights' protected in the Convention through the consideration of periodic reports. submitted by the states parties and issuing general comments to elaborate the various provisions of the Convention for the benefit of the state's parties. The Convention does not provide for the individual communications procedure. The Committee holds two annual sessions of three weeks' duration. The Committee held extra-ordinary sessions in 2000 and 2001 to clear the backlog of reports. One striking feature of CESCR's work is that it was the first committee to initiate formal, close cooperation with UN organizations and specialized agencies. CESCR is an important player in the international dialogue on such economic and social issues as poverty alleviation and structural adjustment programmes with agencies like the international Monetary Fund, the World Bank and, the United Nations Development Programme (UNDP). This Committee is also known for encouraging interaction with and participation of human rights and development NGOs. Hence, it is seen as the most NGO-friendly of all the committees. With regard to the Committee's other function of issuing the general comments, it has done a commendable job by issuing 15 general comments. Most of them are based on substantive articles of the Covenant with the exception of two general comments which relate to rights of two particular groups, disabled and .older persons.

3.9 COMMITTEE ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child establishes its own mechanism; the Committee on the Rights of the Child, consisting of 18 experts monitors the implementation of the treaty by states parties (Article 43 (1)). The structure and functions of this committee are very similar to that of the CESCR discussed above. Originally, this Committee had only 10 members but in view of its workload and the need for members from diverse fields, the membership was, raised to 18. The composition of the Committee is multidisciplinary, including experts from such fields as law, medicine, economy, sociology, and education their principal task is to consider periodic reports of states parties on the means of adopted 'to give effect to the rights of children and on the progress made in the enjoyment of such rights. Like ICESCR, The reports are to be submitted by the state parties initially after two years from the entry into force of the Convention, and thereafter every five years (instead of 4 years to other treaty bodies). Originally the Committee met annually but in view of its increased volume of work, it has met three times a year since 1995. The Committee now meets three times a year and considers six to eight reports in each session.

The purpose of this procedure is to aid the Committee in understanding the level of adherence to the Convention achieved by a state party and the difficulties encountered in implementation. The Committee has repeatedly emphasized-that the reporting procedure itself should not be seen as a mere administrative exercise; rather, it is intended to give a state party an opportunity to review the existing legislation, harmonize it with the Convention provisions, evaluate their implementation, interact with NGOs, and to appreciate the attendant problems. The objective of the entire process is to make the domestic environment more child-friendly, and thereby enhance the understanding of, and the capacity to implement, the Convention. Further, a state report is to be widely circulated within that country to generate public debate and domestic scrutiny (Article 44(6)). While considering the state reports, the Committee takes into account relevant information from specialized

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agencies, such as UNICEF, UNHCR, other treaty bodies, international organizations and NGOs. It engages in a continuous "constructive dialogue" with governmental authorities of states parties. The Committee and UNICEF have succeeded in establishing a very positive partnership since UNICEF treasures cumulative knowledge, database and experience in the area. The Committee has also built up an innovative relationship with civil society through national and international NGOs. The Committee, in addition to considering the state reports, also issues general comments which are of great help in interpreting the concepts and provisions of the treaty for the benefit of the member states in understanding and implementing the treaty better. The Convention, like ICESCR again, does not provide for either inter-state complaints or individual communication procedures.

Problems There are many problems in implementation. One of them is that it suffers on account of excessive reservations. Like CEDAW, its success story of being a widely ratified treaty is marred by these reservations. Nearly 50 states have formulated reservations to substantive provisions. Sometimes the reservations are so extensive that they make member state's assumption of obligations under the Convention more nominal than real.

Secondly, reporting by the states parties is irregular and delayed. Huge backlog of state reports reveals that the Committee has faced progressive deterioration in state reporting. It is helpless in tracking down erring states because there is no provision for action against such delay except for sending repeated reminders or allowing the states parties to submit combined reports in case they are overdue. Delay is not only on the part of the states; the Committee too has experienced a gap between the date of submission of a report and the date of its consideration. The Committee is unable to take up reports for consideration within the shortest time as its sessions are brief and too many reports are pending in its office.

Thirdly, success always comes at a price. As the most widely ratified Convention, the number of states parties and the volume of communications are large. There is enormous amount of work to be done before a report is taken up for discussion. The secretarial assistance available to the Committee is inadequate which makes timely processing of reports difficult.

Fourthly, the Convention makes the protection of civilians, including children, a matter of feasibility and not of necessity. Likewise, it is weak on the child soldiers' age limit for recruitment to combat services as low as 15. This, in effect, legitimizes use of children of 15-16 years as combat soldiers.

3.10 COMMITTEE ON THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) is the most recent human rights treaty to have a monitoring body. The treaty entered into force on 1 July 2003. It has a Committee of 10 members (experts) to oversee the implementation of the Convention. Its composition will be enlarged to 14 members when the CMW will have more than 40 states parties. It met for the first time in March 2004 where it adopted the provisional rules of procedure. This Convention provides for the compulsory procedure of state reporting. The Committee is scheduled to meet annually to consider the state reports. It met again in July 2005 to begin the consideration of state reports. The Committee deferred the adoption of reporting guidelines in view of the ongoing reform process of the UN treaty bodies. The Committee is still a nascent one. One will have to wait for a while to assess the efficacy and evaluate the working of this body. CMW also provides for an optional individual complaints mechanism. Under Article 77, a state party has to make a declaration to that effect. So far, out 36 members, no state party has made such a declaration. The procedure, therefore, has not yet come into effect.

Check Your Progress 3

Note: Use the space given below for your answers.

- 1) Discuss about Committee on the Rights of All Migrant Workers and Their Families.

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- 2) Discuss some of the major problems faced by CRC in implementing rights of the child.

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3.11 LET US SUM UP

The above discussion about the various treaty bodies shows that the United Nations has developed an elaborate network of institutions to oversee the implementation of its core human rights instruments. Some of these committees have been highly successful in carrying out their functions while others have successful due to systemic and other constraints.

However, it is to be noted that all of them uniformly allow the global citizens to monitor the actions of states parties, hold states accountable for their obligations and most importantly, empower the individual to secure and safeguard his rights beyond the state borders. It is true that the avenues of redress are limited to citizens of only those states that have ratified all the available procedures under a treaty and also that all treaties do not provide for individual communications system. But wherever the procedure exists, it undoubtedly incapacitates the individual

and allows for the creation and maintenance of a better human rights regime world over. Most treaty bodies have also gone beyond their original, restrictive mandate to contribute meaningfully to the dialogue and understanding of the issues related to human rights. Most committees issue general comments elucidating the provisions of the respective treaties that have helped in the overall understanding of the nature and moral value of various rights guaranteed in the treaties.

Moreover, these treaty bodies have created avenues for interaction with the international civil society agencies such as NGOs. These options were earlier not available to the non-state actors. There are many instances where the pressure brought by NGOs upon treaty bodies has been instrumental in the adoption of newer treaties, addition of newer mechanisms and procedures such as individual communications procedure added to CEDAW and, generally bringing the errant states within the purview of international scrutiny.

Lastly, many new developments and innovations are taking place in the treaty monitoring system. There is an effort to evolve a common framework for reporting that would allow a state party to submit one consolidated report to a basket of treaty bodies to which it is a party. Such harmonization of reporting obligations would allow optimum utilization of time and resources for both the states parties and the treaty bodies. Since these bodies and their procedures are ever evolving, there is no last word on the UN human rights treaty system. One must try and constantly update oneself on viewer innovations.

3.12 KEY WORDS

UN: United Nations

CEDAW: The Convention on the Elimination of all Forms of Discrimination Against Women is an international treaty adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 states.

CMW: Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

UNICEF: The United Nations Children's Fund, originally known as the United Nations International Children's Emergency Fund, was created by the United Nations General Assembly on 11 December 1946, to provide emergency food and healthcare to children and mothers in countries that had been devastated by World War II.

3.13 QUESTIONS FOR REVIEW

- 1) What do you understand by the Charter-based human rights bodies?
- 2) In what way are the treaty-based human rights bodies different from the non-treaty human rights bodies of the United Nations?
- 3) Discuss the functions and features that are common to all seven human rights treaty bodies.
- 4) Which human rights body/committee is the most NGO-friendly? Elaborate your answer.
- 5) Discuss some of the major problems faced by CRC in implementing rights of the child.

3.14 SUGGESTED READINGS AND REFERENCES

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3.15 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

- 1) See Section 3.2
- 2) See Sub Sections 3.2.1 and 3.2.2
- 3) See Section 3.3

Check Your Progress 2

- 1) See sub-section 3.4.1
- 2) The individual communication system under the ICCPR is very successful.
(See section 3.5).
- 3) See Sub-section 3.6.1
- 4) See paragraph 3 of sub-section 3.2.4

Check Your Progress 3

- 1) See Section 3.10
- 2) See section 3.9

UNIT 4: UNIVERSAL DECLARATION OF HUMAN RIGHTS

STRUCTURE

- 4.0 Objectives
- 4.1 Introduction
- 4.2 Historical Background: The Need for Human Rights
 - 4.2.1 Human Rights and Natural Rights
- 4.3 Universal Declaration of Human Rights
 - 4.3.1 Objectives of UDHR
 - 4.3.2 Nature of UDHR
 - 4.3.3 Importance of UDHR
- 4.4 Critique of Human Rights
- 4.5 Universality of Human Rights
 - 4.5.1 Cultural Differences
 - 4.5.2 The East Asian Challenge
 - 4.5.3 Use and Misuse of Cultural Relativism
 - 4.5.4 Ideological Differences
- 4.6 How universal are Human Rights?
 - 4.6.1 Worldwide Influence of UDHR
 - 4.6.2 NGOs on Human Rights
- 4.7 UDHR and Its Articles
- 4.8 Let us sum up
- 4.9 Key Words
- 4.10 Questions for Review
- 4.11 Suggested readings and references
- 4.12 Answers to Check Your Progress

4.0 OBJECTIVES

This unit deals with the history, importance, contents and justification of Universal Declaration of human rights. After studying this unit, you should be able to:

- To understand the historical importance of human rights;

- To know that why there is a need for human rights over and above the rights enshrined in the constitutions of different states;
- To have the ideas behind the Universal Declaration of Human rights and various covenants on Human rights; and
- To discuss about the worldwide influence of Human Rights.

4.1 INTRODUCTION

To emphasize the importance of rights, adjectives like 'natural' 'fundamental: or 'human' have been used in the long history of their development. Twentieth century has been described as the century of human rights because the concept of human rights became increasingly important in liberal democratic as well as in the socialist and developing countries particularly after the Second World War. Today virtually all states officially subscribe to some doctrine of human rights. The Universal Declaration on Human Rights (UDHR) and the subsequent covenants on rights recognized that individuals have certain rights and obligations over and above those set down in their own judicial and administrative system. UDHR accepted the fact that there are clear occasions when an individual has a moral obligation beyond that of his obligation as a citizen of a state, thus opening up a gap between the rights and duties bestowed by citizenship and the creation in international law of a new form of liberties and obligations.

4.2 HISTORICAL BACKGROUND: THE NEED FOR HUMAN RIGHTS

You have read in the last unit that the term human rights refer to the concept that every member of the human race has a set of basic claims simply by virtue of his humaneness. These are rights claimed in respect of all human beings as human beings. They are said to be universal rather than national and are different from the legal rights. They are claims held to belong to everyone regardless of any real provisions that may or may not exist for him in a particular state. They are based upon the simple fact that a human being should not be forbidden from certain things by any government. They inherent in human beings rather than in societies and

states. They are called human rights because rights are no longer derived from the operations of natural reason but from what is called 'human'. It is derived, for example from the fact that a person who is malnourished, tortured wrongly imprisoned, illiterate or lacking in regular paid holidays is not living in a manner appropriate to a human being. According to Macfarlane, human rights are those moral rights which belong to each man and woman solely by reasons of being a human being. These are possessed by the human being simply as human beings, irrespective of the fact that they belong to any state, society, race or religious faith.

4.2.1 Human Rights and Natural Rights

The term human rights came into being in the 20th century. In earlier centuries, these rights were commonly spoken of as 'natural rights' or 'rights of man'. The theory of natural rights emerged in the seventeenth century in the writings of Grotius, Hobbes, Locke etc. who attributed natural rights to the natural law which provided that 'no one ought to harm, another in his life, health, liberty or possessions'. That law could therefore be said to give each person a natural right to life, liberty and property, though it also imposed upon each a natural duty to respect the lives, liberties and properties of others.

The theory got its classical expression in the writings of John Locke in his book *Two treatises on Government*. Locke termed the rights to life, liberty and estates as natural rights. Similarly, the American Declaration of independence in 1776 enunciated as self-evident truths that all men are created equal and they are endowed by their creator with certain inalienable rights that among them are life, liberty and the pursuit of happiness. Again the French Declaration of the Rights of Man and Citizens of France in 1789 made similar claims in relation to the natural imprescriptibly and inalienable rights that it enumerated. In short all these declarations emphasized upon the rights of man as man and not as a citizen of a state.

Seventeenth and eighteenth century's declarations of natural rights were matched in the twentieth century by the declaration of human rights by the United Nations and the various other UN covenants and conventions that followed. The Human rights, thus; are the direct descendant of the theory of natural rights. The human rights introduced immediately after the Second World War by the newly formed United Nations were a direct consequence of the revulsions against the genocidal policies followed by the Hitler regime. These revulsions led to put a number of German leaders on trial for an offence that had no place in any statute book but was created by the decision of the international court. The offence was called 'crime against humanity'. The Nuremburg trials tribunal lay down for the first time in history that when international rules that protect basic humanitarian values are in conflict with the state laws, every individual must transgress the state law. The legal framework of Nuremburg trials challenged the principle of military discipline and subverted the national sovereignty. However, the contemporary international law endorsed the position taken by the tribunal and affirmed its rejection of the defense of obedience to superior order in matter of responsibility for crimes against peace and humanity. As a standard for the future, a special committee of the United Nations drafted a Declaration of Human rights in 1948 followed by the two covenants - one on economic, social and economic rights and the other on civil and political rights which were recognized by the member states of the UN.

Thus having come through the harrowing experience of inters war totalitarianism and the horrors of the Second World War, the post war international community set its human rights agenda through the Universal Declaration of Human Rights. Since then the record of state behaviour became subject to scrutiny through the standard of UDHR.

4.3 UNIVERSAL DECLARATION OF HUMAN RIGHTS

The comprehensive International Bill of Human Rights consists of three instruments –

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- i) the Universal Declaration of Human Rights,
- ii) the International Covenant on Economic, Social and Cultural Rights, and
- iii) the International Covenant on Civil and Political Rights and its Optional Protocol.

The Universal Declaration of Human Rights (UDHR) represents the first and the most important instance of formulation of international human rights standard. In fact, much of the international norm - setting activity of the United Nations flows from and relates to UDHR. It was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948 as a common standard of achievements for all peoples and all nations, to that end that every individual and every organ of society, 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.

4.3.1 Objectives of UDHR

The preamble of UDHR makes it clear that it was a simple testimony to the fact that it was the first normative response of the then international community to the terrible experiences it had during the World War II. It noted that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. It emphasized that 'recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. It also stressed that a common understanding of the human rights and freedoms enshrined in the UN charter is of greatest importance for the full realization of the pledge. This was reflected in Article 1 which reads as 'all human beings are born free and equal in dignity and rights'. They are endowed with reasons and conscience and should act towards one another by a spirit of brotherhood. It defined the basic assumption of the Declaration that

- i) the right to liberty and equality is man's birthright and cannot be alienated, and that
- ii) because man is a rational and moral being he is different from other creatures on earth and therefore entitled to certain rights and freedoms which other creatures do not enjoy.

Similarly, Article 2 set out the basic principle of equality and nondiscrimination as regards the enjoyment of human rights and fundamental freedoms and forbids distinction of any kind such as race, colour, sex language, religion political and other opinion national or social origin, property birth and other status.

4.3.2 Nature of UDHR

The UDHR contains a long list of Human Rights that belong to all human beings. These in general are categorized as Civil and Political Rights and Economic, Social and Cultural Rights. Article 3 provides the right to life liberty and security of persons, as a right essential to the enjoyment of all other rights. This is expanded in Articles 4 to 21 in certain civil and political rights such as freedom from slavery and servitude, freedom from torture or cruel inhuman or degrading treatment or punishment, the right to recognition everywhere as a person and before the law, the right to an effective judicial remedy, freedom from arbitrary arrest detention or right to a fair trial and public hearing by an independent and impartial tribunal, the right to be presumed innocent until proved guilty, freedom from arbitrary interference with privacy, family, home or correspondence, freedom of movement and residence, the right of asylum, the right to nationality, the right to marry and to found a family, the right to property, freedom of thought, conscience and religion, freedom of opinion and expression, the right to peaceful assembly and association, the right to take part in the government of one's country and to equal access to public service on one's country. Apart from the civil, and political rights, the next six Articles specify certain economic, social and cultural rights such as right to social security, the right to work, the right to equal pay for equal work, the right to rest and

leisure, the right to a standard of living adequate for health and wellbeing, the right to education and the right to participate in the cultural life of the community. These rights were considered as indispensable for human dignity and the free development of personality and indicated that they were to be realized through national effort and international cooperation.

4.3.3 Importance of UDHR

When the UN General Assembly adopted UDHR in 1948, it only intended the Declaration to be 'a common standard of achievement for all peoples and all nations'. However, 60 years after the Declaration, one finds that it still stands as the single most important normative act ever adopted by the United Nations, for a number of reasons.

First, having come through the harrowing experiences of inter-war totalitarianism and the horrors of the Second World War, the post-war international community set its human rights agenda through the Declaration. Since then the record of state behaviour became subjected to scrutiny through the standards set by UDHR. Second, although the Declaration did not proclaim itself to be legally binding, it acquired such a character in two ways. It came to be regarded as an interpretation and elaboration of the UN Charter provisions on human rights. Its influence on the drafting and practice of state constitutions which came into existence after 1948 has been extremely impressive and far-reaching.

The founding fathers of the Indian Constitution too were influenced by UDHR. Indian courts still use the Declaration to interpret and clarify the Fundamental Rights provisions of the Constitution. Third, UDHR provided the normative basis for all future activities of the United Nations in the field of Human Rights. It led to the drafting of the two International Covenants on Human Rights in 1966 - both of which, along with UDHR, constitute the International Bill of Rights. The diverse provisions of UDHR inspired the eventual drafting and adoption of a large number of treaties and further declarations on specific aspects of

human rights. In fact, almost all the United Nations' human rights instruments that have emerged so far are in some way or the other based on UDHR.

Fourth, the Declaration also inspired efforts at the regional level for evolving human rights institutions. Its influence on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the institutions established under this treaty, such as the European Commission of Human Rights and the European Court of Human Rights, has been very significant.

The Charter of the Organization of African Unity, 1963, also acknowledges its influences. However, we cannot overlook the fact that UDHR reflects what was essentially a mid-century Western perception of human rights, a response to the inter-war and wartime European experiences. An international community dominated by the Western countries adopted it. The presence of the Third World countries of Asia, Africa and Latin America started being felt at the United Nations only from 1960s. Till then, their human rights problems did not receive as much serious attention at the United Nations as they deserved. This has led to a debate with regard to both the theories of Human Rights as well their universality.

Check Your Progress 1

Note: Use the space given below for your answers.

- 1) Describe the relationship between Human Rights and Natural Rights.

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2) What rights are provided by Universal Declaration of Human Rights?

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3) Evaluate the importance of Universal Declaration of Human Rights.

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4.4 CRITIQUE OF HUMAN RIGHTS

Although the concept of human rights has been quite popular after the Second World War and has been universally accepted by the international community by adoption of UDHR, yet it has raised a number of objections ranging from philosophical, legal to ideological. Altogether they have led to the question - of how far human rights are justified. The opponents of human rights have dismissed them as no more than merely a set of prejudices.

While the natural rights were justified on the basis of natural law, the concept of human rights has been detached from natural law thinking. Contemporary political philosophers justify a case for human rights upon the commitment to fundamental values such as freedom, autonomy, equality and human wellbeing. However, the issue of human rights is a complex one because of the diversity in the socio economic political and cultural differences among the states. In fact in spite of their popularity, the human rights are far from being universally accepted. In some cases, they are rejected on a general critique of the rights approach to politics,

whereas in others, the criticism is directed against the specific human rights. Some of the important points of criticism are as follows:

- 1) The first objection is the philosophical basis of human rights and its utility. The assertion that human rights inherent in all human beings are clearly a very sweeping statement irrespective of faith. The Universal Declaration is based on a political commitment by the founding states of UN but raises questions about why the governments of those states at that moment of history should have the power to commit the successor states despite numerous changes of regimes. It must presumably be based on reason or an appeal to common understanding about the human situation but that raises the familiar philosophical dilemma about how values, particularly values said to be binding can be extracted from facts. All governments might agree that human beings seem to enjoy freedom of action in this field or that without agreeing that it is good for them to be given such freedom. In short, the philosophical argument for the Declaration is shaky. As far the utility of the Declaration many states are dictatorial and the declaration has not deterred most of those regimes from violating several of the human rights specified. It might be said that appeals to the declaration have been at best as empty gestures at worst a weapon in the cold war. Moreover it has failed to bring the violators of human rights before some Nuremberg type tribunal difficult because Article 11 states that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under the national or international law, at the time when it was committed.
- 2) The second objection is the legal one. Followers of Benthamite tradition claim that the human rights are asserted as though their existence is as much a matter of fact as the existence of legal rights. There is a fundamental difference between legal and human rights and if this distinction is recognized then human rights are no more than a moral claim.

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- 3) The social, economic and cultural rights such as right to education, work, social security, rest and leisure and an adequate standard of living, though not completely unprecedented have become prominent within the human rights. But they have raised doubts not only about social justice but also about their intelligibility as human rights. For example, Maurice Cranston says that the economic and social rights are of little relevance because they are no more than utopian ideals for the poorer states and their inclusion may lead skeptics to regard the other rights also as utopian ideals. Similarly, Brian Barry has also questioned the inclusion of social rights because they involve relativities about which arguments are always possible. A number of underdeveloped and developing countries do not have the resources to provide the goods. It is awkward to tell people that they have rights which cannot be provided while on the other side of the globe, there are people who are "enjoying them for a long time. Hence they become different standards for different people. The other questionable feature of socio economic rights is that for any specific person, the corresponding obligation to provide the goods falls upon the particular government the right to have that good depends on citizen of a particular state rather than a member of the human race. Again whatever the intention of those who have drafted declaration of rights, it is not logically non sensual to hold that human beings have a responsibility on a world scale for another's economic wellbeing.

Some countries believe that the statements in the UDHR are based on a very modern Western way of life and thinking. They go on to argue that other cultures, like ancient tribal cultures or Oriental cultures, have customs that may clash with the ideas and the Articles given in the Declaration. The 'culture-dependent' debate shows up in different ways. Sometimes it takes a religious garb (for example, that human rights are Christian values, and therefore not valid in Islamic states). Sometimes the debate is in the garb of Asian cultures versus European nations, as the following discussion shows.

In Hindu philosophy, 'dharma' is perhaps the closest word to 'human rights'. Actually, dharma has many levels of meaning: law, norms of conduct, truth, rights, ritual, justice, morality, destiny, religion and more. 'Vasudhaibkutumbakam' (the world is our family) is the underlying philosophy. In particular, this philosophy says that rights are not confined to human alone; animals and plants also have such rights. (In fact, this is part of the Jain philosophy too.) Human rights are "not rights only; they are also duties, and both are inter-dependent). As you can see, Hindu philosophy looks at society and the universe as a whole. This differs from the Western view of the 'individual-based' notion of human rights. In fact, most Asian societies reject the individualistic approach to human rights. The Buddhist doctrine, for example, does not accept the concept of life based on the self or ego. It emphasizes the holistic nature of things.

If you look at studies of African and Latin American cultures, you will find the same stress on group rights rather than the rights of individuals. Another source of major differences involving community rights versus individual's rights is the right to own private property. The UDHR has listed this as an individual's right. This has met with strong opposition from societies in which property belongs to the community as a whole. According to them, the Western world is trying to impose free enterprise and capitalism on the rest of the world by calling property ownership a fundamental human right. In fact, there is a very strong feeling in all these cultures that it is more important to improve the quality of life of the social group as a whole, rather than that of individuals. Giving priority to individuals is thought of as creating a selfish, aggressive and competitive society. What you have just read is a cross-section of views on human rights in different cultures and traditions. Would you agree that the Third World's views are clearly against human rights based on aggressive individualism? Think about this.

4.5 UNIVERSALITY OF HUMAN RIGHTS

It has been mentioned above that the Universal Declaration of Human Rights was accepted by almost all member states of the United Nations Organizations. From it appears that the ideas and nature of rights contained in the UDHR are universally accepted. The fact, however, is that in spite of UDHR there are differences of opinion among states with regard to nature of rights and their universality.

4.5.1 Cultural Differences

A number of socialist and developing countries have objected to the universal character of human rights thinking that they lead to cultural imperialism of the West. They claim that the western societies are imposing their value system on the other cultures. For example, the western idea of free speech may not be relevant to an illiterate unemployed or starving individual. Hence employment, food, shelter, education may be more important than political rights and civil liberties in a particular state. Some states have also used this idea as an excuse to curtail the civil liberties. Anyhow according to this view if the individuals the world over must be accorded human rights, then that may be seen as granting a license for the domination of European culture over other cultures which do not share its conceptions of good life and just society. Also the concept of human rights as developed in the West ignores the rights of the groups such as classes, nations and races. Ideas of liberty democracy though good have paid too little attention to the concerns of class exploitation, national self-determination and racial discrimination.

4.5.2 The East Asian Challenge

The opposition to the UDHR discussed above has gained force in recent years. It is known as the 'Asian Values Debate' or the 'East Asian Challenge' because the arguments are mainly put forward by China, Indonesia, Malaysia, North Korea, Iran, Singapore, etc. In fact, the Bangkok Meet of the NGOs on the eve of the Vienna Conference, and

their Declaration on Human Rights in 1993, is usually considered to be the beginning of the East Asian challenge.

Extending the debate Prof. Panikkar, a human rights philosopher, argues that the notion of human rights is a Western concept. Yet he also argues that these human rights are very necessary for a decent life in the modern world. What he and other scholars believe is that these rights need to be adopted and adapted to different cultures. Regarding this matter, the Bangkok NGO Declaration stresses that the world can learn from different cultures and draw lessons from the humanity of these cultures to deepen respect for (universal) human rights. Different cultures should be allowed to co-exist and their positive aspects must be respected by all. But, the Declaration goes on to insist, those cultural practices which go against universally accepted human rights, including women's rights, must not be tolerated.

As an example of adaptation, the Islamic Council of Europe (London) prepared a document called the Universal Islamic Declaration of Human Rights (UIDHR). This is based on the values and principles of the Quran and the Sunnah. Like the UDHR, the UIDHR also recognizes the right to privacy, the right to freedom of movement and residence, the right to use one's own culture and the right to freedom of religion. In this context, it is interesting to learn what Mohammed Kamali gathered from a brief survey. He found that 'even though Muslim jurists never articulated a precise definition of human rights, Islamic law was not only cognizant of these rights but it even developed other more comprehensive and precise concepts such as *bukum* (order or legal decisions of God) which subsumed the former'. In the following section you will have the opportunity to learn a little more about ancient traditions and what they have to say about such humanitarian objectives. (The major points highlighted below have been taken from Prof. B.K.Roy, Burmon's research.)

- The rock edicts of Ashoka (in the 3rd century BC) proclaim the emperor's concern for the wellbeing of the hill-dwellers. This line

of thinking which shows concern for the disadvantaged people runs through all the ages and has produced bold advocates like Jyotiba Phule, Periyar and Ambedkar in the recent years. Manusamhita forbade the king from misbehaving with the wife of the defeated enemy.

- In various chapters of the Quran, female infanticide has been condemned, and freeing a slave has been praised as an act of great merit. In fact, the Prophet himself had hundreds of slaves freed and allowed, after conquest, Christians and Jews to pursue their own faith.
- In China, Confucius laid the foundation of ethics in social relations. Chinese cultural traditions emphasized the importance of living together with dignity and happiness.
- Ancient Roman laws required minimum 'horror of the sword' to be sued to conquer enemy. Christian churches in early days 'prohibited the use of crossbow in war as it was deadly and odious to god'.
- In tribal societies, even today, rape of women is unheard of.

4.5.3 Use and Misuse of Cultural Relativism

Let us now go back to the cultural relativists. There is one important aspect of the issue that we have not yet discussed. Can this argument be misused by people for their own ends? For instance, if we are talking of Asian values, who was upholding these values when the Chinese government shot down hundreds of students demonstrating for democratic rights in Beijing? Were the students less Chinese than the rulers? Often ruling classes indulge in their power games under the guise of culture. People in power uses the cultural-relativism argument to justify political repression and restriction of rights. Of course, this is not always so. In Japan, the people chose to exercise their political rights according to their culture, and opted for a one-party system without any force by the government or by law. It should now be clear that there are various dimensions of cultural relativism and for a better understanding it deserves close examination.

4.5.4 Ideological Differences

The traditional western emphasis on individual liberties and political rights has met with objections and skepticism from the socialist and the Marxists as well. The Marxists for example stress that along with liberty equality is also an important human value and they regard the liberal notion of individual rights as a bourgeois illusion. They point out that the substantial inequality in income effect quality of life and power that exists in many liberal capitalist societies. The gulf between haves and have not is often very wide in these societies. Thus the Western concept of human rights merely promises to everyone an equal chance to be unequal i.e. to become richer than his or her neighbours. Again the promise of equal opportunity is in reality a myth because power, wealth and expertise are concentrated in a few hands. This concentration- gives the elite control over the masses and allows a minority to exploit the majority. Finally the Marxists argue that the interest of the society must override the rights of the individual.

Check Your Progress 2

Note: Use the space given below for your answers.

- 1) On What basis the modern idea of Human Rights is criticized by some?

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- 2) What do you understand by East Asian Challenge to the idea of Universality of Human Rights?

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3) How can the idea of cultural relativism be misused?
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4.6 HOW UNIVERSAL ARE HUMAN RIGHTS?

What you have just read is that certain cultural traditions and practices are not in line with the views projected by the UDHR. At least, that is how it appears. But, there is a little known fact which is, however, of great importance. Before creating the UDHR, the UN appointed a committee to see which, if any human rights were considered fundamental by the different cultures of the world. The committee sent a detailed questionnaire to philosophers, historians, politicians, and thinkers around the world. Replies came in describing what different cultures consider to be human rights. How came the surprise! They found that the list of basic rights and values that they received from all these diverse cultures were essentially similar. For instance, the basic right to life is a value shared by all cultures. So, all the cultures would agree that most of the rights listed in the UDHR are necessary for a decent, dignified way of life. It is only a question of how each cultural group interprets these rights. The difference lies in this aspect. The different human rights cannot be separated from each other. They form among themselves a harmonious whole. It is the universal harmony that ultimately counts.

The first paragraph of the Vienna Declaration states without ambiguity: 'The universal nature of these rights and freedoms is beyond question.' The whole of the fifth paragraph is devoted to this question which, in the

words of the Declaration, states: All human rights are universal, indivisible and interdependent and interrelated.

The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

These provisions of the Vienna Declaration lead to the following conclusions:

- They state once and for all that dignity is the common basis of all human rights.
- They proclaim the universal character of those rights.
- However, important to note is a need for taking note of national and regional peculiarities and of various historical, cultural and religious heritages as we accept the universal nature of the human rights.

We live in a period of civilization in which human rights have received recognition through universal instrument, international human rights organizations and in some countries through national constitutions and commissions. It is gradually being recognized that man is born free and is endowed with certain universally claimed human rights. However, the paradox of contemporary times is that everywhere such rights are being violated or ignored. Humans without rights are on increase. Blood and tears and trauma and misfortune claim victims everywhere. Human inhumanity takes many forms.

Social divisiveness and political instability coupled with different institutional framework and inadequate resources make it impossible to comply with the requirements of UN Declaration. It is argued that either

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human right laid down by UN are too valuable to make it possible to establish what constitutes a right violation or that they require to be interpreted by reference to the particular value or tradition of a particular society.

Most of the rights are defined primarily in terms of civil liberties and political rights in the liberal democratic framework. The citizens of Western liberty democracies generally enjoy these rights and liberties. While the erstwhile socialist countries had criticized the nature of human rights from the beginning, the underdeveloped countries, social and political dislocation caused by the process of nation building tended to reduce the government's observance of human rights as defined by the UN Declaration. The development of liberal democratic institutions usually occurred in societies with high level of communication, urbanization and per capita income. Thus certain minimum level of socio economic development is necessary for liberal democratic values and institutions to take hold in a country. Thus socio political structure of underdeveloped societies has been usually too fragile and inflexible to maintain the level of human rights. As a result millions of people are being deprived of basic and minimum human rights.

Although there have been sharp differences between liberal and socialist countries about the nature of human rights during the cold war, yet the profile of human rights has changed in the post-cold war era and the UN has emerged as a significant institution to evolve human rights standards. The 1993 world Congress on Human rights in Vienna noted 'the promotion and protection of all human rights is a legitimate concern of all in the international community'. Of late the UN has taken steps to protect the rights of people through the use of humanitarian intervention in countries like Iraq, Somalia and Bosnia. It also established tribunals charged with the indictment and persecution of individuals accused of crimes against humanity and genocide in the former Yugoslavia and Rwanda.

4.6.1 Worldwide Influence of UDHR

Soon after the Declaration, the issue of human rights began to be persuaded vigorously throughout the world and gradually attained a status of a movement. While the Western democratic countries saw in the human rights a vindication of the liberal capitalist ideology and a weapon to fight the cold war, the colonial countries of Asia and Africa saw in them an opportunity to get rid of their old feudalistic systems and a necessary tool for their development. The idea of human rights was propagated by a number of regional organizations which provided separate conventions and covenants for the enforcement of human rights and fulfilling the gap left by UN. For example, a more marked reaction in favour of human rights was seen in Europe not only because of its memories of the atrocities of the Nazis and Fascists rulers but also because the democratic Europe lived very near the communist USSR whose outlook negated all the conclusions of philosophy which had led to the Universal Declaration of Human Rights. The Congress of Europe at The Hague in May 1948 announced its desire for a Charter of Human Right guaranteeing the liberty of thought, assembly and expression. It was followed by a Europeans Convention for the Protection of Human Rights and Fundamental Freedoms signed in November 1950. The Convention guaranteed the right to life, liberty, security of persons, of a fair trial, to respect for one's private and family life, home and correspondence, to marry and found a family freedom from torture or inhuman treatment or punishment, freedom from slavery and servitude, freedom of thought and expression, conscience and religion and freedom of assembly and association: Subsequently, right to property, to free election, right of parents to educate their child in conformity with their beliefs, freedom from imprisonment for debt, freedom from exile and prohibition of collective expulsion of aliens were also added. In marked contrast to the UN Declaration, the European convention was 'to take the first step for the collective enforcement of certain rights of UN Declaration'.

Similarly, across the Atlantic, the Latin American states established an American Organization of States (OAS) in 1959. The various articles of

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this charter of OAS held the states responsible for protecting human rights an American convention on Human Rights was signed by Chile, Columbia, Costa Rica, Ecuador, El Salvador Guatemala, Honduras, and Nicaragua, Panama Paraguay, Uruguay and Venezuela in 1969 which came into force in 1978. About these regional instruments and arrangements you will read more in units' of this course. In 1960s when the winds of change were blowing across Africa, the leaders of the African states formed the Organization of African Unity (without South Africa) and proclaimed the right of the people to self-determination. It prepared a draft of an African Charter of Human Rights and peoples right (1981) and worked hard to establish bodies to provide, promote and protect human rights. The OAU has successfully performed. It covers people's rights known as group rights or collective rights. It too has a commission which examines the periodic reports from state parties on their complaints within the provisions of the Charter and established dialogue with the state representatives aimed at encouraging states to implement their human rights obligations. The OAU has been successful in bringing apartheid to an end. The experience of the European, Latin American and African countries proved an encouraging example for the countries of South East Asia also. But such progress could not be made because of certain factors such as lack of political rights and civil liberties, lack of democratization and multi-party system, self-serving constitutional process, excessive national security laws, preventive detention and constraints upon due process of law, extensive limits on freedom of thought, expression and assembly, a compromised and defective judicial criminal system, unbalanced development, inadequate social safety nets etc. Still some regional initiatives have been taken to the direction of human rights such as the Non-aligned movement, The association of South East Asian Nations and the United Economic and Social commission for Asia and pacific, and South Asian Association for Regional Cooperation. The landmark achievement of the ASEAN is a treaty signed between it and EEC in which ASEAN expressed its willingness to work for the betterment of human rights at regional level. Nearer home, SAARC formed with a strong signal for human rights awareness. It has been fighting against terrorism and human rights

violation and hope to adequately respond to these challenges. Also national human rights institutions in the form of human rights committees and commissions have also been set up in countries like India, Philippines, Indonesia, Sri Lanka etc.

4.6.2 NGOs on Human Rights

Apart from the regional organizations and human rights commissions at national levels, a number of non-governmental organizations have also come into existence throughout the world to keep a watch on the national governments with regard to any possible violation of human rights on the one hand and to promote and protect the human rights awareness on the other. Some of the NGOs of international fame are International Commission of Jurists, the International Federation of Human Rights (Paris), the International League of Human Rights (NY) and the Minority Rights Group (London). All these organizations have a special consultative status with UN. Two other important NGOs of international recognition are the Amnesty International and the Human Rights Watch. The Amnesty International was established in 1961 and its main thrust is to secure immediate and fair trials of political prisoners. It seeks an end to torture, execution, disappearance, arbitrary killings, hostage taking and other inhuman cruel or degrading treatments and punishments. The Human Rights Watch was established in 1987 in New York and it has more than 8000 members. It evaluates the human rights practices of governments in accordance with standards recognized by international law and agreements and UN Declarations. It identifies governmental abuses of human rights by monitoring. Unit of this course provides detailed information about the nature and role of NGOs engaged in the task of protection and promotion of Human Rights.

4.7 UDHR AND ITS ARTICLES

Preamble

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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 is 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.

Notes

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 defense.

(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.

Notes

- (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 of equal access to public service in his country.

- (3) The will of the people shall be the basis of the authority of government; this will 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.

Notes

- (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.

Check Your Progress 3

Note: Use the space given below for your answers.

- 1) Why it is suggested that all human rights are universal, indivisible and interdependent?

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2) How has Universal Declaration influenced the process of protection of rights in the world?

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3) Discuss the articles of UDHR.

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4.8 LET US SUM UP

In this Unit we have studied the issue of human rights - both as a concept and as propounded by the United Nations. We have seen that in spite of the fact that rights are granted in the constitutions of various countries, the need for universal human rights over and above the state laws was acutely felt particularly after the Second World War due to certain crimes committed against humanity. The lead for this was given by the UN Declaration of Human rights in 1948 which was followed by the two covenants - one on economic, social and cultural rights, and the other on civil and political rights which were adopted in 1966. This was followed by a number of regional conventions such as the European Convention, The African Charter of Human rights, the OAS convention on Human Rights etc. The issue of human rights became a worldwide phenomenon in the post war period and it caught the attention of both the developed and the developing countries. A number of international NGOs and local organizations also came into existence almost in every country to promote and protect the human rights of the people. These organizations have done splendid work in securing the rights of the ethnic minorities, refugees, children, victims of gender bias, bonded labour, mentally

disabled, prisoners under trials etc. It is not that the efforts of these organizations have removed cruelty and inhuman behaviour from the face of the earth. Too many people still lack the simplest necessities of life and may still be deprived of the most basic human needs. But the upholding human rights are to reverse the process of human suffering and to restore the dignity of the individual.

4.9 KEY WORDS

UDHR:The Universal Declaration of Human Rights (UDHR) is a historic document that was adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France. Of the then 58 members of the United Nations, 48 voted in favor, none against, eight abstained, and two did not vote.

Declaration: In law, a declaration is an authoritative establishment of fact. Declarations take various forms in different legal systems.

4.10 QUESTIONS FOR REVIEW

- 1) Why it is suggested that all human rights are universal, indivisible and interdependent?
- 2) How has Universal Declaration influenced the process of protection of rights in the world?
- 3) Why is promotion and protection of Human Rights important?
- 4) Discuss about the articles of UDHR.

4.11 SUGGESTED READINGS AND REFERENCES

- Feldman, Jean-Philippe (December 1999). "Hayek's Critique of the Universal Declaration of Human Rights". *Journal des Economistes et des Etudes Humaines*. 9 (4). doi:10.2202/1145-6396.1172.

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- Hashemi, Nader and Emran Qureshi. "Human Rights." In The Oxford Encyclopedia of the Islamic World. Oxford Islamic Studies Online.
- Littman, D (February–March 1999). "Universal Human Rights and Human Rights in Islam". Midstream. Archived from the original on 2006-05-01.

4.12 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

- 1) See Sub section 4.2.1 - Empirical critiques of human rights have reached a crescendo. Despite their centrality in late modernity, human rights face claims of irrelevance and predictions of demise. These social science–inflected assessments follow a familiar repertoire of critique. Concerns surrounding sociological legitimacy, material effectiveness, and distributive equality are foregrounded and undergirded by a growing body of empirical evidence, especially in sociology, political science, and anthropology but also in economics and social psychology. However, the critique has also catalyzed a counter-critique. A contending body of evidence accompanied by mid-level theorizing suggests that the turn to human rights has been more successful than imagined. This paper argues that it is difficult to reach any definitive conclusion given the role of normative biases in the research and a failure to agree on common benchmarks for evaluation. Nonetheless, with an emerging postliberal order, and a deepened concern over respect for human rights in both democracies and autocracies, critiques and counter-critiques

deserve consideration in ensuring that the political project of human rights is both effective and equitable.

- 2) See Sub section 4.3.1
- 3) See Sub Section 4.3.3

Check Your Progress 2

- 1) See section 4.4
- 2) See Sub section 4.5.2
- 3) See Sub section 4.5.3

Check Your Progress 3

- 1) See section 4.6
- 2) See Sub Section 4.6.1
- 3) See Section 4.7

UNIT 5: CIVIL AND POLITICAL RIGHTS: THE COVENANTS

STRUCTURE

- 5.0 Objectives
- 5.1 Introduction
 - 5.1.1 Codification of Rights
- 5.2 Civil and Political Rights
 - 5.2.1 Adoption of the International Covenant on Civil and Political Rights
 - 5.2.2 The Rights
 - 5.2.3 Optional Protocols
- 5.3 Limitations on the Exercise of Rights
- 5.4 Implementation Mechanism
 - 5.4.1 Functions of Human Rights Committee
 - 5.4.2 The Emergency Procedure
 - 5.4.3 Formation of General Comments
 - 5.4.4 Inter-state Complaints Procedure
 - 5.4.5 The Individual Communication Procedure
- 5.5 Importance of Civil and Political Rights
- 5.6 Let us sum up
- 5.7 Key Words
- 5.8 Questions for Review
- 5.9 Suggested readings and references
- 5.10 Answers to Check Your Progress

5.0 OBJECTIVES

This unit discusses the type and nature of Civil and Political Rights as these have been provided in the International Covenant on civil and political Rights.

After going through this unit you will be able to know:

- To know the nature of International Covenant on Civil and Political Rights;
- To discuss the types of Rights provided by the Covenant;
- To know restrictions on the exercise of the Rights;
- To discuss the mechanism provided for monitoring the implementation of Rights; and
- To know the procedure to file complaints.

5.1 INTRODUCTION

International human rights regime has been designed to protect the full range of human rights required for people to have a full, free, safe, secure and healthy life. The right to live a dignified life can never be attained unless all basic necessities of life, namely, work, food, housing, health care, education and culture are adequately and equitably available to everyone. Based squarely on this fundamental principle of the global human rights system, international human rights law has established individual and group rights relating to the civil, cultural, 36 economic, political and social spheres. These however, have developed step by step.

Therefore, they are also referred to as three generations of human rights. These are:

- First Generation Rights: civil and political rights;
- Second Generation Rights: economic, social and cultural rights;
- Third Generation Rights: solidarity rights.(group rights) The above mentioned rights have been placed in different International Conventions, Covenants, Declarations etc.

Civil and political rights are a class of rights that protect individuals' freedom from infringement by governments, social organizations, and private individuals. They ensure one's entitlement to participate in the civil and political life of the society and state without discrimination or repression.

Civil rights include the ensuring of peoples' physical and mental integrity, life, and safety; protection from discrimination on grounds such as race, gender, sexual orientation, national origin, color, age, political affiliation, ethnicity, religion, and disability; and individual rights such as privacy and the freedom of thought, speech, religion, press, assembly, and movement.

Political rights include natural justice (procedural fairness) in law, such as the rights of the accused, including the right to a fair trial; due process; the right to seek redress or a legal remedy; and rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defense, and the right to vote.

Civil and political rights form the original and main part of international human rights. They comprise the first portion of the 1948 Universal Declaration of Human Rights (with economic, social, and cultural rights comprising the second portion). The theory of three generations of human rights considers this group of rights to be "first-generation rights", and the theory of negative and positive rights considers them to be generally negative rights.

5.1.1 Codification of Rights

As has been explained in the earlier unit that the Universal Declaration of Human Rights (UDHR) was proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations and as the foundation of freedom, justice and peace in the world. Accordingly, the UDHR contained almost all types of rights: Civil, Political, Economic, Social, Cultural etc. At the same time the UDHR was a mere declaration and not a treaty imposing legal obligations on the states. International community, while looking for an International Bill of Rights was also interested in a set of rights and freedoms as a part of an international agreement as a treaty which would

be legally binding on the states. Thus there emerged a process to establish Human Right Treaties. Since then a number of treaties known as International Covenants or conventions have been adopted. Seven of these covenants are known as core International Human Rights Treaties. These are called Core, as they are concerned with the most important aspects of Human Rights of individuals and groups and provide for the machinery for their monitoring. The Treaties are

- 1) International Convention on the Elimination of All Forms of Racial Discrimination (1965).
- 2) International Covenant on Civil and Political Rights (1966)
- 3) International Covenant on Economic, Social and Cultural Rights (1966)
- 4) Convention on the Elimination of all Forms of Discrimination against Women (1979)
- 5) Convention against Torture and other Cruel;. Inhuman or Degrading Treatment or Punishment (1984)
- 6) Convention on the Rights of the Child (1989)
- 7) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

From among the above two treaties namely International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are considered most important. These two treaties along with UDHR constitute what is known as International Bill of Rights. Below we discuss the nature of Civil and Political Rights as described in the International Covenant on Civil and Political Rights. In subsequent units we will discuss about other conventions and covenants.

Check Your Progress 1

Note: i) List out the space below for your answers

- 1) What is known as Three Generations of Human Rights?

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2) Which Human Rights Treaties are known as Core International Treaties?

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5.2 CIVIL AND POLITICAL RIGHTS

Civil and Political Rights are often referred to as the "first generation" or "first dimension" of human rights, which distinguishes them from the economic, social and cultural rights as well as from collective or solidarity rights of the third generation. It is suggested that civil and political rights are the most important and lasting achievements of the American and French revolutions in the late eighteenth centuries and other democratic revolutions of nineteenth and twentieth centuries. These are based on rationalistic doctrine of natural law according to which human beings are born free and equal in dignity and inalienable rights. These rights and machinery to monitor them are contained in the International Covenant on Civil and Political Rights.

5.2.1 Adoption of the International Covenant on Civil and Political Rights

As already mentioned when the UDHR was adopted broad agreement already existed that the rights it contained should be translated into legal form as treaties, which would be directly binding on the states that agreed to be bound by its terms. In fact right from the time of the establishment of Human Rights Commission in 1946 extensive negotiations for formulation of such treaties began. A milestone was

reached on 16 December 1966, when the UN General Assembly adopted two covenants that is International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights. The drafting of the Covenants was a long and arduous process; while the Universal Declaration of Human Rights (UDHR) took only 18 months to complete, the two covenants took eighteen years. The value of these instruments is apparent: first, they defined more explicitly the scope and standards of those human rights which are considered fundamental and legally binding to the States which have ratified these treaties. Under international law a multilateral treaty is binding to only a State, which has ratified the treaty, in simple meaning, has shown its willingness to make herself accountable to the treaty. ICCPR provides a mechanism for implementation of the rights contained. The ICCPR contains 53 articles. States are to respect and ensure those rights upon becoming the parties to the ICCPR. It is true that most of the substantive articles of the ICCPR define and amplify corresponding provisions in the UDHR. The provisions of the ICCPR are explicit as to the rights to be protected and also places a positive obligation on States to ensure such protection. States have also an obligation to implement these articles, 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.

5.2.2 The Rights

The basic characteristics of ICCPR can be described as :

- The states freedom of action is limited, as the state is obliged to respect such rights;
- The rights primarily are individual in nature;
- All states have the responsibility to respect these rights, irrespective of the political system and level of development;

Notes

- They are justiciable, which means that a court or a tribunal is able to assess, if a violation has occurred.

Following rights are identified as civil and political rights under the International Covenant on Civil Political Rights in Articles 6 to 27 :

- 1) Right to Life (Article 6)
- 2) Prohibition against Torture (Article 7)
- 3) Prohibition against Slavery (Article 8)
- 4) Right to Liberty and Security of person (Article 9)
- 5) Humane Treatment to persons who are deprived of personal Liberty (Article 10)
- 6) No one shall be arrested for failure of contractual obligations (Article 11)
- 7) Liberty of Movement and Freedom to Choose residence (Article 12)
- 8) Right to Aliens not to be expelled without the process in accordance with law (Article 13)
- 9) Equality before and equal protection of courts and tribunals (Article 14)
- 10) Non-retroactive application of laws (Article 15)
- 11) Right to Recognition as a person before the law (Article 16)
- 12) Respect to privacy, family, home or correspondence, nor to unlawful attacks on honour and reputation of the individual (Article 17)
- 13) Right to freedom of thought, conscience and religion (Article 18)
- 14) Right to hold opinions without interference (Article 19)
- 15) Prohibition against propaganda for war shall be prohibited by Law (Article 20)
- 16) Right of peaceful assembly (Article 21)
- 17) Right to freedom of association with others, including the right to form and join trade unions for the protection of interests (Article 22)

- 18) Right to family is the natural and fundamental group unit of society (Article 23).
- 19) Right to Child (Article 24)
- 20) Right to participate and vote in elections (Article 25)
- 21) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law (Article 26)
- 22) Right of Minorities (Article 27)

5.2.3 Optional Protocols

The International Covenant on Civil and Political Rights also has two optional protocols as supplements. These protocols contain further obligation for the states. However, these are optional and states are free to accept or not accept. Having accepted they become bound by them. The first Optional Protocol to the International Convention on Civil and Political-Rights enables the Human Rights Committee, set up under the terms of that covenant to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. This was adopted along with ICCPR in 1966.

Under Article 1 of the Optional Protocol a state party of the Covenant that becomes a party to the Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from the individuals subject to its jurisdictions who claim to be victims of a violation by that State of a right set forth in the covenant. Individuals who make such a claim and who have exhausted all available domestic remedies are entitled to submit written communications to the Committee. We will discuss the procedure for complaints in sub section 4 of this unit.

The second optional protocol was adopted in 1989. It promotes abolition of death penalty. According to this protocol no one within the jurisdiction of signatory state shall be executed and each state party shall take its necessary measures to abolish the death penalty within its

jurisdiction. The protocol has been adopted on the belief that abolition of the death penalty contributed to enhancement of human dignity and progressive developed of human rights.

5.3 LIMITATIONS ON THE EXERCISE OF RIGHTS

The Covenant also places certain limitations on the exercise of the rights recognized by it. These limitations are primarily in the interest of public safety, public order and morals, national security, or for the protection of human rights of others. Article 29 (2) of the Universal Declaration of Human Rights in broad general terms makes the following limitations respecting the exercise of the rights set forth in the Declaration. It states that : " 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." In time of public emergency which threatens the life of the national and the existence of which is officially proclaimed, the States Parties to the ICCPR may suspend implementation of certain rights mentioned under ICCPR. Such limitations must however, be provided by domestic law and must be necessary that is proportional, reasonable and non-arbitrary. Limitation clauses provide states with an opportunity to balance universal human rights with national peculiarities and cultural and religious values but states are under an obligations to prove to the international community that there restrictions are necessary and reasonable.

In addition to limitation clauses, states also have other means to escape their obligations to respect civil and political rights - i.e. Emergency Situations. In time of public emergency which threatens the life of the nation (for example war, internal armed conflicts, terrorism, and natural disasters) they are authorized by Article 4 of the ICCPR to take temporary measures derogating from most of their obligations. At the

time of ratification or accession they may also enter reservations, even to the extent of fully excluding the application of certain rights. In practice states tend to make use of these powers to suspend or violate rights quite frequently, but the Human Rights Committee and regional human rights bodies stress their authority to monitor reservations and emergency powers of states.

While the state is permitted temporarily to deny civil and political rights in situations of emergency it (the state) is not permitted, under any circumstances to violate or derogate from the right to life, freedom from slavery and slave trade, freedom from civil prison, right against ex post facto criminal law, right to recognition as a person before law, and the right to freedom of thought, conscience and religion. The, state, thus, is not allowed to violate these rights under any conditions, even those of emergencies. These seven rights are considered the minimum basic fundamental rights which should remain guaranteed to the individual at all times and cannot be abridged, reduced or denied under any circumstances.

Check Your Progress 2

Note: i) List out the space below for your answers

- 1) What political rights have been provided in International Covenant on Civil and Political Rights?

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- 2) Discuss the Optional Protocol?

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- 3) What are the limitations of International Covenant on Civil and Political Rights?
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5.4 IMPLEMENTATION MECHANISM

The implementation measures of the ICCPR are set out in Articles 28 to 45, and also in the Optional Protocol I which establishes a procedure for considering individual communication. The body which is charged with supervising the observance by States Parties of their obligation under the ICCPR is the Human Rights Committee (HRC). Article 28 of the ICCPR provides for the establishment of a HRC, consisting of 18 members who must be nationals of the parties to the ICCPR and persons of high moral character and recognized competence in the field of human rights. In their election consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems. The members of the Committee are elected for a four year term by secret ballot from nominations by State Parties at a special meeting convened for the purpose by the Secretary General of the United Nations. Each party may nominate more than two candidates who must be nationals of the nominating State. Members of the Committee are eligible under Article 29(3) of ICCPR for re-election. The personal nature of the duties performed by Committee members is reinforced by the requirement that each must, on appointment, make a solemn declaration that he will perform his functions impartially and conscientiously. The Committee members are paid by the UN, thus eradicating one particular major source of potential government interference. The Committee presently meets three times in each year, in the spring, summer and autumn in sessions of three working weeks each. The spring session takes place in

New York and the others two in Geneva. Secretariat services are provided by the United Nations Centre for Human Rights.

5.4.1 Functions of Human Rights Committee

The HR Committee performs three roles: Advisory and monitoring, conciliatory and inquiring and investigative. For this the main functions of the Committee can be divided into four.

- (1) To study reports from the States,
- (2) To formulate general comments,
- (3) To consider complaints from a state party regarding other state (Communications from states) and
- (4) to consider complaints from individuals against state party.

Reports From The States The ICCPR and its Optional Protocol I provide for one mandatory and two optional mechanisms to enable the Human Rights Committee to monitor fulfillment of obligations by the State parties. The mandatory means of supervision is a system of periodic reports under Article 40 (1). Under this provision States Parties undertake to submit reports on the measures they have adopted to give effect to the rights recognized in ICCPR and on the progress made in the enjoyment of those rights. Copies of State reports and comments are forwarded to ECOSOC for consideration, and the Committee itself is also required to submit an annual report to the General Assembly on its activities. A state party's initial report is due within one year of the entry into force of the covenant for the country concerned. Subsequent reports, known as the "periodic reports" are due at a time individually specified by the Committee for each state party.

The Committee has decided that the periodicity for submission of subsequent reports other than initial reports is five years. However, pursuant to Article 40, the rules of procedure also stipulate that reports can also be requested "at any other time the Committee deems appropriate". The Committee has stressed that the official reports should deal not only with the constitutional and legal situation in a country, but

also with relevant activities of judicial, legal and administrative authorities, together with any restrictions or limitations even of a temporary nature imposed by law or practice or in any other manner on the enjoyment of the rights guaranteed in the ICCPR, and any other information on the progress made in the enjoyment of the rights. However, in 1995 the Committee amended its guidelines for initial and periodic reports to stipulate that information provided on the implementation of each right should include, "factors affecting and difficulties experienced in the implementation of the ICCPR including any factors affecting the equal enjoyment by women of that right".

5.4.2 The Emergency Procedure

Since 1991 the HRC has developed a procedure to respond to what it perceived as emergency situations. The procedure is clearly based on the provisions of Article 40 of the ICCPR and is reflected as follows in the Committee's Rules of Procedure: Request for submission of a report under Article 40, paragraph 1(b) of the Covenant may be made in accordance with the periodicity decided by the Committee or at any other time the Committee may deem appropriate. In the case of exceptional situation when the Committee is not in session, a request may be made through the Chairman, acting in consultation with the members of the Committee. \ The Committee has under the procedure requested urgent reports from nine States parties so far. In most cases, the States parties are requested to submit the report within three months. Non-governmental Organizations (NGOs) have an important role in bringing emergency situation of human rights violations to the attention of the Committee.

5.4.3 Formation of General Comments

A further means by which the Committee carries out its functions of interpreting the Covenant and to clarify, the scope and meaning of its articles, and thus of all states parties obligation is through the development and adoption of so-called general comments. As the

provisions of the Covenant, like most human rights treaties, are phrased in general terms and thus liable to be interpreted in a variety of ways, the committee has taken up the task of elaboration of general comments by way of advice to all states parties. Rather than dealing with a particular issue as it arises in the context of a particular state party's situation, general comments analyse a specific article or general issue in the Covenant in as extended and comprehensive fashion. While most general comments are detailed interpretations of a specific Covenant right some address the Covenant rights of specific groups, such as aliens, while others address procedural issues, such as the preparation of reports, or miscellaneous issues, such as reservations to the Covenant. The General comments are available on the Treaty Bodies database of the office of the United Nations High Commissioner for Human Rights.

5.4.4 Inter-state Complaints Procedure

An important method of supervision of implementation of the ICCPR is optional, related to an inter-state complaints procedure covered under Articles 41 and 42 of the ICCPR. The Committee is competent to consider communications from a State party which considers that another State party is not giving effect to the provisions of the ICCPR. It shall make available its good offices to the State parties concerned with a view to promoting a friendly solution of the matter. This activity can be exercised by the Committee only if both States have declared that they recognize its competence to receive and consider such communication from States. The first step in the process is for the state lodging the complaint to bring the matter to the attention of the state that is alleged not to be fulfilling its obligations. Within three months, the latter should reply, in the form of a written explanation or clarification. If, within six months, the matter is not settled to the satisfaction of both parties, either may refer it to the Committee which may deal with it, once satisfied that within a reasonable period of time, all domestic remedies have been tried without success. The Committee may then take the matter up and propose its good offices in the search for a friendly solution. If there is still no agreement, the committee may appoint a five-person conciliation

commission, with the agreement of the states parties directly concerned but not including their national among the members, with instructions to complete its business and submit a report to the Chairperson of the Committee and through that person, to the parties in dispute, within 12 months.

5.4.5 The Individual Communication Procedure

Another method of supervision of enforcement of the rights contained in the ICCPR is again optional. This is the individual communication procedure contained in the Optional Protocol. States parties may empower the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State of any of the rights stipulated in the Covenant. The Committee can entertain individual communication only 'if a State party has ratified the Optional Protocol to the Covenant. Individuals who claim that any of their rights enumerated in the covenant have been violated and who have exhausted all available domestic remedies may submit written communication to Human Rights Committee for consideration. The duty of the Committee here is to "forward its views to the State Party concerned and to the individual". The function of the Committee is to gather all necessary information, by means of written exchanges with the parties, to consider the admissibility and merits of complaints, and to issue its "views" accordingly. All steps of the procedure under the Optional Protocol are confidential where the Committee adopts its views or otherwise concludes consideration of a case.

Human Rights Committee under the Optional Protocol - An Evaluation

The Human Rights Committee started its work under the Optional Protocol at its second session in 1977. One general trend in the emerging case law of the Committee is most promising: the Committee has displayed a determined desire to be seen to be acting in, at least, a quasi-judicial manner. It has been conducting its work being fair to both

petitioners and States parties. The ensuing analysis will reflect the nature and breadth of the Committee's decisions on communications lodged by individuals.

Legal analysis for Follow-up Procedure

The idea for establishment of Human Rights Court with an effective implementation mechanism is still gaining momentum. It is true that the Human Rights Committee is not such a Court, but it does exercise analogous responsibilities and it is the only inter-national body to fulfil this need. The Human Rights Committee's decisions on the merits are referred to as "views" in Article 5, paragraph 4. Although views are read like court judgments, in fact drafters of the ICCPR did not call them so, nor did they confer upon them legally binding force. Another weakness is that the Optional Protocol does not provide for an enforcement mechanism. Thus, in practice the Committee's views are more in the nature of recommendations. To make the Human Rights Committee more effective, a State may provide in its domestic legislation for implementation of the decisions of the Human Rights Committee.

5.5 IMPORTANCE OF CIVIL AND POLITICAL RIGHTS

As has already been mentioned Civil and Political Rights are considered as the most important and lasting achievement of various democratic revolutions and movements. These rights are primarily concerned with the recognition of individuals dignity, his or her right to live his or her life according to own choice while enjoying equality and liberty in the state and society. Thy very philosophy of Human Rights is based on the idea that all human beings are born equal and free. While this vision has been amply provided in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights imposes binding obligations on state in the form of treaty. State parties undertake to ensure the equal rights of men and women to the enjoyment of rights. It also enjoins states to make that principle a reality.

Notes

Civil and Political rights provide for the protection of the right to life and dignified existence of individuals. These, therefore stipulate that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, that no one shall be held in slavery, that slavery and slave trade shall be prohibited and that no one shall be held in bondage or required to perform forced or compulsory labour, that no one shall be subjected to arbitrary arrest or detention, that all persons deprived of their liberty shall be treated with humanity. Liberty of movement and freedom to choose a residence, right to freedom of thoughts, conscience and religion and freedom of expression recognize that each individual has been endowed by nature of rationality and thinking faculty which cannot be restricted by the state arbitrarily. With respect to the area of an individual existence, the right to privacy protects one's identity, integrity and intimacy. Identity includes one's name, gender, appearance, feeling, honour and reputation.

The rationalism of the Enlightenment, as Manfred Nawak points out, stipulates individual's spiritual existence that is one's belief in spiritual ideas and convictions, the communication of spiritual subject matters to fellow citizens, and the freedom to defend one's thoughts and ideas in public, either individually or in community with others. The political freedoms of thought, conscience, religion, belief, expression, media, art, information, associations, assembly and trade unions' etc., stem from this vision of rationality. Nawak further suggests that the right to take part in the conduct of public affairs, directly or through freely chosen representatives, is the most direct expression of political (democratic) freedom, distinguished from the concept of liberal or socialist freedom. Since democracy usually functions by means of representative participation, the most important political rights violating these rights put forward various explanations for that. They are held accountable by the International community and U.N. monitoring bodies. In extreme cases of violations collective actions have also been initiated against some states. In addition recognition of civil and political rights by the International Community has also encouraged human rights activists and movements to mobilize public opinion for their promotion and

protection. As it is well known now a large number of Nongovernmental Organizations and other bodies are actively engaged in generating awareness about rights and putting the states in dock for their violation. Of course, individual they also need to be aware and concerned about their rights and participate in the movement for their promotion and protection.

Civil and political rights

The Right to Life

Section 93 of the Constitution of the Republic of Latvia

Article 3 of the Universal Declaration of Human Rights

Article 6 of the UN International Covenant on Civil and Political Rights

Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

European Court of Human Rights has stipulated that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that guarantees the individuals' right to life and determines the conditions under which deprivation of life can be justified constitutes one of the key clauses in the European Convention for Human Rights, and that deviation from that clause is impermissible. In correlation with Article 3 of the Convention it presents an essential fundamental value of a democratic society. On the basis thereof, any grounds justifying deprivation of life are subject to possibly narrow interpretation.

Obligation of the State to protect the life of each and every citizen is composed of three parts:

- The duty to take the steps required in the given circumstances to prevent unjustified loss of life;
- The duty to investigate suspicious death;

Notes

- The duty of its representatives to abstain from deprivation of life incommensurate with the law.

Deprivation of life of a lawfully detained individual can take place in different circumstances, such as deprivation of life during interrogation, suicide by detained person as a result of threat; bodily injuries incommensurate with life.

The Right to Liberty and Security

Section 94 of the Constitution of the Republic of Latvia
Article 9 of the UN International Covenant on Civil and Political Rights

Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The right of individual to liberty in the wider sense includes, for example, freedom to select movement of an individual, and security includes freedom from interference with the personal integrity of individual on part of the State or other subjects.

The right to liberty and personal security inviolability is not absolute; it is subject to restriction in the manner and amount prescribed by law. In Latvia, for example, it is regulated by the procedure prescribed in the Administrative Offence Code, Criminal Procedure Law and other regulatory acts.

Guaranty of liberty of an individual as stipulated in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 9 of the International Covenant on Civil and Political Rights includes the right of individual to physical movement. The above-stated articles, however, guarantee liberty from placement of an individual into detention facilities of different kinds, rather than freedom of movement in general.

Deprivation of liberty is only justified in the cases and manner prescribed by law, and deprivation of liberty is subject to the statutory procedure and other regulations. It has to be grounded, and it may not be arbitrary. The right to liberty also includes the stipulation that no individual may be kept in prison without judicial sentence, without appropriate substantiation. The State has positive duty to take all efforts to ensure that an individual is subject to trial within reasonable limits of time.

Torture and Cruel Treatment

Section 95 of the Constitution of the Republic of Latvia
Article 5 of the Universal Declaration of Human Rights
Articles 7, 10 of the UN International Covenant on Civil and Political Rights
UN Standard Minimum Rules of 1957 for Treatment of Prisoners
Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

International and national regulatory acts prohibit cruel treatment and torture. The said prohibition is absolute, that is, no exceptions and deviations are permissible. In the real life, application of the said norms is the most problematic at closed-type facilities where individuals have limited right to protect themselves.

There are different forms of inhuman treatment, depending on the type and methods of execution; the nature and context of sentence; pre-mediation and systematic organization; age; duration; effect on human health; health condition at the time of execution; social meaning of the sentence; whether or not there have been other options available to public authorities, and the exigence and proportionality of the means applied for sake of security.

European Court of Human Rights has pointed out that cruel treatment, punishment or abasement is related to causing intensive or regular physical or moral sufferings to an individual, even if it does not lead to

actual bodily injuries. Such actions make the victims feel fear, humiliation and inferiority that can abase them and break their physical and moral resistance. Similar opinion has been issued by the UN Human Rights Committee: qualification of the prohibited treatment or punishment depends on the nature, purpose and severity of treatment. In addition, each of the above-mentioned forms of treatment includes not only physical but also moral sufferings.

The Right to Elect and to be Elected

Sections 101, 8, and 9 of the Constitution of the Republic of Latvia

Article 21 of the Universal Declaration of Human Rights

Article 25 of the UN International Covenant on Civil and Political Rights

Article 3 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Election right – the right to elect and to be elected – is closely related to the right of participation in the operation of Governmental and municipal authorities. The said right designed to ensure representation of citizens in the operation of the Government and municipalities constitutes a key element of democratic State.

The said right is related to duty of the State to ensure practical exercise of the right to elect and to be elected without unjustified restrictions. It follows from the above-stated that only justified reasonable restrictions prescribed by law are permissible. This is true not only concerning the election process but also the election procedure in a wider sense: listing for voting or standing, periodicity and availability of election, and the procedure for summarizing and announcing the results of election. Equality of electors and expression of their free will has to be ensured throughout the election process.

The Right to Legal Status: Matters of Citizenship, Asylum and Migration

Articles 6 and 15 of the Universal Declaration of Human Rights
Article 25 of the UN International Covenant on Civil and Political Rights
Article 1 of the Seventh Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms
Convention Relating to the Status of Refugees

The universal principle of international human rights stipulates that each and every individual, regardless of their domicile, has the right to be treated as a subject of law: to have a certain status granted to them in the State and a set of rights and obligations appropriate to such status, as well as corresponding identity documents.

There are certain guarantees of human rights to be provided to each and every individual regardless of their status (such as the right to life, for example); the set of other rights and obligations of an individual may differ, depending on their status – whether the person is a citizen or permanent resident of the country, or a refugee, or short-term visitor. It is essential, however, to ensure that a certain system is put in place in the State for legalization and granting of status to individuals, and to ensure that it operates without any discrimination, in compliance with the national and international legal norms. All institutions are bound to observe the norms of human rights when handling the matters related to the status of individuals: to ensure human treatment, and to take into account the rights of individuals, for example, to family life, liberty and security, to the extent prescribed by law.

The Right to Fair Trial

Section 92 of the Constitution of the Republic of Latvia
Articles 10, 11 of the Universal Declaration of Human Rights
Articles 14, 15 of the UN International Covenant on Civil and

Political

Rights

Article 6 of the European Convention for the Protection of Human Rights; Articles 2, 3, 4 of the 7th Protocol to the European Convention for the Protection of Human Rights

The UN Universal Declaration of Human Rights stipulates that everyone is entitled to have their rights and legal interests defended in a fair court. The said right includes a number of aspects: the principles of fairness, transparency, independence, timeliness, objectiveness, and legitimacy of court; publicity of the court judgment, the presumption of innocence, and other guarantees to the parties involved in judicial proceedings.

Everyone shall be presumed innocent until his or her guilt is established in accordance with law. The State shall seek to ensure that the presumption of innocence is observed in all activities of law enforcement institutions as well as mass media and public activities. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation.

Everyone has the right to the assistance of counsel. The State shall provide a counsel free of charge to the unprotected groups of society and take all steps necessary to ensure that low income persons can effectively exercise their right to fair court.

Provision of the right to fair court is crucial because it affects the possibility to protect other rights of an individual. A country is only law-based and democratic if the individuals in it can rely upon lawful, objective and operational actions of the law enforcement institutions.

Freedom of Speech and Expression

Section 100 of the Constitution of the Republic of Latvia

Article 19 of the Universal Declaration of Human Rights

Article 19 of the UN International Covenant on Civil and

Political

Rights

Article 10 of the European Convention for the Protection of Human Rights

Freedom of speech and expression includes freedom of views, the right to freely receive and distribute information and ideas without interference on part of public institutions, regardless of the state borders. The right to freedom of expression is the fundament of the right of everyone to express their views without fear from restriction, punishment or prosecution.

Freedom of speech in democratic society is widely construed, and it may only be subject to restriction on extremely exceptional occasions. In addition, freedom of speech includes not only “information” or “ideas” that are perceived as predisposing or neutral but also those that are offensive, shocking or alarming.

At the same time, such human rights are absolute, and they do not mean entitlement to impunity of expression. The State may impose restrictions on such right in certain manner and amount, especially because the exercise of such right involves certain duties and responsibility.

Freedom of Meeting

Section 103 of the Constitution of the Republic of Latvia
Article 20 of the Universal Declaration of Human Rights
Article 21 of the UN International Covenant on Civil and Political Rights
Article 11 of the European Convention for the Protection of Human Rights

The right to peaceful meeting is among the key values of democratic society, along with the right to freedom of speech. Freedom of meeting, as well as freedom of formation and speech, is among the most essential political rights. Such rights enable active civil society to express publicly their opinion and to participate in democratic processes.

Notes

Freedom of meeting includes the right to participate at the event in question as well as the right to arrange such event. The said right is individual by nature, notwithstanding that meeting means participation of more than one person.

The right to freedom of meeting is not absolute and it is subject to restrictions. It should also be taken into account that protection stipulated in the international legal norms only extends to the right to peaceful meeting.

Freedom of Formation

Section 102 of the Constitution of the Republic of Latvia
Article 20 of the Universal Declaration of Human Rights
Article 22 of the UN International Covenant on Civil and Political Rights
Article 11 of the European Convention for the Protection of Human Rights

The freedom of formation guarantees the right to form and join associations, political parties and other public organizations for the purpose of achievement of any common goal that is not prohibited by law. Article 20 of the UN Universal Declaration of Human Rights also contains special clause to the effect that no one may be compelled to join any organization.

The freedom of formation may take various forms: culture, sport, art, education, charity, ideological, interest groups and other associations of persons. Political parties, religious organizations and trade unions are treated as special forms of the freedom of formation.

The Right to Private and Family Life

Section 96 of the Constitution of the Republic of Latvia
Article 12 of the Universal Declaration of Human Rights
Article 17 of the UN International Covenant on Civil and Political Rights
Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Contents of the right to private life form from: personal identity, physical or moral integrity, including esteem and dignity, personal living space, sexual activities and social relations, as well as relations with other individuals including information about such relations. It also includes the right to keep the private life in secret from other private individuals. The State has the duty not only to abstain from unjustified interference with private life of individuals but also to protect them from infringement on part of their fellow citizens and mass media.

Complaints involving the right of individuals to private life are related to various matters: inviolability of correspondence and home, the extent to which information may be disclosed; transliteration of surnames into Latvian language; use of photographs; tapping of telephone conversations; control of e-correspondence and video surveillance without previous notice; protection of personal data, etc.

The right of individuals to family life includes such aspects as registration of marriage, inviolability of family life, the right to establish family, etc.

Freedom of Thought, Conscience and Religion

Section 99 of the Constitution of the Republic of Latvia
Article 18 of the Universal Declaration of Human Rights
Article 19 of the UN International Covenant on Civil and Political Rights
Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and also Article 2 of the 1st Protocol thereto

Each and every individual has the right to freedom of thought, conscience and religious beliefs. As stipulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, this right includes freedom to change the individual's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest their religion or belief in teaching, practice, worship and observance. It also includes the right not to follow any religion if the person selects so.

Conviction of an individual is not only related to religion. It means any conviction of an individual that is serious and important to them. It may be, for example, pacifism or philosophical conviction of the individual.

This right is also aimed at preservation of pluralism in society. Individuals, however, have to accept general denial of their conviction by society, and the fact that propaganda of a contrary conviction also exists.

Freedom of Movement

*Section 98 of the Constitution of the Republic of Latvia
Articles 9 and 13 of the Universal Declaration of Human Rights
Articles 12 and 13 of the UN International Covenant on Civil and
Political Rights
Articles 2, 3 and 4 of the 4th Protocol to the European
Convention for the Protection of Human Rights and Fundamental
Freedoms; and also Article 1, 6(5) of the 7th Protocol thereto*

Freedom of movement means the right to move freely and choose the residence within the territory. It also means that everyone has the right to depart freely from any State including that of which the individual is a citizen. This freedom means that citizens of the State may not be extradited from and that they must be permitted to enter the State, and also that mass expulsion of foreigners is prohibited.

The Right to Hold Position in the Civil Service

*Section 101 of the Constitution of the Republic of Latvia
Article 21 of the Universal Declaration of Human Rights
Article 17 25? of the UN International Covenant on Civil and
Political Rights*

The right to hold position in the civil service should be viewed separately from the right of individuals to employment. The work in public service differs from that performed in private sector in terms of the legal aspects of establishing of the legal relations as well s in terms of the purpose of work that is closely linked to fulfillment of public assignment.

Exercising of the right to hold office in the civil service in Latvia is fixed in the law, as follows from the stipulation in the Constitution: “Every citizen of Latvia has the right, as provided for by law, to participate in the work of the State and of local government, and to hold a position in the civil service.” The civil service is not necessarily available to all persons, provided however that the applicable criteria are objective.

A number of restrictions are imposed by law on the individuals who seek engagement in the civil service: for example, they have to be citizens of the State, loyal to democracy, etc. The said right is aimed at ensuring legitimacy of the rule of law of democratic state.

Check Your Progress 3

Note: i) List out the space below for your answers

1) Describe the Constitution of Human Rights Committee.

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2) What roles are performed by the Human Rights Committee?

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- 3) What procedures are followed by the Human Rights Committee to deal with different types of complaints?

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- 4) Describe in brief the importance of Civil and Political Rights.

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5.6 LET US SUM UP

In this unit we have discussed the type and nature of civil and political rights, as these have developed through various democratic movements and revolutions and finally consolidated in the International Covenant of Civil and Political Rights adopted by the U.N. General Assembly in 1966. This Covenant (ICCPR) contains 27 articles providing for various freedoms and protections. While importance of these rights is universally recognized, it is also accepted that in certain situations of emergency and in the overall social interest and protection of state these rights may be curtailed or not implemented. However, the state is not permitted, under any circumstances, to violate or derogate from the right to life, freedom from torture, freedom from slavery and slave trade, freedom from civil prison, right against ex post facto criminal law, right to recognition as a person before law, and the right to freedom of thought, conscience and religion. These seven rights are considered the minimum fundamental rights which should remain guaranteed to the individual at all times and a state has no excuse to abridge, limit or deny them to its people. The

machinery for the implementation of the rights recognized mainly consists of

- (a) the reports of state parties
- (b) Human Rights Committee and
- (c) Economic and Social Council.

The main body for monitoring is the Human Rights Committee a body of 18 members. The optional protocol adopted along with the covenants in 1966, provided for a special jurisdiction of the Human Rights Committee to deal with complaints by individuals of human rights violations by a state. Civil and Political rights are important for recognition of dignity of individuals, respect their equality liberty and rational faculties. Recognition of these rights by the international community has encouraged Human Rights movement to mobilize opinion for their promotion and protection.

5.7 KEY WORDS

ICCPR: International Covenant on Civil and Political Rights

Optional Protocol: An **optional protocol** is a treaty that complements and adds to an existing human rights treaty. For this reason, only States that have already agreed to be bound by a parent treaty may choose to be parties to **optional protocols**.

5.8 QUESTIONS FOR REVIEW

- 1) What is known as Three Generations of Human Rights?
- 2) Which Human Rights Treaties are known as Core International Treaties?
- 3) What political rights have been provided in International Covenant on Civil and Political Rights?
- 4) Discuss the Optional Protocol?

- 5) What are the limitations of International Covenant on Civil and Political Rights?

5.9 SUGGESTED READINGS AND REFERENCES

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5.10 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

- 1) See Section 5.1- "Three Generations Theory of Human Rights"—known for dividing human rights into three separate generations based on (1) civil and political rights; (2) economic, social and cultural rights; and (3) collective or solidarity rights.

The theory appears to have supported two political dynamics. It promoted the third generation "collective" rights agenda pushed by a number of UN member states to little actual benefit and obscuring existing human rights legal obligations. In parallel, the Three Generations Theory gave an ideological underpinning to the notion that a historical chasm and substantive divide existed between civil and political rights on one side and social and economic rights on the other. A theory that pulled these rights apart was politically useful in the emerging neo-liberal age of the 1980s with its Cold War backdrop. This may help explain why the generation language has endured. However, as a result certain rights were privileged over others and social and economic rights were side-lined to the detriment of both individuals and states. The theory also fails to recognize that the delineations between the categories have historically been much more porous than regularly understood. These criticisms are not just the concerns of historians but are also reflected in recent critiques by scholars from other disciplines.

Notes

Legal scholar Patrick Macklem writes that the analytical categories that sort human rights into generational conceptions “do not capture their legal nature and character” and “fail to appreciate what is common to all human rights in international law.” Political scientist Daniel J. Whelan writes that the “problem with the generations approach is that it permanently categorizes rights, not only by fixing the categories in history but also by finding within each generation incompatible philosophical sources of inspiration.”

- 2) See Sub Section 5.1.1

Check Your Progress 2

- 1) See Sub Section 5.2.2
- 2) See Sub Section 5.2.3
- 3) See Section 5.3

Check Your Progress 3

1. See Sub Section 5.4.3
2. See Sub Section 5.4.1
3. See Sub Section 5.4.4
4. See Section 5.5

UNIT 6: ECONOMIC, SOCIAL AND CULTURAL RIGHTS

STRUCTURE

- 6.0 Objectives
- 6.1 Introduction
- 6.2 Economic, Social and Cultural Rights
 - 6.2.1 International Covenant on Economic, Social and Cultural Rights
 - 6.2.2 Limitation on the Rights
- 6.3 Implementation Mechanism
 - 6.3.1 Committee on Economic, Social and Cultural Rights
 - 6.3.2 Submission of State Party Reports
 - 6.3.3 Presentation of Reports
- 6.4 The Nature of Obligations under ICESCR
 - 6.4.1 The Three Components of the Obligations
 - 6.4.2 Obligations under Articles 2(1) and 2(2)
 - 6.4.3 Adoption of Legislative Measures
- 6.5 Economic, Social and Cultural Rights under the Indian Constitution
- 6.6 Articles of International Covenant on Economic, Social and Cultural Rights
- 6.7 Let us sum up
- 6.8 Key Words
- 6.9 Questions for Review
- 6.10 Suggested readings and references
- 6.11 Answers to Check Your Progress

6.0 OBJECTIVES

This unit focuses on the study of Economic, Social and Cultural Rights mentioned under the International Covenant on Economic, Social and Cultural Rights (hereinafter referred as ICESCR) and its implementation mechanism. After going through this unit you will be able to know the:

Notes

- To discuss international Covenant on Economic, Social and Cultural Rights;
- To know about the types of Rights provided under ICESCR;
- To discuss the obligations of a State for Implementation of ICESCR;
- To discuss the enforcement Mechanism available under the ICESCR; and
- To know about the economic, Social and Cultural Rights under the Indian Constitution.

6.1 INTRODUCTION

You have already read that since 1948, a large number of human rights treaties have been adopted both at regional and international levels. At universal plane, after the Universal Declaration of Human Rights (UDHR), 1948, International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights were adopted in 1966. The decision to divide the international human rights instrument into two separate Covenants was not a decision to have two entirely different documents. As a matter of fact 50 the couple of rights are common in both the Covenants, namely, right to self determination, prohibition of discrimination, the right to join trade unions etc. However, there are rights, which are exclusively dealt in one or the other Covenant. Those rights are stated in a specific form and subject to implementation independently from each other. The UDHR remains an important human rights instrument in the development of national, regional and international human instruments. The UDHR itself includes not only civil and political rights, but also economic, social and cultural rights. The concluding articles emphasize the interdependence of the rights and duties of the individual in relation to the community. Article 29, paragraph (1) states that: "Everyone has duties to the community in which alone the free and full development of his personality is possible". As far as communities are concerned important for them are economic, social and cultural rights. Of course these are equally important for individuals as members of communities.

6.2 ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The doctrine of human rights aspires to provide a common framework for determining the basic civil, economic, political, and social conditions required for all individuals to lead a minimally good life. Economic, Social and Cultural rights are designed to ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously. In a world where, according to United Nations Development Programme (UNDP) " a fifth of the developing world's population goes hungry every night, a quarter lack access to even a basic necessity like safe drinkingwater and a third lives in a state of abject poverty - at such a margin of human existence that words simply fail to describe it", the importance of renewed attention and commitment to the full realization of economic, social and cultural rights in self-evident. The importance of these rights has increased rapidly since the end of the ideological conflict that was the Cold War. Until the last twenty years or so, human rights work had focused almost exclusively on civil and political rights, on the freedoms of thought, expression and association as well as protections of physical integrity, such as freedom from arbitrary detention or execution, and freedom from torture. The collapse of erstwhile U.S.S.R, end of cold war and the growing numbers of people in poverty worldwide provided momentum to human rights activists to join the global struggle against the poverty through using the framework and tools of human rights.

6.2.1 International Covenant on Economic, Social and Cultural Rights

Economic, social and cultural rights are fully recognized by the international community and throughout international human rights law. Of course, under international human rights law civil and political rights have, in many respects, received more attention, legal codification and judicial interpretation, and have been instilled in public consciousness to a far greater degree, than economic, social and cultural rights. However,

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Universal Declaration of Human Rights in 1948 itself made it clear the indivisibility and interdependency of civil and political rights and economic, social and cultural rights. This was further made Clear by simultaneous formulation of two covenants that is International covenant on civil and political' rights and International Covenant on Economic Social and Cultural Rights. (ICESCR) .The UN General Assembly adopted the ICESCR on 16 December 1966. It entered into force on 3 January 1976. As on 11 October 2007, 157 States had ratified the ICESCR thereby voluntarily undertaking to implement its norms and provisions. The International Covenant on Economic, Social and Cultural rights (ICESCR) covers a wide spectrum of rights. The ICESCR comprises of a preamble and thirty-one articles. Whole ICECSR is divided into five parts. Part I recognizes the right of peoples to self-determination; Part II covers the general nature of States parties obligations; Part III touches upon the substantive rights; Part IV deals with international implementation; and Part V contains typical final provisions of a human rights treaty. Following rights are identified as economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights under Articles 6 to 15:

- 1) The Right to Work (Article 6)
- 2) The Right of everyone to the enjoyment of just and favourable conditions of work (Article 7)
- 3) The Right of everyone to form trade unions and join the trade union of his choice (Article 8)
- 4) The right of everyone to social security, including social insurance (Article 9)
- 5) The widest possible protection and assistance should be accorded to the family (Article 10)
- 6) 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 (Article 11)
- 7) The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12)

- 8) The right of everyone to education (Article 13)
- 9) 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 14)
- 10) The right of everyone (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its causes (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 (Article 15).

6.2.2 Limitation on the Rights

The covenant places certain limitations on the exercise of the rights recognized by it. Many of these limitations flow from the very nature of the rights and the problems involved in their implementation by states. First, the covenant is based on the general awareness that full realization of the rights contained in it would require a high level of economic development in state. Thus, the developing countries are allowed to determine to what extent they would guarantee these rights, "with due regard to human rights and their national economy" (Article 2 (1)). Second, states are permitted to impose limitations on the economic, social and cultural rights, subject to two conditions: (1) that the limitations must be "compatible with the nature of these rights", and (2) that they must be imposed "solely for the purpose of promoting the general welfare in a democratic society" (Article 4). This does not mean that the state or any group or person may engage in any activity in destruction of these rights (Article 5 (1)). Third, many of the rights, such as the right to adequate standard of living and the right to the benefits of scientific and technological advance, depend on international co-

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operation for their realization (Article 2(1), 11, 15 and 22). Article 2(1)) specifically stresses the importance of international economic and technical co-operation for full realization of the rights recognized under the covenant.

Check Your Progress 1

Note: Use the space given below for your answers.

1) What is meant by Economic, Social and Cultural Rights?

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2) Describe the main rights contained in the International Covenant on Economic, Social and Cultural Rights.

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3) What are the Limitations of the Rights?

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6.3 IMPLEMENTATION MECHANISM

State Party to the ICESCR has an obligation to ensure the implementation of core rights of the ICESCR. According to Article 2(1) of the ICESCR, States Parties have an obligation to take progressive measures for the realization of the rights set forth in the ICESCR. Compliance by States parties with their obligation of the rights and duties in question is monitored by the Committee on Economic, Social

and Cultural Rights. The Committee on Economic Social Cultural Rights (Committee) has employed a "typology of State Party obligations" to facilitate understanding with regard to the fulfillment of economic social and cultural rights. Under this model, States Parties should "respect", "protect" and "fulfill" the rights embodied in the ICESCR. It may, however, be mentioned that the Committee was established in 1985 and met for the first time in 1987. The Economic and Social Council (ECOSOC), one of the principal organs of the United Nations, was the key organ for the progressive implementation of economic, social and cultural rights till 1985. States Parties compliance with their obligations under the ICCPR is to be monitored by the Human Rights Committee (HRC), which, in addition to examine states reports, could express its views on complaints submitted by individuals and States. However, the ICESCR failed initially to have similar kind of bodies for the implementation of ICESCR provisions by the State. ICESCR provided only for a reporting system and those reports were to be examined, not by an independent expert committee, but by ECOSOC as a whole. States parties were required to submit State Party report to the Secretary-General of the United Nations, who is required to transmit copies of them to ECOSOC for consideration and copies of their relevant part to the specialized agencies in so far as they relate to their responsibilities. From 1979 to 1986, the ECOSOC carried out its responsibilities through working group, which met for 3 weeks during the ECOSOC's first regular session each year. The general dissatisfaction with the effectiveness of the working group as a supervisory body, combined with the increasing emphasis being placed upon economic, social and cultural rights in the UN and a more conciliatory stance on the part of the East European States, all combined to put fresh impetus into the creation of a truly independent committee of experts. This resulted finally in the establishment of the Committee on Economic, Social and Cultural rights (Committee) composed of 18 members elected in their personal capacities and on the basis of an equitable geographical distribution. The Committee is parallel to supervisory body available under ICCPR, the Human Rights Committee in many respects.

6.3.1 Committee on Economic, Social and Cultural Rights

As already mentioned the Committee was established in 1985, eighteen members of the Committee are elected by ECOSOC by secret ballot from a list of nominees submitted by States parties. The members are experts with recognized competence in the field of human rights. They are independent and serve in their personal capacity, not as representatives of Governments. The principles of equitable geographical distribution and the representation of different social and legal systems guide the selection process.

The Committee itself selects its Chairperson, three Vice-Chairpersons and rapporteur. The first elections for the Committee took place in 1986 and eighteen members were elected for a four-year term beginning from 1 January 1987. The Committee currently meets twice a year, holding two to three-week sessions, generally in May and November or December. It holds all its meetings at the United Nations Office at Geneva. The members are eligible for re-election, if nominated by the State parties. Indeed, it is good practice, which allows members to continue to work as Committee members for long terms; it promotes stability through allowing the development of interpersonal relationships which can help to avoid any friction. The primary function of the Committee is to monitor the implementation of the Covenant by state parties. It strives to develop a constructive dialogue with state parties. The main source of communication is submission of reports by the state parties.

6.3.2 Submission of State Party Reports

According to Article 16(1) of the ICESCR, "the States parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein". The submission of reports by the States parties is clearly central to the integrity of the reporting system and failure to report constitutes a

violation of a State's obligation under the Covenant. However, it has been noted that the compliance with reporting obligations is poor. India has ratified the ICESCR on 10 April 1979. Unfortunately, many state's track record in submission of State party reports to the Committee is not encouraging. Accordingly, following the recommendation of the Committee in its second session, ECOSOC decided that States parties would submit a single report dealing with the whole ICESCR once every five years. Indeed, it will be difficult to assess the effect of the five years periodicity on the quality of supervision. Moreover, the problem of non-reporting tends to overshadow any consideration of the time scale in which reports become due. In addition to the States parties report the Committee works on other sources of information, including UN specialized agencies; International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), Food and Agriculture Organization (FAO) of the United Nations the Office of the United Nations High Commissioner for Refugees (UNHCHR), and the United Nations Centre for Human Settlements (Habitat) and others. It also receives information from non-governmental and community-based organizations working in States, which have ratified the Covenant, from international human rights, and other non-governmental organizations, from other United Nations treaty bodies, and from generally available literature on the economic, social and cultural rights.

6.3.3 Presentation of Reports

The technique adopted by the Committee in the consideration of state reports is one of conducting a 'constructive and mutually rewarding dialogue' with State representatives. Representatives of reporting States are strongly encouraged to be present at meetings when the Committee considers their reports. Such delegations are virtually always present during this process, which is generally carried out over a two-day period. The final phase of the Committee's examination of the report consists of the drafting and adoption of the Committee's concluding observation. The Committee concluded in several occasions that violations of the

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Covenant had taken place, and subsequently urged States parties to desist from any further infringements of the rights in question. Although the Committee's concluding observations, in particular suggestions and recommendations, may not carry legally binding status, they are indicative of the opinion of the only expert body entrusted with and capable of making such pronouncements. Consequently, for States parties to ignore or not act on such views would be to show bad faith in implementing their Covenant-based obligations. In a number of instances, changes in policy, practice and law have been registered at least partly in response to the Committee's concluding observations. The reporting requirement, as such, is much more than simply a formalistic commitment. Although the reporting process is imbued with a number of difficulties, not the least which are the non-submission of reports by a large number of states, this mechanism has a number of important functions. Among these, as Palston points out, are the initial review function, the monitoring function, the policy formulation function, the public secreting function, the evaluation function, the function of acknowledging problems and the information exchange function. The Committee has emphasized that reporting obligations under the Covenant fulfill seven key objectives. In its General Comment No.1 (1989), the Committee stated these objectives as follows:

- 1) to ensure that a State party undertakes a comprehensive review of national legislation, administrative rules and procedures, and practices in order to assure the fullest possible conformity with the Covenant;
- 2) to ensure that the State party regularly monitors the actual situation with respect to each of the enumerated rights in order to assess the extent to which the various rights are being enjoyed by all individuals within the country;
- 3) to provide a basis for government elaboration of clearly stated and carefully targeted policies for implementing the Covenant;
- 4) to facilitate public scrutiny of government policies with respect to the Covenant's implementation, and to encourage the involvement

- of the various sectors of society in the formulation, implementation and review of relevant policies;
- 5) to provide a basis on which both the State party and the Committee can effectively evaluate progress towards the realization of the obligations contained in the Covenant;
 - 6) to enable the State party to develop a better understanding of problems and shortcomings .impeding the realization, of economic, social and cultural rights;
 - 7) to facilitate the exchange of information among State parties and to help develop a fuller appreciation of both common problems and possible solutions in the realization of .each of the rights contained in the Covenant.

Check Your Progress 2

Note: Use the space given below for your answers.

- 1) How is Committee on Economic, Social and Cultural Rights constituted and selected?

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- 2) When and how state parties have to submit reports to the committee on ESCR?

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- 3) For what purposes the Committee uses reports submitted by State Parties.

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6.4 THE NATURE OF OBLIGATIONS UNDER ICESCR

In absence of an individual complaints mechanism, the ICESCR also differs from the ICCPR in its express recognition that the rights it guarantees may take more time to realize than the rights guaranteed by the ICCPR and therefore they may be progressively rather than immediately realized. The States however have an obligation to give domestic effect to the international legal obligations they have assumed by ratifying the ICESCR, in the same way that they are bound by any other international treaty that they have ratified or acceded to. The specific legal obligation to implement the ICESCR is set out in Article 2 as follows:

2(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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(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.

It is clear that Article 2(1) put legal obligations to the State Parties under the ICESCR to progressively implement the rights that it guarantees.

Article 2(2) obliges the Government to ensure that everyone, without discrimination, enjoys these rights.

6.4.1 The Three Components of the Obligations

As part of the ongoing debate as to whether economic, social and cultural rights have the same moral and legal status as other commonly recognized human rights, such as civil and political rights, a three part typology of duties, applicable to all human rights, has been developed. The objective is to show that economic, social and cultural rights share the same basic qualities as other human rights, can therefore be treated same as other human rights and, in particular, are equally capable of being incorporated into national and international legal systems and policy processes. As the Committee has emphasized, every ICESCR right has 'at least some significant justiciable dimensions' which, if violated, are appropriately resolved by courts. The typology places the legal obligation to fully realize each right in the ICESCR into three separate duties: to respect, protect, and fulfill. Achievement of all of these layers of duties arising from a particular right amounts to full realization of that right, but it is possible that a State may achieve only one or two of the layers of duties, thus falling short of full realization.

The Duty to Respect

The duty to respect the rights enumerated in the ICESCR refers to a State's negative obligation to refrain from acting in ways that would deprive people of their rights or impair their enjoyment of them, and is immediately applicable. Thus, as the implementation of the rights relating to trade unions in Article 8(1) require no substantial economic input on the part of the State they may be therefore put into effect without delay merely through the exercise of State restraint. Similarly, if the Government was to cut child support or social assistance allowances without ensuring adequate alternative means of support, it may infringe the duty to respect aspects of Articles 11 (adequate standard of living) and 9 (social security). The duty to respect is a minimal undertaking that

ensures that individuals are protected from interference by the State, and thus implements rights as negative limits on governmental power. Thus, this duty has minimal resource implications, but, as the social assistance example indicates, it may require the maintenance of existing levels of resource commitment in order to ensure no retrogression in existing levels of social and economic security.

The Duty to Protect

The Committee has both expressly and impliedly established an obligation upon States parties to protect the individual's interests against third party interference. The duty to protect requires States to act to ensure that third parties do not violate' human rights. This duty requires States to take positive measures, for example by adopting appropriate regulatory frameworks, which restrain others from abusing human rights. The Committee is thus clear that the realm of State responsibility extends not only to the acts of agents of the state but also those of third parties over whom the State has or should have control.

The Duty to Fulfill

The duty to fulfill economic, social and cultural rights obliges States to take positive action to ensure that social and economic rights are realized or made accessible to everyone. This obligation requires States to guarantee a specified result, which may involve ensuring an immediate outcome or achieving a minimum standard directed at the progressive realization of a right. Considerable resources are usually required to satisfy the duty to fulfill. Failing to fulfill a right, whether it is to be immediately or progressively is a violation of ICESCR.

6.4.2 Obligations under Articles 2(1)'and 2(2)

The fundamental obligation in the ICESCR is for the States parties to 'take steps' towards realizing the rights enumerated in the ICESCR. Although this wording falls short of requiring the Government to

'guarantee' economic, social and cultural rights, it is a positive undertaking that has both an immediate and a continuing effect: the Government cannot be inactive, nor just refrain from taking steps that would otherwise result in a violation of the ICESCR. It must act to adopt measures aimed at achieving the 'full realization' of the rights covered. The ICESCR highlights the interdependence of all States in realizing economic, social and cultural rights and, in particular, that certain countries will be reliant on others to assist with economic and technical expertise and resources. The State has an obligation in implementation of the economic, social and cultural rights to utilize maximum of its available resources. The ICESCR has explained that this involves 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'. The minimum core obligation includes the provision of essential food, essential primary health care, basic shelter and housing, and basic forms of education.

6.4.3 Adoption of Legislative Measures

This obligation allows a great deal of scope for States to determine the measures they adopt in order to implement the ICESCR. Article 2(2) places special importance on legislative measures, but it clearly also envisages other measures which might include judicial, administrative, financial, educational and social implementation. Consequently, a lack of legislative measures does not necessarily entail a failure to implement the obligations imposed by the ICESCR because alternative measures may suffice and, indeed, in some circumstances, may be more appropriate. Nevertheless, some legislative measures will usually be necessary. Furthermore, legislative means may be desirable because their public nature leaves them open to effective scrutiny. This is significant because, as part of the obligation to implement rights through all appropriate means, the ICESCR has identified an obligation to provide 'effective remedies' to those whose ICESCR rights are violated. In particular, the Committee is concerned that States provide sufficient access to judicial remedies. While it is important to recognize that administrative and other non-legislative measures can play an important role in implementing the

ICESCR, their adequacy in providing effective remedies must be seriously questioned.

6.5 ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE INDIAN CONSTITUTION

The leaders of India's freedom struggle fully realized that in the new dispensation following political freedom, the people should have the fullest opportunities for advancement in the social and economic spheres and that State should make suitable provision for ensuring such progress. For that the framers of the Indian Constitution borrowed the idea of enacting Directive Principles of State policy (DPSP) from the Irish Constitution. The Indian Constitution was adopted on 26 November 1949 by the Constituent Assembly and brought into force on 26 January 1950. The Preamble of the Indian Constitution declares India a Sovereign, Socialist Secular Democratic Republic and sets out main objectives of the Constitution to secure justice for all citizens, social, economic and political. The Indian Constitution envisages a democracy, which ensures freedom under the law and the dignity of the individual. Part III of the Indian Constitution enumerates the fundamental rights and Part IV sets out the Directive Principles of State Policy. While the former guarantees fundamental rights to the individuals, the latter gives direction to the State to provide economic and social rights to its people in specified matters. Together, they constitute the conscience of the Constitution. Articles 12 to 35 of the Indian Constitution deal with Fundamental Rights and Articles 36 to 51 contain the Directive Principles of State Policy. The justifiability of fundamental rights is itself guaranteed under the Indian Constitution. In particular, by virtue of Articles 32 and 226 of the Constitution the responsibility for the enforcement of the fundamental rights lies with the Supreme Court and the High Courts. The forty-second Amendment of the Indian Constitution in 1976 has added Part IV A, which deals with the fundamental duties of the citizen. This separation of fundamental rights and Directive Principles of State Policy emphasizes the fact that they are in their nature and effect essentially different. The Directive Principles of State Policy enunciated in Part IV

of the Indian Constitution are nothing but principles of Raj Dharma (duty of the State). Article 37 of the Indian Constitution specifically echoes, as the principles laid down are fundamental in the governance of the country.

The word fundamental in part III of the Indian Constitution is the word "rights" are legally enforceable, and the word fundamental in the governance of the country in part IV of the Constitution, which are not legally enforceable. Fundamental rights are backed by legal sanctions; Directive Principles of State Policy are left to the sense of the duty to those charged with the governance of the country. Soon after the commencement of the Indian Constitution the question was raised regarding the Directive Principles of State Policy before the Court in *State of Madras v. Champakam Dorairajan*, (AIR 1951 SC 226), it was expressed that the Directive Principles of State Policy have to conform and run subsidiary to the Chapter on fundamental rights. By this decision the implementation of economic, social and cultural received setback. However, the Supreme Court in *MH Qureshi v. State of Bihar*; (AIR 1958 SC 731) propounded the doctrine of harmonious construction, and the doctrine of integrated scheme in *I.C. Golak Nath v. State of Punjab* (AIR 1967 SC 1943).

The Indian Parliament established and judiciary accepted the primacy of Directive Principles through the 25th Amendment of the Indian Constitution. Other agencies of the government, legislature and the executive rarely advocated the subordination of the DPSP to fundamental rights. Thus, the view that the DPSP are inferior to fundamental rights, relying on the views of the Constitution maker and Courts is not correct. Directive Principles of State Policy are now in no way subordinate to the fundamental rights, which is firmly established by the Indian judiciary subsequently and also equally recognized by the government. The Economic, Social and Cultural rights that the Directive Principles of State Policy symbolize that demonstrably can be read as forming part of an enforceable regime of fundamental rights. What then is crucial is the will of the state to implement this constitutional mandate. The agenda of

the state can be shaped to a considerable extent by a creative and activist judiciary. The state has to be constantly reminded of its obligations and duties. The actual realization of ESC rights may be a long-drawn affair, but keeping it on the agenda is more than half that effort. The Indian judiciary has through a combination of strategies done just that.

6.6 ARTICLES OF INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

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

4. 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.
5. 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,

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religion, political or other opinion, national or social origin, property, birth or other status.

6. 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 programmes, 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.

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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 I 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.
3. 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.
4. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
5. 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.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that

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information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

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

present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into

force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

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Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

Check Your Progress 3

Note: Use the space given below for your answers.

- 1) What obligations states have to implement Economic, Social and Cultural Rights?

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- 2) How have Economic, Social and Cultural Rights been placed in Indian Constitution?

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- 3) What you think is the relationship between Civil and Political Rights and Economic, Social and Cultural Rights?

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6.7 LET US SUM UP

In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the ICESCR in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. It is important that domestic law should be interpreted as far as possible in a way, which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the economic, social and cultural rights and one that would enable the State to comply with the ICESCR, international law requires the choice of the latter. Guarantees of equality and non-discrimination

should be interpreted, to the greatest extent possible, in ways, which facilitate the full protection of economic, social and cultural rights.

6.8 KEY WORDS

ILO: International Labour Organization

UNESCO: United Nations Educational, Scientific and Cultural Organization **WHO:** World Health Organization

FAO: Food and Agriculture Organization

6.9 QUESTIONS FOR REVIEW

- 1) What is meant by Economic, Social and Cultural Rights?
- 2) Describe the main rights contained in the International Covenant on Economic, Social and Cultural Rights
- 3) What are the Limitations of the Rights?
- 4) How is Committee on Economic, Social and Cultural Rights constituted and selected?
- 5) When and how state parties have to submit reports to the committee on ESCR?
- 6) For what purposes the Committee uses reports submitted by State Parties.
- 7) What obligations states have to implement Economic, Social and Cultural Rights?
- 8) How have Economic, Social and Cultural Rights been placed in Indian Constitution?

6.10 SUGGESTED READINGS AND REFERENCES

- "International Covenant on Economic, Social and Cultural Rights". www.refworld.org.
- "EISIL International Covenant on Economic, Social and Cultural Rights". www.eisil.org.
- "UN Treaty Collection: International Covenant on Economic, Social and Cultural Rights". UN. 3 January 1976.

- "Fact Sheet No.2 (Rev.1), The International Bill of Human Rights". UN OHCHR. June 1996. Archived from the original on 13 March 2008. Retrieved 2 June 2008.
- "Committee on economic, social and cultural rights". www.ohchr.org.
- "International bill of human rights". lawteacher.net. Archived from the original on 19 August 2014.
- Sieghart, Paul (1983). *The International Law of Human Rights*. Oxford University Press. p. 25.

6.11 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress 1

- 1) Universal Declaration of Human Rights provides two types of rights that are Civil and Political and Economic, Social and Cultural Rights.
- 2) Economic, Social and Cultural Rights are those rights which are essential to ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedom and social justice simultaneously.
- 3) See Sub-section 6.2.1

Check Your Progress 2

- 1) The Committee is comprised of 18 members who are experts with recognized competence in the field of human rights. Members of the Committee are elected by ECOSOC for four year term, and are eligible for re-election if re-nominated.
- 2) State parties have to submit periodic reports to the committee within two years of the entry into force of the covenant for a particular state party and thereafter every five years outlining the legislative, judicial policy and other measures which they have taken to ensure the enjoyment of rights contained in the covenant.

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3) A state party committee is the organization that by virtue of the bylaws of a political party or by the operation of state law is part of the official party structure and is responsible for the day-to-day operation of a political party at the state level, including any entity established, maintained, financed or controlled by the organization.

- Whether an organization qualifies as a state party committee is determined by the Commission. Committees desiring such a determination should submit an AO request to the Commission.
- Three requirements must be met in order for a committee to qualify as a state party committee:
- The committee must have at least one candidate for federal office whose name appears on the ballot as a candidate of the committee;
- The committee must possess an official party structure; and
- The relationship between the political party and the committee must be based on an agreement that requires the committee to perform activities commensurate with the day-to-day operation of the party on a state level (such as raising contributions; assisting candidates' fundraising efforts; conducting voter registration drives; holding state conventions; and nominating candidates for state and federal office).

Check Your Progress 3

- 1) States have obligations to respect, protect and fulfill the rights and take steps towards their realization. For details see sub-section 6.4.1
- 2) Economic, Social and Cultural Rights have been placed in Part IV of the constitution as Directive Principle of State Policy.

- 3) Civil and Political Rights and Economic, Social and Cultural Rights are equally important. Generally Civil and Political rights have been given more important. But there is indivisibility and interdependence of Civil and Political rights and Economic, Social and Cultural Rights. Both are fundamental tenets of international human rights law.

UNIT 7: MAJOR HUMAN RIGHTS CONVENTIONS

STRUCTURE

- 7.0 Objectives
- 7.1 Introduction
- 7.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965
 - 7.2.1 Provisions of ICERD
- 7.3 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
 - 7.3.1 Drafting of Covenants
 - 7.3.2 Provisions
 - 7.3.3 Implementation
- 7.4 International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
 - 7.4.1 Provisions
 - 7.4.2 The problems
- 7.5 The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), 1984
 - 7.5.1 Definition and Provisions
- 7.6 The Convention on the Rights of the Child (CRC), 1989
 - 7.6.1 Provisions
 - 7.6.2 Implementation Mechanism and Problems
- 7.7 The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), 1990
 - 7.7.1 Causes of Migration
 - 7.7.2 Provisions
- 7.8 Let us sum up
- 7.9 Key Words
- 7.10 Questions for Review
- 7.11 Suggested readings and references
- 7.12 Answers to Check Your Progress

7.0 OBJECTIVES

This unit deals with seven core Human Rights Treaties. By going through this unit you will be able to:

- To know about survey the major UN human rights conventions that are considered to be the core ones;
- to understand the contents of seven core human rights conventions;
- to know the implementation mechanisms available in these instruments such as the monitoring bodies and their various reporting procedures; and
- To know about the nature and impact of these conventions in establishing a regime of human rights and its implications to national and regional level human rights mandates.

7.1 INTRODUCTION

One of the most significant achievements of the United Nations has been to develop the rules and principles governing the rights and duties of individuals. Every convention or treaty drafted by the United Nations draws on customs and practices of various societies. In addition to it, they also provide safeguards against discriminatory social practices. In other words, the international human rights system developed by the United Nations both promotes human rights norms for individual rights and protects these rights from violation by the state or society. International human rights conventions also derive their inspiration from 'justice', 'morality' and a general regard for the 'dignity' of the individual. It is important to discuss and know about the human rights conventions because they have been able to check absolute control of states over individuals and have made states accountable to the international community for how they treat their own citizens. If the purpose of the international human rights conventions is to protect individuals from states' tyranny, how does it achieve this goal in practice? It does so through various conventions drafted to protect either a group of people (e.g. women, children and migrant workers) or protect from certain kinds

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of violations (such as racial discrimination and torture), yet again, to promote certain types of rights (e.g. civil-political or socio-economic and cultural rights). For the present, we need to know about seven major conventions which are considered as core documents because they have monitoring bodies to oversee their implementation and also to make member states, those who have ratified them, accountable to the international community. There are many other important human rights conventions but they do not have monitoring bodies, e.g. the Genocide Convention of 1948, and the Convention Relating to the Status of Refugees, 1951. The distinguishing feature of the core conventions, therefore, is the provision for monitoring bodies. The monitoring mechanism available in each of the core conventions is known as the committee system. Member states are obligated under the conventions to provide information regarding the implementation of rights and obligations to the respective committees through periodic reports. One must bear in mind that member states remain important agents in the implementation system, which means that state has to ultimately ensure that the rights are available to its citizens. The seven core conventions that we will discuss below are :

- 1) International Covenant on Economic, Social and Cultural Rights
- 2) International Covenant on Civil and Political Rights
- 3) International Convention on the Elimination of All Forms of Racial Discrimination
- 4) International Convention on the Elimination of All Forms of Discrimination against Women.
- 5) Convention against Torture, Inhuman and Degrading Treatment or Punishment.
- 6) Convention on the Rights of the Child
- 7) The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

7.2 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD), 1965

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly on 21 December 1965 which entered into force on 4 January 1969. Its principal objective is to eliminate all forms of discrimination based on race, colour, ethnic origin, descent or nationality. In the early 1960s, two events led to the eventual adoption of the Convention. Firstly, increasing membership of the African states in the United Nations brought to the fore the issue of discrimination faced by the black people because of their race and colour. Secondly, several anti-Jewish and discriminatory incidents occurred in various parts of the world in 1959-1960 that were condemned by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The UN General Assembly too condemned all manifestations and practices of racial, religious and national hatred in all spheres of life. The apartheid regime in South Africa provided immediate reason for the adoption of this convention. The apartheid regime officially justified and practiced discriminatory policies against the black population there. Accordingly, in order to counter the apartheid regime, the Convention lays a great emphasis on both prohibition and prevention of racial discrimination.

7.2.1 Provisions of ICERD

The Convention contains a preamble and 25 articles that are divided into three sections. Article 10 of the Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which affects the enjoyment or exercise of human rights and fundamental freedoms. Among the important provisions, Articles 2 and 5 are significant. Under Article 2, each state party undertakes not to engage in any act or practice of discrimination against any person, to refrain from sponsoring, supporting

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or defending racial discrimination in the country. Under Article 5, each state party is obligated to ensure equality before law and non-discrimination. to everyone in the enjoyment of their rights. Article 5 further guarantees various civil-political and socio-economic rights to be guaranteed to everyone without any distinction based on race, colour, ethnic or national origin. }... The Convention was the first international treaty to provide for an implementation mechanism. Under Article 8, a Committee of 18 independent experts (known as the Committee on the Elimination of Racial Discrimination) was to be established to oversee the implementation of the Convention through consideration of periodic reports submitted by the member states.

This is a compulsory procedure that obligates every state party to report on the measures taken to give effect to the provision of the Convention. The Convention is also unique in the sense that it was the first international human rights treaty that incorporated, in Article 14, a provision for the individual communications system. However, this provision is optional and is applicable to individuals of only those states that have accepted this obligation through a declaration. This Article recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals who claim to be the victims of racial discrimination or any of the rights set forth in the Convention. Since this was one of the earliest human rights treaties adopted by the United Nations and concerned with only one type of violation, that is racial discrimination, it is a relatively brief treaty with only 25 Articles, unlike other human rights instruments that we will discuss below. Though brief, the significance of this Convention lied in the fact that it provides for a legal framework to address the problem of racial discrimination and that it is also a moral document that reflects international community's condemnation of racist ideologies and the idea of the racial superiority.

Check Your Progress 1

Note: i) Use the space given below for your answers.

1) What is the purpose of international human rights conventions?

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2) What is the major difference between the seven core conventions and the other human rights conventions?

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3) Give two reasons that led to the adoption of ICERD.

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7.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR), 1966

These two Covenants, along with the Universal Declaration of Human Rights, constitute the International Bill of Human Rights. The drafting of the Covenants and the First Optional Protocol (to the ICCPR) took 18 years. They are the most comprehensive human rights treaties ever prepared by the international community. They contain almost all the basic rights of the individual - civil, political, economic, social and cultural rights - and provide measures for their implementation.

7.3.1 Drafting of Covenants

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When the Covenants were being drafted, the General Assembly decided to divide the rights enumerated in the Universal Declaration into two legal instruments:

- (i) the International Covenant on Civil and Political Rights embracing the traditional civil and political rights recognized in Western societies and cultures, and
- (ii) the International Covenant on Economic, Social and Cultural Rights to satisfy the aspirations of the socialist and third world societies.

Also, an (First) Optional Protocol to the ICCPR granted individual's right to petition to the monitoring body of the Covenant. Another (second) Optional Protocol has also now been added to the ICCPR on the abolition of death penalty. The provisions of the ICCPR were meant to be implemented immediately whereas those of the ICESCR were to be achieved progressively through such long-range measures as education, planning and promotion. With the adoption of these Covenants in 1966 and other relevant instruments, it can be said that a solid legal foundation of human rights law has now been laid down for application at all levels of society: local, national and international. The International Covenants and the two Optional Protocols constitute a positive, effective and realistic step towards the international protection of the individual. Both the Covenants entered into force in early 1976 - almost a decade after their adoption. It was only these two Covenants that took so long to get the minimum ratifications required to become operational. This could be due to the nature of the obligations contained in them which were broad and intended to restrict the sanctity of state sovereignty. However, it is gratifying to note that more and more states are ratifying these Covenants in recent years. Until April 2007, the ICCPR has been ratified by 160 States and the ICESCR by 156 States, whereas the First and Second Optional Protocols have been ratified by 109 and 60 States respectively. India has ratified both the Covenants on 10 April 1979, but it has not ratified either of the Optional Protocols.

7.3.2 Provisions

The states parties are under an obligation to respect and ensure to all individuals within their territories the civil and political rights set out in the ICCPR. Some of the important rights are, right to life (Article 6), freedom from torture and inhuman treatment (Article 7), freedom from slavery and forced labour (Article 8), the right to liberty and security/ Article 9), the right of detained persons to be treated with humanity (Article] 0), freedom of movement and choice of residence (Article 12), freedom of aliens from expulsion (Article 13), the right to a fair trial (Article 14), the right to recognition as a person before the law (Article 16), freedom of thought, conscience and religion (Article 18), freedom of opinion and of expression (Article 19) ,freedom of association (Article 22), the right to marry and found a family (Article 23), political rights, such as right to vote, right to contest elections, right to participate in the governance and to have access to public services (Article 25), equality before the law (Article 26), and the rights of minorities (Article 27). This is an extensive, ifnot exhaustive, list. The rights of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language is guaranteed in Article 27. In fact, ICCPR is the only international treaty that contains enforceable provision for comprehensive minority rights under Article 27. Some important economic, social and cultural rights protected by the ICESCR are, right to work (Article 6), right to just and favourable conditions of work including fair wages, equal pay for equal work and holiday with pay (Article 7), right to form and join trade unions, including the right to strike (Article 7), right to social security (Article 9), protection of the family, including special assistance for mothers and children (Article 10), right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement ofliving conditions (Article 11),right to the highc-n attainable standard of physical and mental health (Article 12), right to edu. .uion, primary education being compulsory and free for all, and secondary and higher education generally accessible to all (Article 13), and the right to participate in cultural life and enjoy the benefits of scientific progress (Article 15).

You have already read in detail about nature and importance of two types of rights in Units 5 and 6.

7.3.3 Implementation

The rights contained in the ICCPR were to be implemented immediately while the ICESCR provisions were to be realized progressively subject to the availability of resources. For example, the right to a fair trial. could be enacted into law immediately, whereas right to health would require programmes of action over a period of time such as appointment of doctors, construction of hospitals, enrolment of people in health schemes, etc. Both the Covenants have implementation mechanism by way of committees. The ICCPR's implementation body is known as the Human Rights Committee whereas the ICESCR's body is called the Committee on Economic, Social and Cultural Rights. The members of these committees are independent experts in the subject field who work in their individual capacity. These Committees receive periodic reports from the member states regarding the progress in the implementation of the obligations contained in the Covenants. It is a compulsory procedure to which every state party is obligated. In addition to this, the Human Rights Committee is also empowered to receive individual communications under its First Optional Protocol. ICESCR has no such analogous provision. As the name suggests, the procedure 'is optional and only states that have ratified the Optional Protocol are bound by it. Lastly, the Committees have issued from time to time "General Comments: elaborating the provisions of the Covenants for the benefit of state parties. These "General Comments" are an important contribution to the development of human rights norms and standards. The powers and procedures of these committees, you have already read in Units 5 and 6.

7.4 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), 1979

This Convention was adopted by the General Assembly on 18 December 1979 and came into force in September 1981. It was the first of the core conventions to deal with a specific group of individuals, i.e. women. The Convention in general, spells out the standards of non-discrimination and a wide variety of rights for women. The Convention rests on the basic principle of equality between men and women, and it recognizes such equality in both public and private spheres. For example, social, economic and political equality belong to the public domain whereas equality in family life and marital relations concern the private life of an individual. After the Convention on the Rights of the Child (Which we will discuss later), CEDAW has the largest number of ratifications (185 up to April 2007). Another important aspect related to CEDAW is that prior to this Convention, there was no standard benchmark to measure the gender sensitivity and gender equality in a society. To that extent, CEDAW is both a treaty and a yardstick notion to measure the status of women across societies.

7.4.1 Provisions

Discrimination against women is systematic and rooted in the institutions, attitudes and mindset of the society. CEDAW aims to dissolve every institution of patriarchy to achieve equality and non-discrimination. Hence Article 1 of CEDAW has the most comprehensive definition of discrimination against women which says that any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition, enjoyment or exercise of human rights by women in political, social, economic, cultural, civil or any other field. The Convention consists of 30 articles divided into a preamble and six parts. Articles 1-16 consist of substantive provisions containing various rights for women based on the principle of equality and non-discrimination. Article 17 provides for a Committee of 23 independent experts to monitor the implementation of the Convention. The Committee receives periodic reports from the state parties. The Committee meets once every year for a two-week session in Vienna, Austria. The Convention also has an optional protocol that allows for an

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additional procedure whereby individuals and groups of women can send communications to the Committee if any of their rights contained in the Convention have been violated (and if their country has accepted the procedure). This protocol came into force in December 2000 but it has not been very widely ratified. If more countries were to agree to be bound by it, it can become a very effective tool to address the concerns of women.

7.4.2 The problems

As a forward looking, progressive document, CEDAW has also suffered from some serious problems. It has the highest number of reservations and declarations entered to it. Reservations and declarations allow the member states to ratify a treaty without accepting obligations under certain provisions which might be against their interest, ethos, or culture. For example, Article 2 of CEDAW obligates the member states to eliminate all forms of discrimination against women through legislative, administrative and policy measures and also to protect women from discrimination. Many member states that have entered reservation to this article are not bound by the provision. Reservations by the member states cripple the impact and effectiveness of a treaty. In other words, an otherwise good treaty can be rendered weak and ineffective by widespread reservation. Some of the reservations related to Article 16 on marriage and family matters are so extensive that they are incompatible with the 'object and purpose' of the Convention.

Check Your Progress 2

Note: i) Use the space given below for your answers.

- 1) Explain the importance of ICCPR & ICESR

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2) What do you understand by the "General Comments?"

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3) CEDAW suffers from which serious problems?

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7.5 THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CAT), 1984

This is the only core convention that deals specifically with one form of violation, i.e. torture. This Convention was adopted by the General Assembly of the United Nations in 1984. It is an absolute prohibition in the sense that nothing can justify or no circumstances can permit torture of any kind. Article 7 of the ICCPR and regional conventions like the European Convention of Human Rights (ECHR) prohibit torture absolutely but this treaty develops an entire legal framework within which practices of torture are sought to be both prevented and punished.

7.5.1 Definition and Provisions

Article 1 of the Convention defines torture as involving any act by which severe mental or physical pain or suffering is intentionally inflicted on a person for an express purpose to fulfill such objective as extracting information, forcing confession of guilt or merely to intimidate the victim. The prohibition to torture is so absolute that if an individual is expected to be put to torture in a country upon reaching there, such an individual cannot be deported, extradited or otherwise returned to that country, This important provision is known as 'non refoulement' or not to

push back a person to a country where he is at risk of being tortured. If torture is committed outside one's national boundaries, the state whose nationals are involved in perpetrating torture cannot go unpunished irrespective of where they are staying. The law enforcement agencies like police, armies etc. are to be suitably educated and sensitized so that they do not resort to torture in their methods of work. Moreover, as a safety net for the individual, article 15 of the Convention provides that evidence gathered through torture cannot be used in courts. In every civilized society torture is denounced as barbaric, cruel and against human dignity. Yet one may find several instances of torture inflicted by the state, its agencies or even public. Prohibition of torture in absolute terms has also led to a more important development. There is a general opinion at the international level that it is a rule of general international law binding on all states. Hence, whether a country ratifies CAT or not, it is still bound by the principles contained in that Convention. This customary law also lends moral force to the prohibition of torture. Part II of the Convention provides for an implementation mechanism through a committee of experts that is empowered, like any other treaty body discussed so far, to receive and consider periodic reports from the state parties. One special power invested in this committee is that the committee can on its own decide to make visits and investigate alleged incidences of systematic practice of torture. However, the convention suffers from certain shortcomings. The Convention empowers the committee to work only in a reactive way. It takes action only when acts of torture have taken place and are reported. There is very little emphasis in the convention on prevention of torture and the institutionalization of mechanisms of prevention. There is an optional protocol to the Convention that has been adopted by the General assembly which provides for regular visits of international and national independent bodies to visit places of detention but this optional protocol has not yet received requisite number of ratifications and hence it is yet to come into force.

7.6 THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC), 1989

The Declaration of the Rights of the Child was promulgated by UN General Assembly on 20 November 1959. This text was the springboard initiative to draft a convention on the subject. The UN Convention on the Rights of the Child (hereafter CRC) was subsequently adopted by the UN General Assembly on November 20, 1989 and entered into force in record time on September 2, 1990. With 193 states parties as on 7 June 2007, the Convention has become the first human rights instrument to achieve near-universality in the UN system. Only the United States remains outside the treaty regime (though it has signed the Convention on 16 February 1995). This development is all the more remarkable, because CRC is the most comprehensive, holistic and focused treaty in the field of human rights. In addition to the Convention, the UN General Assembly adopted two Optional Protocols to the CRC on 16 May 2000: First Optional Protocol to CRC on the Involvement of Children in Armed Conflict and Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. With the adoption of these two Optional Protocols the scope of CRC has been widened. These Protocols entered into force on 18 January and 12 February 2002 respectively and have been ratified by 114 and 119 states as of June 2007.

7.6.1 Provisions

The essential theme underlying the Convention is that children need special protection and priority care because, socially and physically speaking, they represent the weakest part of human society and at the same time they depend on adults for their survival. This situation is of objective inferiority often favouring their exploitation in different areas: labour, sexual integrity, etc. The Convention recognizes child's vulnerability and proclaims that childhood is entitled to special care and assistance. It is, guided by the principle that-the essential needs of children should be given highest priority by the state. It obligates the state to respect and ensure that children get a fair and equitable deal in society. The Convention emphasizes the importance of the family and the need to create an environment that is conducive to the healthy growth and development of children. The Preamble and text attach great

Notes

importance to the role of the family as "the fundamental group of society". It recognizes that "for the full and harmonious development of his or her personality", a child "should grow up in a family environment, in an atmosphere of happiness, love and understanding". Four general principles capture the spirit and philosophy of treaty: (a) Nondiscrimination (Article 2); (b) Best interest of the Child (Article 3); (c) The right to life, survival and development (Article 6); and (d) Respect for the views of the child (Article 12). These general principles provide the framework for all actions concerning children and adolescents. The substantive rights and freedoms granted in the Convention are grouped under four categories:

- **Survival Rights:** Rights to life and needs basic to a child's development.
- **Development Rights:** Those rights that children need to achieve their full potential, such as freedom of expression (Article 13), right to education (Article 28), etc.
- **Protection Rights:** Those rights that are needed to safeguard the children from neglect, abuse and exploitation, such as protection of privacy (Article 16) and freedom from abuse and neglect (Article 19).
- **Participation Rights:** Those rights that allow children to participate in decision making and in affairs that concern them, such as respect for the views of the child (Article 12).

7.6.2 Implementation Mechanism and Problems

The CRC establishes its own mechanism, the Committee on the Rights of the Child (consisting of 18 experts), to monitor the implementation of the treaty by states parties (Article 43(1)). The composition of the Committee is multidisciplinary, including experts in such fields as law, medicine, economy, sociology, and education. Their principal task is to consider periodic reports to states parties on the measures adopted to give effect to the rights of children and on the progress made in the

enjoyment of such rights. The reports are submitted by the state party concerned, initially after two years from the entry into force of the Convention, and thereafter every five years.

One of the major problems of CRC is that it suffers on account of excessive reservations. Like CEDAW, its success story of being a widely ratified treaty is marred by these reservations. Nearly 50 states have formulated reservations to substantive provisions. Secondly, CRC makes the protection of civilians, including children, a matter of feasibility and not of necessity. Likewise, it is weak on the child soldiers' age limit for recruitment to combat services as low as 15. This, in effect, legitimizes use of 15-16 year old children as combat soldiers. Thirdly, many states parties' reports are long overdue. The Committee is also unable to take up reports for consideration within the shortest time as its sessions are brief and too many reports are pending in its office. Notwithstanding these problems, the CRC stands 'out as the universal human rights treaty, which has established a rights - based ethics for children, in the light of a unique change in the global perception of the child.

7.7 THE CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (CMW), 1990

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) represents the culmination of the development of various conventions of the International Labour Organization (ILO) in this field. It is a fairly recent treaty that became effective on 1 July 2003. As of now, it has 36 parties and 28 signatories. The Convention aims to prevent and eliminate the exploitation of migrant workers by creating obligations for both the host and home countries of the migrant workers. It addresses several issues related to economic migration such as illegal recruitment, trafficking, workers' welfare, education to their children, etc. The Convention covers both legal and illegal migrant workers.

7.7.1 Causes of Migration

In the last two decades, economic migration has grown manifold owing to such reasons as the inequality of wealth between different countries of the world arising from political turmoil, economic despondency, unemployment due to natural and manmade disasters and effects of certain economic policies as structural adjustment programmes that has resulted in serious economic destabilization in some countries. These are known as the 'push factors' that have led to migration of workers from some of the poorest countries of the world to the developed part of the globe. On the other hand, there are also 'pull factors' that compel the host countries to encourage and attract migrant workers to their shores. The reasons are not far to seek. In many developed countries, higher standard of living, better healthcare facilities, and greater employment opportunities have resulted in low fertility rates and longer life expectancy, which means that the proportion of ageing population is greater than the able-bodied skilled and unskilled workforce. This gap between the supply of eligible workers and demand for skilled and unskilled labour can be effectively filled by the migrant workers. In other words, migrant labour caters to certain needs of the host countries while fulfilling its own aspiration for gainful employment. The migrant workers also contribute significantly to their home country's economy by sending their earning to their kith and kin. For example, Indians working in Gulf countries contribute to India's foreign currency earnings when they send their remittances to their family and relatives living in India. The process of sending and receiving workers, though significant, is not very simple. Their rights are routinely violated that include torture, forced labour, inappropriate working conditions, restriction on freedom of movement, withholding their travel documents, inadequate wages, etc. While all migrant workers face such labour and human rights violations, illegal migrant workers are at greater risk. These violations can occur in country of origin or in transit, or yet again in the host country. Added to this, migrant workers also encounter social and cultural handicaps flowing from living in an alien country and in an altered socio-cultural matrix.

7.7.2 Provisions

The UN Convention on Migrant Workers addresses the issues and problems concerned with migrant workers and it reinforces the standard set out by the ILO Convention on the equal treatment of nationals and immigrant workers (ILO Convention number 97 that has been reiterated in Article 25 of the CMW), on protection of human and labour rights of both regular and irregular immigrants (ILO Convention number 143), and the rights of migrant workers and their families. The Convention is the most comprehensive treaty among the core ones with 93 Articles divided into IX parts. It has a committee of ten-members (experts) to oversee the implementation of the Convention. The Committee is still a nascent one. It met for the first time in March 2004. One will have to wait for a while to assess the efficacy and evaluate the working of this body. The Convention took inordinately long time to come into effect. It became effective 13 years after it was adopted by the General Assembly. The main problem of this treaty is that it has received little ratifications in these many years. Moreover, none of the Gulf countries which have a major portion of migrant workers has ratified the Convention. Despite these problems, it should be noted that the CMW is the most comprehensive legal shield that the migrant workers have as yet.

Check Your Progress 3

Note: i) Use the space given below for your answers.

- 1) Examine the shortcomings of CAT

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- 2) Discuss the four categories of rights guaranteed in CRC.

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- 3) What do you understand by 'pull factors' and 'push factors' concerning migrant workers?

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7.8 LET US SUM UP

The international human rights system developed by the United Nations both promotes human rights norms for individual rights and protects these rights from violation by the state or society. International human rights conventions also derive their inspiration from 'justice' 'morality' and a general regard for the 'dignity' of the individual. The major conventions with their monitoring mechanism constitute the core of this system that has been able to check absolute control of states over individuals and has made states accountable to the international community for how they treat their own citizens. The monitoring body (treaty body) available in each of the conventions is known as the committee. There are two important mechanisms to monitor the implementation of the rights contained in the Conventions. One is the compulsory system called reporting procedure under which member states are obligated to submit periodic reports containing information regarding the implementation of rights and obligations. Second method is optional that allows individuals to send communications to the respective committee if their rights have been violated.

This is known as the individual petition system. The second method is optional that allows individuals to send communications to the respective committee if their rights have been violated. This is known as the individual petition system. The second method is not available in all the Conventions. For example, CRC does not have this provision. One must bear in mind that member states remain important interlocutors in the implementation system, which means that state has to ultimately ensure that the rights are available to its citizens. Most of these Conventions are plagued by the problem of reservations and declarations entered by the member states that seriously hamper the effectiveness of the treaties. A

concerted effort will have to be made to overcome this problem. Notwithstanding the problems associated with Conventions, they have made significant contribution to the promotion and protection of human rights by laying down the legal framework within which an individual and groups of individuals can seek protection. These Conventions have come to symbolize a potent weapon against state oppression and a yardstick notion to measure the human rights norms and practices.

7.9 KEY WORDS

Convention: A binding legal instrument in international law that creates obligations for member states who chose to accept them.

Covenant: Same as convention. Legally there is no difference between a convention, a covenant or treaty.

General Comments: A treaty body's interpretation of the contents of provisions, of a specific article, or of general thematic issue. General comments sometimes seek to clarify the reporting obligations of states parties or suggest approaches to implementing them.

Ratification: The legal process by which a state party become bound by a treaty to which it ratifies. This process often involves the acceptance of international obligations by national legislature.

Signature: Signature is often an executive act that represents expression of willingness/intent of a state party to be bound by a convention. But this is incomplete without accession or ratification of a convention through legislative process.

Declaration: Declaration to a treaty by a member state means that the state accepts the legal obligations pertaining to that provision. Some treaties require specific mandatory or optional declaration pertaining to certain provisions. For example, under CRC, First OP, article 3(2) requires a member state to make a binding declaration setting out the minimum age at which it will permit voluntary recruitment to its armed forces and the safeguards adopted to ensure that such recruitment is not coerced or forced.

Reservations: It is a statement made by a state party to certain provision(s) of a treaty by which that provision(s) is legally not applicable to the signatory state. This enables a state party to ratify a

treaty without being bound by all the provisions of that treaty. Such reservations may be withdrawn by the state party at any time thereafter.

7.10 QUESTIONS FOR REVIEW

- 1) What is the purpose of international human rights conventions?
- 2) What is the major difference between the seven core conventions and the other human rights conventions?
- 3) Give two reasons that led to the adoption of ICERD.
- 4) Explain the importance of ICCPR & ICESR
- 5) What do you understand by the "General Comments?"
- 6) CEDAW suffers from which serious problems?
- 7) Examine the shortcomings of CAT
- 8) Discuss the four categories of rights guaranteed in CRC.
- 9) What do you understand by 'pull factors' and 'push factors' concerning migrant workers?

7.11 SUGGESTED READINGS AND REFERENCES

- The U.N. Convention on the Elimination of All Forms of Racial Discrimination. By NatánLérner. Alphen aan den Rijn: Sijthoff&Noordhoff International, 1980.
- Report of the Committee on the Elimination of Racial Discrimination, pp. 104–105.
- Felice, William F. (2002). "The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights". *Human Rights Quarterly*. 24: 205–236. doi:10.1353/hrq.2002.0009.
- Lérner, Natán (2003). *Group rights and discrimination in international law* (second edition). The Hague: Kluwer Law International. p. 71. ISBN 90-411-1982-5.

7.12 ANSWERS TO CHECK YOUR PROGRESS

Check Yours Progress 1

- 1) See section 7.1 - One of the most significant achievements of the United Nations has been to develop the rules and principles governing the rights and duties of individuals. Every convention or treaty drafted by the United Nations draws on customs and practices of various societies. In addition to it, they also provide safeguards against discriminatory social practices. In other words, the international human rights system developed by the United Nations both promotes human rights norms for individual rights and protects these rights from violation by the state or society.
- 2) See paragraph Section 7.1 –
 - i. International Covenant on Economic, Social and Cultural Rights
 - ii. International Covenant on Civil and Political Rights
 - iii. International Convention on the Elimination of All Forms of Racial Discrimination
 - iv. International Convention on the Elimination of All Forms of Discrimination against Women.
 - v. Convention against Torture, Inhuman and Degrading Treatment or Punishment.
 - vi. Convention on the Rights of the Child
 - vii. The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- 3) See section 7.2

Check Your Progress 2

- 1) See sub-section 7.3.2
- 2) See sub-section 7.3.3
- 3) See sub-section 7.4.2

Check Your Progress 3

- 1) See last paragraph of sub-section 7.5.1
- 2) See paragraph 3 of sub-section 7.6.1
- 3) See sub-section 7.7.1