

MSW-004
Social Work and Social
Development

Block

3**DEVELOPMENT: HUMAN RIGHTS PERSPECTIVE**

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BLOCK INTRODUCTION

This is the third block of course MSW-004 'Social Work and Social Development'. The units of this block pertain to human rights perspective. You will learn here about the various provisions that are available in the Indian Constitution and also guaranteed under the international human rights instruments.

Unit 1 on 'Social Ideals of Indian Constitution' introduces you to several areas that are included in the Indian Constitution such as the Preamble, the Fundamental Rights, the Directive Principles of the State Policy, Indian vision of liberty, Justice and Equality, and Constitutional Rights of the Disadvantaged. The unit deliberates on the expectations from the first and last citizens in the country.

Unit 2 Social Work and 'Human Rights' acquaints you, at the very outset, with the meaning and criticism on human rights. The unit also covers topics discuss about the United Nation and human rights, mechanism for human right protection, and responsibilities with rights. Apart from generating awareness on various issues of human rights, this unit teaches that upholding one's human right means one should be fair to others in the family in the community and in the world as well.

Unit 3 explains development is understood as expansion of freedom. Freedom can be achieved through expansion of education, health, empowerment and so on. This Block is designed in this direction and outlines the meaning of welfare economics, capabilities approach to welfare economics, and issues of health, education and women's empowerment in relation to welfare economics.

Unit 4 explains the Government of India is the governing authority of the Republic of India. To carry out the judicial responsibility of this vast and diverse nation, judicial system is structured like a Federal Hierarchy. The present unit gives details on this 'Indian Judicial System'. It sets out how the constitution serves as a fountainhead of the Indian Judicial system, how the machinery is structured and organized at different levels, and deals with procedures prescribed under the law for criminal cases, and the main duties and responsibilities of the legal practitioners.

The deliberations made in all the above mentioned four units will equip you to have knowledge on various constitutional provisions and judicial system to reinforce development based on human rights perspectives. As a social worker, it is important that you have the minimum required information on Judicial System. Therefore you may like to read more on any of the topics discussed in this block.



UNIT 1 SOCIAL IDEALS OF INDIAN CONSTITUTION

Structure

*Ranjana Sehgal**

- 1.0 Objectives
- 1.1 Introduction
- 1.2 The Preamble
- 1.3 The Fundamental Rights
- 1.4 The Directive Principles of the State Policy
- 1.5 Indian Vision of Freedom Liberty, Justice and Equality
- 1.6 Rights of the Disadvantaged and the Constitution
- 1.7 Let Us Sum Up
- 1.8 Key Words
- 1.9 Further Readings and References

1.0 OBJECTIVES

This Unit presents a discourse on the social ideals as embodied in the Indian Constitution. The aim is to make the learner understand the essence and spirit of our Constitution and the path it lays down for all governments to walk on. After studying this Unit, you should be able to:

- understand the social ideals embodied in the preamble of the Constitution;
- know the guarantees given to all Indians under the Fundamental Rights;
- analyze the promises made by Directive Principles of the State Policy;
- critique the Indian vision of Justice and Equality; and
- review the Constitutional efforts for the disadvantaged sections of the society.

1.1 INTRODUCTION

The Constitution is a set of basic rules that determines the nature of State, structure of its Government and distribution of power within it. It is a device whereby power is distributed to the various organs of the government and limits imposed. It is the fundamental law of the land. It is all this and much more. It is a potent instrument of justice, change and empowerment. The concept of Constitution till the 19th Century was that of an instrument of governance but in the 20th and the 21st century, it has come to be accepted as an instrument of socio-economic transformation. When India became independent from British rule, it got a golden opportunity to consciously restructure itself as an egalitarian society based on the ideals of freedom, liberty, equality and justice, which was promised to all irrespective of religion, class, caste or sex. All our laws and policies were subsequently based on this premise. Though, structural changes tempered with justice and sensitivity cannot be made by drawing up a good Constitution alone, our Constitution does not lack on these counts. Even after 58 years of having given this Constitution to

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ourselves, we still have to deliver on many of the promises, attributed more to the failure of governance than shortcomings of the Constitution per se. Our Constitution has given us three very important things. *Firstly*, it has given us the power to demand for the enactment of laws, not only it has provided the base for social, economic and political justice but also for the passing of laws to meet these objectives. *Secondly*, the Constitution by itself is the supreme law and any law which is in contravention to its provisions is *ultra vires*. *Thirdly*, it has given us the instruments such as the High Court and the Supreme Court for the implementation of the various laws. The Indian Constitution is a bulky one comprising 395 articles grouped in 22 parts and 9 Schedules. According to *Dr. Ivor Jennings*, it is the bulkiest and the most detailed Constitution in the world. It is bulky due to the primary reason that it not only contains the broad principles but also details of administration. It delineates what we expect from a farmer as well as the President of the country. It narrates the role of every citizen of the country. The Fundamental Rights guarantees seven important rights and the Directive Principles of the State Policy craftily articulate the Indian vision of social ideals.

1.2 THE PREAMBLE

Our Constitution contains the philosophical and social goals of our country. Every written Constitution has a preamble, an introduction, with which it begins and which comprises its objectives and basic purposes. As the preamble consists of the goals of the State, it can be considered as the soul of the Constitution. The Preamble, though not an integral part of the Constitution and without any legal force is nevertheless very significant, as it indicates

- the sanction
- the pattern
- the objects
- the content

of the Constitution.

Preamble of the Indian Constitution

The Preamble to the Indian Constitution reads as follows :

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

A look at the preamble reveals the pointed goals of social, economic and political justice, liberty, equality and fraternity. It contains lofty social ideals which the framers of the Constitution have set before all the future governments of India. It declares India to be sovereign democratic republic and emphasizes in unequivocal terms the sovereignty of the people as it proclaims that the source from which it emerged is the people of the country. It contains the pledge of the people of India to themselves.

Check Your Progress I

Note: Use the space provided for your answer.

- 1) What are the social ideals embodied in the preamble which the framers of our Constitution have set before all future Governments of India?

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1.3 THE FUNDAMENTAL RIGHTS

The social ideals laid down in the preamble not only get strengthened by the Fundamental Rights and the Directive Principles of State policy, albeit, they are the two principal components of the Indian Constitution. Our fundamental rights, which are a corollary of our preamble, form the strong roots of our democracy and are its core and distinguishing feature. These rights are fundamental because they are:

- essential to democratic governance
- incorporated in the fundamental law of the land, hence cannot be infringed
- safeguarded by the judiciary
- constant reminder to the government about the assured liberties to the people, which they need to respect and uphold at all times

Let us first take a look at the Fundamental Rights:

Fundamental Rights as in the Constitution

The following seven Fundamental Rights are guaranteed under the Constitution:

- Right to Equality
- Right to Freedom
- Right against Exploitation

- Right to Freedom of Religion
- Cultural and Educational Rights
- Right to Constitutional Remedies
- Saving of Certain Laws

The elaborate enumeration of the Fundamental Rights in Chapter three of the India Constitution embodied in Articles 12-35 is briefly recapitulated as under:

Right to Equality (Article 14 – 18)

14) **Equality before law**—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15) **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth** — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

- a) access to shops, public restaurants, hotels and places of public entertainment; or
- b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provisions for women and children and for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16) **Equality of opportunity in matters of public employment** — (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence be ineligible for, or discriminated against in respect of, any employment or office under the State.

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens and promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes.

17) **Abolition of Untouchability** — “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘untouchability’ shall be an offence punishable in accordance with law.

18) **Abolition of titles** — No title, not being a military or academic distinction, shall be conferred by the State and no citizen of India shall accept any title from any foreign State.

No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

Right to Freedom (Article 19 To 22)

19) **Protection of certain rights regarding freedom of speech, etc.**— (1) All citizens shall have the right—

- a) to freedom of speech and expression;
- b) to assemble peaceably and without arms;
- c) to form associations or unions;
- d) to move freely throughout the territory of India;
- e) to reside and settle in any part of the territory of India; and
- g) to practice any profession, or to carry on any occupation, trade or business.

The above mentioned freedoms have been given to us but can be subjected to restrictions by the State on the following grounds:

- in the interests of the sovereignty and integrity of India,
- the security of the State,
- friendly relations with foreign States,
- public order, decency or morality,
- in relation to contempt of court, defamation or incitement to an offence,
- the professional or technical qualifications necessary for practicing,
- any profession or carrying on any occupation, trade or business,
- the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

20) **Protection in respect of conviction for offences**

- 1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- 2) No person shall be prosecuted and punished for the same offence more than once.
- 3) No person accused of any offence shall be compelled to be a witness against himself.

21) **Protection of life and personal liberty**—No person shall be deprived of his life or personal liberty except according to procedure established by law.

22) Protection against arrest and detention in certain cases

- 1) No person who is arrested shall be detained in custody without being informed, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
- 2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate.

Right against Exploitation (Article 23 And 24)

23) Prohibition of traffic in human beings and forced labour

- 1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and shall be an offence punishable in accordance with law.
- 2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24) Prohibition of employment of children in factories, etc.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Right to Freedom of Religion (Articles 25 To 28)

25) Freedom of conscience and free profession, practice and propagation of religion—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

26) Freedom to manage religious affairs—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- a) to establish and maintain institutions for religious and charitable purposes;
- b) to manage its own affairs in matters of religion;
- c) to own and acquire movable and immovable property; and
- d) to administer such property in accordance with law.

27) Freedom as to payment of taxes for promotion of any particular religion

28) Freedom as to attendance at religious instruction or religious worship in certain educational institutions—

- 1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- 2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment

or trust which requires that religious instruction shall be imparted in such institution.

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

Cultural and Educational Rights (Articles of 29 and 30)

Articles of 29 and 30 protect the interests of minorities and their right to establish and administer educational institutions. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(Right to Property)

- 31) Compulsory acquisition of property. Repealed by the Constitution (Forty fourth Amendment) Act, 1978 (w.e.f. 20-6-1979) After the 44th Amendment of the Constitution, right to property has ceased to be a fundamental right. Under article 300A, it has become a constitutional right. One other important aspect is with regard to deprivation or acquisition of agricultural and homestead land belonging to weaker sections.

Saving of Certain Laws

- 31a) Saving of laws providing for acquisition of estates, etc.
31b) Validation of certain Acts and Regulations
31c) Saving of laws giving effect to certain directive principles

Right to Constitutional Remedies (Article 32)

32) Remedies for enforcement of rights conferred by this Part

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. A more detailed description of the nature of these writs has been given in the unit entitled 'Indian Judicial System.'

Articles 33, 34 and 35 do not confer any rights but lay down the provisions pertaining to the power of Parliament

- to modify the rights in their application to forces, etc.,
- impose restriction on rights conferred by this Part while martial law is in force in any area, and
- enact legislation to give effect to the provisions of this Part.

Nature of Fundamental Rights

The Fundamental Rights are the unique feature of our Constitution and are made justiciable by providing special remedies for its enforcement.

Most Elaborate

Chapter three of the Indian Constitution contains 24 articles enumerating seven rights to their minutest detail. They are most elaborate and an entire chapter has been devoted to them. The voluminous size of the chapter is due to the enumeration of these rights to their minutest detail along with an elaborate set of limitations imposed on them.

Negative and Positive

By negative rights we mean those rights where restrictions are imposed on the State as in Article 18, which forbids the State from conferring any title other than of military and academic distinction on any citizen. Right to freedom, Right to religion, on the other hand fall in the category of positive rights, even if they are hedged with restrictions.

Not Absolute

Unlike the American Bill of Rights, the Indian Constitution imposes a lot of limitations on these rights. Not only has the Constitution hedged them but also allowed the Parliament to impose restrictions, if it deems fit. Further they can even be abrogated by an amendment of the Constitution or can be suspended during emergency.

Special Remedies for their Enforcement

The rights endowed by the Constitution do not merely exist on paper but have been granted to the people by making them justiciable. A special right 'Right to Constitutional Remedies under Article 32, has been included to safeguard all other Rights. The Supreme Court is the savior of our Rights and even the High Courts according to Article 226 are empowered to issue writs for the enforcement of these rights within the limits of their respective jurisdiction.

Check Your Progress II

Note: Use the space provided for your answer.

- 1) How is the concept of equality and right against exploitation enshrined in our Constitution?

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- 2) Are the Fundamental Rights legally enforceable? What Constitutional remedies are available in the case of the violation of our Fundamental Rights?

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1.4 THE DIRECTIVE PRINCIPLES OF THE STATE POLICY

In the Indian Constitution, Chapter IV entitled “Directive Principles of State Policy,” sets out certain fundamental obligations of the State under Articles 36 to 51. At the very outset Article 37 makes clear that, while these directives are fundamental in the governance of the country, the provisions are not judicially enforceable. While the civil and political rights were incorporated in the chapter on Fundamental Rights, which could be enforced judicially, the social, economic cultural rights were included in the Directive Principles, which are not judicially enforceable. Though not justiciable, they embody the ideals of a welfare state and are instrumental in securing social justice to all. They are like lamp posts that show light to the State on the path to progress and prosperity, hand in hand, with justice and fair play.

Directive Principles of State Policy

Let us now briefly take a look at these Directive Principles of State Policy.

Article 38 enjoins upon the State to secure a social order for the promotion of welfare of the people. It asks the State to do so by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. It directs the State to particularly strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39 empowers the State to direct its policy towards securing all the following:

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

Article 39A enjoins upon the State to ensure provision of free legal aid by suitable legislation or schemes, so that justice is not denied to any citizen by reason of *economic or other disabilities*.

Article 40 empowers the State to organize village panchayats and endow them with such powers so as to enable them to function as units of self-government.

Article 41 asks the State to, within the limits of its economic capacity; make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42 states that the State shall make provision for securing just and humane conditions of work and maternity relief.

Article 43 is for our workers which directs the State to secure, by suitable legislation or economic organization, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure, social and cultural opportunities and, in particular, promote cottage industries on an individual or co-operative basis in rural areas.

Article 43A asks the State to secure, by suitable legislation or otherwise, workers' participation in management of organizations.

Article 44 tells the State to endeavor to secure for the citizens a uniform civil code throughout the territory of India.

Article 45 which provided for free and compulsory education for children within a period of ten years at the commencement of this Constitution, until they complete the age of fourteen years is now by the latest constitutional amendment, a fundamental right.

Article 46 concentrates on the promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and asks the State to protect them from social injustice and all forms of exploitation.

Article 47 directs the State to raise the level of nutrition and the standard of living and to improve public health.

Article 48 asks the State to endeavor to organize agriculture and animal husbandry on modern and scientific lines and **Article 48A** talks of protection and improvement of environment by safeguarding forests and wild life of the country.

Article 49 talks of the obligation of the State to protect monuments and places and objects of national importance from destruction.

Article 50 talks of separation of judiciary from executive and **Article 51** underlines the need for the promotion of international peace and security.

Nature and Significance of Directive Principles

Directive Principles are like instruments of instructions to the State while formulating its policies and to the executives while executing them. They are recommendatory in nature. The Supreme Court has, in a number of judgments, referred to the importance of the Directive Principles. It has called these principles as the "conscience" of the Constitution. These principles are the "goals" to be achieved through Fundamental Rights of the Constitution. They are intended to ensure "distributive justice" remove inequalities and disabilities and to achieve a fair division of wealth amongst the members of the society. The Supreme Court held that the courts can look at the Directive Principles for the purpose of interpretation

of the Fundamental Rights. The courts have to make every attempt to reconcile the fundamental rights with the Directive Principles, remembering that the reason why the Directive Principles were left by the founding fathers as non-enforceable was to give the Government sufficient latitude to implement them. The courts should adopt that interpretation which makes the fundamental rights meaningful and efficacious.

Though the Directive Principles cannot be legally enforced, they are nonetheless, fundamental in the governance of the country. The State is under an obligation to devise appropriate mechanisms for realization of these Directive Principles. It should put in place a complaints procedure in as much as it ensures proper allocation of resources for the realization of the right to work, health, food, clothing, housing, education and culture. The state has been directed to make laws so that these directives can then be claimed as legal rights. Our Constitution itself provides for the creation of structures from the national to the district level for free legal aid. The concept of legal aid is enshrined in our Constitution under Article 39. This Article is a directive to the State to give a level play field to all the litigants of the case by providing free legal aid. The judgment of the Supreme Court in a case {(1980) 1 SCC 99} further gives strength to the right of the poor to legal aid as a fundamental right. It says that ‘the right to free legal service to the poor and needy is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the Fundamental Right to life and Liberty guaranteed under Article 21 of the Constitution.’ This judgment puts a seal on the right of every accused to engage a lawyer and secure legal aid and legal services. Legislation is to be made with reference to the Directive Principles and laws contrary to the spirit of the constitution can be declared void. Citizens can directly resort to Supreme Court for relief, if they are deprived of their Fundamental Rights. Fundamental Rights are prohibitive, whereas the Directive Principles are positive directions.

Check Your Progress III

Note: Use the space provided for your answer.

- 1) Enumerate briefly the important Directive Principles and their significance for us?

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1.5 INDIAN VISION OF FREEDOM, LIBERTY, JUSTICE AND EQUALITY

The Constitution, which made India into a Sovereign Democratic Republic, gave us a federal system with Parliamentary form of Government in the Union and the

States. It also gave us an independent judiciary, guaranteed Fundamental Rights and through Directive Principles of State Policy made promises, which though not enforceable in law are nonetheless fundamental to the governance of the nation. A number of International Conventions and political documents, such as League of Nations and then of the United Nations recognize that every human being was born free. India's commitment to ideals of freedom equality, liberty and justice is incorporated in our Constitution. The preamble promises this liberty to all citizens which is the bedrock of all other freedoms and needs to be guarded at all costs.

The Constituent Assembly that wrote our Constitution consisted people with vision and constituent. Even in the early fifties, they specifically spoke of certain "principles" being "fundamental" in the "governance of the country" and enjoined upon the State "to apply these principles in making laws" in Article 37. They were aware of the fact that political democracy, unaccompanied by social and economic democracy was meaningless. The right to vote once in five years is meaningless, unless, accompanied by social and economic rights in a democracy. Right to vote for a hungry and illiterate man without clothing and shelter is a hollow right. Political equality is not possible, unless people were made equal on the social and economic plane as well. True democracy becomes a reality when there is sharing of power and responsibility by all sections of the people and not a pursuit of power by the elite and dominant sections alone. *Dr. Ambedkar* had said:

"We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is of economic democracy."

Mahatma Gandhi, a visionary, had rightly observed at the Second Round Table Conference in London, much before the UN Declaration of Human Rights, 1948 came into existence that his aim was to establish a political society in India in which there would be no distinction between high class and low class of people, where women would enjoy the same rights as men and justice — social, economic and political, would be ensured to the teeming millions of India. This is the vision, of which, the Indian Constitution is an embodiment. The Fundamental Rights and the Directive principle of State policy, accompanied by many other empowering provisions of our Constitution are the instruments that make possible the achievement of this vision that can transform the lives of teeming millions of our country. As observed by *Granville Austin* 'The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State policy. These are the conscience of the Constitution.' The Directive Principles and Fundamental Rights are not mere rhetoric conveniently to be used as a tool of electoral appeasement by our political parties. These initiatives, if carried out in the spirit as embodied in the ideals of our Constitution, can effectively lead to empowerment of the people, men and women.

The Directive Principles are the unique feature of our Constitution not found in most other Constitutions of the world except the Irish Constitution which was our inspiration. Further the rights and assurances given by our Constitution are

concretized into reality through our five year plans which aim at eradicating poverty, increasing agricultural and administrative growth, creating employment opportunities etc. As stated by *Kulkarni*, the unique feature of the Indian Constitution is that it has given a constructive lead to the Government in shaping its socio-economic policies. The Directive Principles of the State policy also provide the yard stick to measure the adequacy or otherwise of the policies that have evolved since the adoption of the Constitution. They lend a social dimension to our economic aspirations when they stipulate that the State would not allow concentration of wealth and ownership in a few hands. Article 41 directs the State to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. This is social security in its widest sense.

The Constitutional provisions have become formidable tools to meet the challenges thrown before the nation at the time of independence. High rates of illiteracy, low levels of education and incomes, malnourishment and high rates of morbidity were the defining features of India at the time of its birth. Adhering to the ideals laid down in our Constitution, the 60 year old largest democracy, traversing numerous vicissitudes, has come a long way, so much so that it is on its way to becoming a super power. However, there are a few formidable goals which still are out of our reach, despite governmental efforts, for instance we still have to separate religious precepts from civil law. Civil law is a matter for the people not for religious leaders to decide. In matters of laws of property and inheritance and marriage and divorce, although practices may differ, legal rights that accrue must be the same. For example, a marriage may be solemnised according to any religious or social custom but the rights of a woman in the case of divorce must be the same irrespective of religion. Progress in these directions has been slow but we should keep trying. The main key to achieving our national vision lies in education. Right to education as a directive principle has not succeeded to bring about the desired state action. One hopes that we will be finally able to say goodbye to illiteracy now that free and compulsory primary education has become a Fundamental Right.

When India became independent, it rightly decided to structure the Indian society on the ideals of liberty equality justice and fair play through the mechanism of State. This vision as reflected in the Constitution laid the foundation of a social system based on equal opportunities and reduction of disparities of income and wealth. India made a good beginning with the Directive Principles of State Policy and the Fundamental Rights. Suitable laws have also been enacted from time to time for the marginalized population, but not always fully and fairly implemented. Social change cannot be brought about by the mechanisms of State alone but by creating a collective consciousness. A strong partnership with the voluntary agencies who can mobilize the deprived can go a long way. It is also imperative that the deprived and the exploited sections themselves become aware and demand their rights under the Constitution. Poverty eradication continues to be a major challenge for social and economic policy. Today, we need a reversal of those policies and programs which have not yielded the desired result. Fortunately for us there is a distinct shift in the judicial attitude, from narrow interpretation to an expanded view of the Constitutional provisions. The Apex Court has today expanded and humanized the concept of the 'right to life' and 'right to liberty.' Judicial activism is welcome, the acrimonious debate on an 'activist' judiciary exceeding its limit, notwithstanding.

Check Your Progress IV

Note: Use the space provided for your answer.

- 1) 'The Constitutional provisions have become formidable tools to meet the challenges thrown before the nation'. Do you agree with this statement? How far the State has succeeded in meeting these challenges?

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1.6 RIGHTS OF THE DISADVANTAGED AND THE CONSTITUTION

The Preamble, the Directive principles of state policy and the Fundamental Rights enshrined in the Constitution have earmarked a very positive role for the State towards disadvantaged sections of the society, such as women, children, scheduled castes and scheduled tribes, etc. The Constitution of India contains provisions that seek to ensure the protection of women and children's rights among others. Article 15 (3) specifically empowers the State to make special provisions in favor of women and children. While some of these endeavors are embodied in the Fundamental Rights, others are reflected in the Directive Principles of State Policy.

Women and the Constitution

The Indian Constitution places men and women on equal scales vide Article 14 which provides that the State shall not deny any person equality before the law. While it does so, it also acknowledges that women have traditionally been considered inferior to men and subjected to many disabilities and injustices. To do away with these injustices and usher equality, the Constitution directs the State to make special efforts to enact special laws so as to prevent the exploitation of women. The right to equality, a fundamental right which is conferred on both men and women has special value for women. Further Article 15(1) directs the State not to discriminate against any citizen on grounds of sex among others, Articles 16(1) and 16(2) prohibit discrimination in general and especially on grounds of sex in offices and employments under the State. Constitution upholds the dignity of women under article 51A by making it the duty of every citizen of India to renounce practices derogatory to the dignity of women. Another Article important from the perspective of women is 39(a) and (d). While the former asks the State to direct its policy towards securing the right to an adequate means of livelihood for both men and women, the latter ensures equal pay for equal work to both. Article 39 (c) further requires the state to secure the strength, health of workers, men and women. Article 42 enjoins upon the State to make provisions for securing just and humane conditions of work and for maternity relief.

Undoubtedly, our Constitution contemplates attainment of a new social order. With respect to the status and privileges conferred on women, there is a discrepancy in the theoretical postulates and the ground reality. Lip service is being paid to the

doctrine of gender equality. The fact remains that generally women are still regarded as inferior both at home and workplace. Though there is an improvement, we are dissatisfied with the degree of the improvement and still have a long way to go.

Child Rights and the Constitution

If the rights of children are to be respected, a concerted effort must be made to ensure that those in power do not look upon children as a section of the population that may be taken for granted. According to the Constitution, the State is entrusted with the responsibility for framing laws and policies for “protecting children and youth against exploitation and moral and material abandonment. “Under the Constitution, it is the duty of the state to ensure that children of tender age are not abused and forced by economic necessity to enter vocations unsuited to their age and strength [Article 39 (e)] and to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity [Article 39 (f)]. As one step towards this aim, the Juvenile Justice (Care and Protection of Children) Act, 2000, has been enacted “to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles.

One of the areas of concern in Indian law today is in the one relating to family relations which are still governed by a bewildering variety of customary, religion-based personal laws applicable to persons depending on their birth into one or other religion. There are also gaps in laws relating to health, education, housing and employment where compromises have been made which sometimes do not always maintain the highest principles of the dignity of childhood, human rights and the principles of the Constitution. On child prostitution, on the status of disabled children and on the neglect of the street children there are serious inadequacies and shortcomings in the law when compared to the ideals of the Constitution. Child labour is still rampant in the country despite Constitutional directive to the contrary. The union Parliament and the State Assemblies have been playing an effective role in bringing forward appropriate legislation to support the status and welfare of children. A long list of beneficial laws has been put in the Statute Book translating Constitutional Directives into legislative policies. However, gaps and distortions in legislations governing child rights should be renewed on a regular basis and appropriate remedial measures be taken. The civil and political rights of children, such as the right against abuse and exploitation, must be connected with their economic, social and cultural rights, such as education and work. The ‘disconnect’ exists because children are not recognized as full citizens due to their inability to consent, which reduces them to non-citizens.

Constitution and the Rights of the Scheduled caste and Scheduled tribes

Even though the Indian Constitution abolished the practice of caste discrimination and untouchability, but still the Hindu caste ridden society practices and ‘dalits’ have been victims of oppression and exploitation at the hands of the dominant sections. This has resulted in inequality subjecting a vast mass of people to various socio- economic and political disabilities. Fired by the principle of equality and justice the Constitution specifically provides for protective discrimination in favour of certain groups, prominent among them being the scheduled caste and scheduled tribes. Articles 14, 15, 16, 17, 18 and 23 of the Constitution fulfill the assurance embodied in the preamble. It was largely Dr. Ambedkar’s unrelenting efforts that

the framers of the Constitution agreed to make provisions for these groups. Clause (4) was subsequently added to Article 15 which enabled the State to make any 'special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

The Constitution permits protective discrimination for scheduled castes and scheduled tribes and OBC's in three specific areas, namely, reservation of seats in the legislature, reservation of jobs and reservation of seats in the educational institutions. Constitutional provisions and special measures for the protection and promotion of the educational and economic interests of these groups have greatly impacted, directed and shaped the path of our policies and programs under the five year plans. There are also large numbers of developmental programs specifically meant for their upliftment. Though the urban centres reveal a change in attitude, the deep prejudice against them is still prevalent in the rural areas. The primary goal of all efforts to help them should be to empower them in all respects and create mechanisms which can help them to defend and protect themselves at all levels. One such mechanism is law. We have a law which is specifically focused on the problem of untouchability and is a literal translation of a constitutional provision into a legislative one, namely the protection of Civil Rights Act, 1955. Further, in order to control the crimes against SC/ST by persons belonging to other Communities, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been brought into force from 30 January 1990. These enactments prescribe penalties that are more stringent than the corresponding offences under Indian Penal Code (IPC) and other laws. In addition, in pursuance of the Constitution's 65th Amendment Act, 1990, National Commission for scheduled caste and scheduled tribe was constituted w.e.f. 12 March 1992 with wide functions and powers of Civil Court to take up matters which are of vital importance for their socio-economic development.

Check Your Progress V

Note: Use the space provided for your answer.

- 1) Briefly review the Constitutional provisions for protecting the rights of women?

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1.7 LET US SUM UP

The unit aims at developing an understanding in the learner about our Constitution. The concept of Constitution till the 19th Century was that of an instrument of governance but in the 20th and the 21st century, it has come to be accepted as an instrument of socio-economic transformation. When India became independent from British rule, it got a golden opportunity to consciously restructure itself as an egalitarian society based on the ideals of liberty, equality and justice, which was

promised to all irrespective of religion, class, caste or sex. The Indian Constitution is a bulky one comprising 395 articles grouped in 22 parts and 9 Schedules. It is bulky as it not only contains the broad principles but also details of administration.

The Preamble, though not an integral part of the Constitution and without any legal force is nevertheless very significant, as it indicates the sanction, the pattern, the objects and the content of the Constitution. A look at the preamble reveals the pointed goals of social, economic and political justice, liberty, equality and fraternity. It contains lofty social ideals which the framers of the Constitution have set before all the future governments of India. It declares India to be sovereign democratic republic and contains the pledge of the people of India to themselves.

Fundamental Rights and the Directive Principles of State policy are the two principal components of the Indian Constitution, whereby these social ideals laid down in the preamble are further strengthened. The fundamental rights, which are a corollary of our preamble are its core and distinguishing feature and form the strong roots of our democracy. These rights are fundamental because they are essential to democratic governance and cannot be infringed. They are a constant reminder to the government about the assured liberties to the people, which they need to respect and uphold at all times

The Fundamental Rights guarantee seven important rights and the Directive Principles of the State Policy craftily articulate the Indian vision of social ideals. The elaborate enumeration of the Fundamental Rights as embodied in Chapter III in Articles 12-35 of the Constitution comprise the all important Rights to equality and freedom, right against exploitation, right to freedom of religion, Cultural and Educational Rights among others. Chapter IV entitled “Directive Principles of State Policy,” sets out certain fundamental obligations of the State under Articles 36 to 51. At the very outset Article 37 makes clear these directives are fundamental in the governance of the country, the provisions are not judicially enforceable. The Directive Principles are the unique feature of our Constitution not found in most other Constitutions of the world. Though not justiciable, they embody the ideals of a welfare state and are instrumental in achieving social justice. The rights and assurances given by our Constitution are concretized into reality through our five year plans which aim at eradicating poverty, increasing agricultural and administrative growth, creating employment opportunities etc. The Directive Principles and Fundamental Rights are not mere rhetoric conveniently to be used as a tool of electoral appeasement by our political parties, albeit initiatives which, if carried out in the spirit as embodied in the ideals of our Constitution, can effectively lead to empowerment of the people, men and women.

1.8 KEY WORDS

- Writ Petition:** A petition referring to the violation of the fundamental rights is called a writ petition.
- Preamble:** A preliminary statement or introduction.
- Socialism :** A political and economic theory of social organization which advocates that the means of production, distribution, and exchange should be owned or regulated by the people as a whole.
- Republic:** A State in which supreme power is held by the people and their

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elected representatives and which has an elected or nominated president rather than a monarch.

Sovereignty: Supreme power or authority/ the authority of a State to govern itself.

Fraternity: A group of people sharing common interests.

Secular: Not subject to or bound by religious rule.

1.9 FURTHER READINGS AND REFERENCES

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UNIT 2 SOCIAL WORK AND HUMAN RIGHTS

Structure

*Mohd Shahid **

- 2.0 Objectives
- 2.1 Introduction
- 2.2 Human Rights: Definition and Key Concepts
- 2.3 Social Work and Human Rights: Basic Linkages
- 2.4 Three Generations of Human Rights: Positioning Social Work
- 2.5 Limitations and Alternate Paradigms of Human Rights
- 2.6 Matrix of Social Work and Human Rights in India
- 2.7 Let Us Sum Up
- 2.8 Key Words
- 2.9 Further Readings and References

2.0 OBJECTIVES

Social work is a human service profession and social workers have a unique role to play in promoting human rights, in contemporary social and political discourse. The concept of human rights is very often loosely used with varied interpretations and is a cause of concern for social workers upholding human rights perspective. The broad objective of this unit is to crystallize the dynamics of relationship that exist between social work and human rights. After reading this Unit, you will be able to:

- develop clarity on concept, evolution, main currents and changing paradigms of human rights;
- understand basic linkages between social work and human rights; and
- comprehend issues and problems that social workers face and confront in upholding and practising human rights.

2.1 INTRODUCTION

The contemporary globalized society with multitude of changes is posing challenges before human beings. For some of them, these are challenges of survival while to others it's a question of supremacy and hegemony. These changes require social work educators and practitioners to rethink their approach to social work to develop theories and forms of practice that can use the profession's existing strengths, particularly its capacity for critical reflexive practice, to move in directions that are consistent with a value base rooted in promoting human rights and social justice through practice (Dominelli, 2004).

Taking into cognizance the rapidly changing global society on the eve of new millennium, and social work values recognising individual worth and dignity and

appreciating diversity, the professional social work associations pondered over the role and place of social work in professional and finally came up with a document— *Ethics in Social Work, Statement of Principles*¹. This document has not only emphasized the seminal importance of human rights in social work practice but also provided an international definition of social work which was much needed to ensure that micro/local level practice is inclusive of diversity within what has become a globally recognised profession. The section 2 of the document provides definition of social work which is reiterated below:

The social work profession promotes social change, problem solving in human relationships and the empowerment and liberation of people to enhance well-being. Utilising theories of human behaviour and social systems, social work intervenes at the points where people interact with their environments. Principles of human rights and social justice are fundamental to social work (International Federation of Social Workers & International Association of Schools of Social Work, 2004).

Thus social workers have not only been charged with the duty of upholding human rights but are also guided by principles of human rights and social justice. However, in promoting human rights, social workers tread a tightrope over a chasm that requires considerable knowledge and skills to cross safely. It is here that it becomes essential for the students of social work to develop clarity on concept of human rights, evolution and main currents in human rights, linkages with social work profession, and issues and challenges that social workers face and confront in upholding and practicing human rights.

2.2 HUMAN RIGHTS: DEFINITION AND KEY CONCEPTS

Human rights are natural rights of human beings. The Vienna Declaration (1993) states that all human rights begin with human dignity; and the humans are central subject of human rights and basic freedoms. In other words, humans themselves are the objects of human rights and are at the core of this basic freedom. To develop a human rights basis for social work requires that the concept of human rights and the problems and criticisms associated with it be carefully examined.

Defining Human Rights

Human rights *per se* refer to rights of individuals which are deemed necessary by virtue of their being the members of human community. It is in bracketing these rights for effective practice that human rights took the form of a bunch of rights that spread to all-political, economic and social areas. In 1987 United Nations defined human rights as those rights which are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs.

Human rights have priority over other claims of rights and need to be differentiated from other rights. For example the right to food needs to be differentiated from the right to bear arms. Questions can be raised as to which and what kinds of rights are or claimed to be human rights. Recently, Jim Ife (2001) has proposed five-fold criteria to define what constitute a human right or to make a claim on the basis of human rights:

- Realisation of the claimed right is necessary for a person or group to be able to achieve their full humanity, in common with others.
- The claimed right is seen either as applying to all of humanity, and is something that the person or group claiming the right wishes to apply to all people anywhere, or as applying to people from specific disadvantaged or marginalised groups for whom realisation of that right is essential to their achieving their full human potential.
- There is substantial universal consensus on the legitimacy of the claimed right; it cannot be called a 'human right' unless there is widespread support for it across cultural and other divides.
- It is possible for the claimed right to be effectively realised for all legitimate claimants. This excludes rights to things that are in limited supply, for example the right to housing with a panoramic view, the right to own a TV channel, or the right to 'own' large tracts of land.
- The claimed right does not contradict other human rights. This would disallow as human rights the 'right' to bear arms, the 'right' to hold other people in slavery, a man 'right' to beat his wife and children, the 'right' to excessive profits resulting in poverty for other, and so on.

Thus the class of human rights does not include all the rights that people might claim, and that a claim to human rights has to pass certain stringent tests as narrated above.

When beginning to study human rights, a social worker needs to understand the basic concepts relating to those rights. Human rights are commonly referred as: universal, indivisible, inalienable, inabrogable and intergenerational. The concept of universality underpins human rights and implies that human rights apply to all human beings and every individual has a claim to enjoyment of human rights, irrespective of his other attributes. The concept of indivisibility means that human rights come as a package. It refers to necessity that governments and individuals recognize each human right and not to selectively promote some rights over others. One can not pick and choose, accepting some and rejecting others as the denial of one human right can easily impact the enjoyment of other rights and directly or indirectly deny other human rights. Inalienable nature of human rights provide that they can not be taken away from some one and remain all through human life span. Human rights are also inabrogable which means that one cannot voluntarily give up one's human rights or trade them for additional privileges. Human rights are not to be idly dispensed with. We may choose not to exercise all our rights all the time, but we still have those rights. The concept of intergenerational rights reflects the most recent and important changes that have taken place in human rights discourse in extending our understanding of human rights obligations beyond present. This temporal extension of human rights is a relatively new understanding of human rights and their corresponding obligations because we used to think spatially about human rights — the obligations of communities or nations to each other — but not temporally, where there are human rights obligations that extend back into the past and forward into the future, but which affect our present behaviour. It forces us to think historically, to locate our actions in their historical context, and to understand that the definition and realisation of human rights are not static but have an important historical dimension (Ife, 2001).

Nevertheless these concepts should not be subjected to extreme interpretations. For example universality does not mean that everyone is alike or should be developed in same manner or there is need to create uniformity between different cultures. It only aims to ensure that individuals and peoples everywhere have basic rights in their existence. Likewise the laws restricting the freedom of prisoners for association and travelling is not the violation of inalienable nature of human rights nor is vice-versa means upholding of the same. However the inalienable human rights do recognise the freedom of life and liberty to prisoners. Similarly, notion of intergenerational rights as human rights can affect social workers not only working in community development or with environmental issues but also those who work to break ongoing cycles of structural disadvantages, deprivation and violence.

2.3 SOCIAL WORK AND HUMAN RIGHTS: BASIC LINKAGES

Social workers have focussed on valuing social justice and social change in micro-level relationships and attempted to work with clients in ways that are ameliorative and respectful of their diversity and differences. These concerns have provided the backdrop for the development of a human rights-based social work. National Association of Social Workers (2000) in its policy statement *International Policy on Human Rights* endorses the Universal Declaration, conventions and treaties that according to National Association of Social Workers, provide a human rights template for social work.

Human rights framework provides a prism through which to view social work profession's values, ethics and principles which are necessarily expected from social workers in their practical settings. As is said when social workers fail to operationalize these principles, they victimize clients and disempower them. Conversely, upholding these practice principles facilitates empowerment. The section 4 of International Federation of Social Workers and International Association of Schools of Social Work document provides two principles fundamental to social work viz., Human Rights and Dignity (section 4.1), and Social Justice (section 4.2). Both the principles are reproduced below. These illustrate how social work professionals are mandated to uphold and promote human rights perspective:

Human Rights and Human Dignity

Social work is based on respect for the inherent worth and dignity of all people, and the rights that follow from this. Social workers should uphold and defend each person's physical, psychological, emotional and spiritual integrity and well-being. This means:

- 1) Respecting the rights to self determination : Social workers should respect and promote people's right to make their own choices and decisions, irrespective of their values and life choices, provided this does not threaten the rights and legitimate interests of others.
- 2) Promoting the right to participation : Social worker should promote the full involvement and participation of people using their services in ways that enable them to be empowered in all aspects of decisions and actions affecting their lives.

- 3) Treating each person as a whole : Social workers should be concerned with the whole person, within the family, community and societal and natural environments, and should seek to recognise all aspects of a person's life.
- 4) Identifying and developing strengths : Social workers should focus on the strengths of all individuals, groups and communities and thus promote their empowerment.

Social Justice

Social workers have a responsibility to promote social justice, in relation to society generally, and in relation to the people with whom they work. This means:

- 1) Challenging negative discrimination : Social workers have a responsibility to challenge negative discrimination on the basis of characteristics such as ability, age, culture, gender or sex, marital status, socio-economic status, political opinions, skin colour, racial or other physical characteristics, sexual orientation, or spiritual beliefs.
- 2) Recognising diversity : Social worker should recognise and respect the ethnic and cultural diversity of societies in which they practice, taking account of individual, family, group and community differences.
- 3) Distributing resources equitably : Social workers should ensure that resources at their disposal are distributed fairly, according to need.
- 4) Challenging unjust policies and practices : Social workers have a duty to bring to the attention of their employers, policy makers, politicians and the general public situations where resources are inadequate or where distribution of resources, policies and practices are oppressive, unfair or harmful.
- 5) Working in solidarity : Social workers have an obligation to challenge social conditions that contribute to social exclusion, stigmatisation or subjugation, and to work towards an inclusive society. (IFSW & IASSW, 2004)

Further the IFSW-AISSW document also enumerates the international conventions for the ready reference of professionals. The section 3 (International Conventions) provides that international human rights declarations and conventions form common standards of achievement, and recognise rights that are accepted by the global community. Documents particularly relevant to social work practice and action are:

- Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All Forms of Discrimination against Women
- The Convention on the Rights of the Child
- Indigenous and Tribal Peoples Convention (ILO convention 169)

A human rights perspective can thus strengthen social work and provide a strong basis for an assertive practice that seek to realise the social justice goals of social workers in any setting. Adopting a humanitarian approach rooted in the realisation

of human rights and citizenship, social workers could work in ways that acknowledge the interdependence existing between different groups of people in society and facilitate the implementation of reciprocity in their interactions with them. They also have to recognize differentiation within and between groups alongside the significance of various cleavages in an individual's identity. Reichert (2003) rightly summed that certainly a social work practice based on human rights is no panacea for discrimination, inequality, poverty, and other social problems. Yet knowledge of human rights can help the social work profession better understand its role as a helping profession. By integrating human rights into the profession, social workers will obtain unique insight into issues central to the profession.

2.4 THREE GENERATIONS OF HUMAN RIGHTS: POSITIONING SOCIAL WORK

The red letter day in the history of human rights was December 10, 1948 when United Nations General Assembly proclaimed Universal Declaration of Human Rights (UDHR). The preamble to the Charter declares that one of the chief aims of the organisation is 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.' Article 1 states that one of the principal purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all. Article 55 provides that the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 56 enjoins that all members of the United Nations pledge themselves to take joint and separate action in co-operation with the United Nations for the achievement of the purposes set forth in Article 55.

This listing of general principles and broad obligations provided grounds to modern democracies to evolve, construct, formalise and uphold human rights agenda. Human rights have evolved over a period of time and are broadly placed in three grouping or what is commonly referred as three generations of human rights. It is argued that human rights are developed in three waves and in each wave main currents were influenced with specific philosophy, disciplines and professions and hence the focus on specific kinds of rights. The first generation human rights are referred as civil and political rights, and are individually based and concern the fundamental freedoms. Basing on liberal political philosophy there is strong assertion on protecting natural rights like individuals inherent worth, dignity and freedoms-right to speech, assembly, movement, fair trial and equality before law etc. These rights are also referred as *negative rights* which need to be protected rather than realised, and the state is required to ensure that they not threatened or violated. The second generation of human rights is the constellation of rights known as economic, social and cultural rights. Influenced by the socialism ideology these are rights of individual and group to receive various forms of social provision or service in order to realise their full potential as human beings. Unlike first generation rights, these rights require more active and positive role of the state in realisation of these rights through various forms of social provision and hence second generation rights are referred as *positive rights*. The third generation of human rights involve rights which only make sense if defined at a collective level and hence referred as *collective rights*. These are rights that belong to a community,

population, society or nation. Resting on traditions that started with struggle against colonialism to unsustainable economic and social development, this category of rights include the right to economic development, the right to live in cohesive and harmonious society, as well as those on safe environment and ecology.

Further each of these generations of human rights was influenced in varying degrees from disciplines/professions like law, social work and community development. However, that does not mean impervious boundaries; it is only the nature of rights that determines quantum of dominance of one discipline or the other. Jim Ife (2001) a noted social work professional and acclaimed human rights activist has brilliantly consolidated the discussion on generations of human rights as well as the position of social work in each period of human rights evolution. The approach taken in discussing human rights and social work is summarised in the following table.

The Three Generations of Human Rights

	First generation	Second generation	Third generation
Name	Civil and political rights	Economic, social and cultural rights	Collective rights
Origin	Liberalism	Socialism; social democracy	Economic; development studies; green ideology
Examples	Right to vote, free speech, fair trial; freedom from torture, abuse; protection of law; freedom from discrimination	Rights to education, housing, health, employment, adequate income, social security, etc.	Rights to economic development and prosperity; benefits from economic growth; social harmony; healthy environment, clean air, etc.
Agency	Legal clinic; Amnesty International; Human Rights Watch; refugee work	Welfare state; third sector; private market welfare	Economic development agencies; community projects; Greenpeace etc.
Dominant profession	Law	Social Work	Community Development
Social work	Advocacy; refugee work; asylum seekers; prison reform, etc.	Direct service; management of the welfare state; policy development and advocacy; research	Community development: social, economic, political, cultural, environmental, personal/spiritual

Ife has commented at length (as table shows) on the positions social workers have taken across each generation of human rights. For example he argued that first generation human rights are an important area of social work practice, especially in relation to advocacy models. Civil and political rights, although they may be the least contested in public discourse, remain flagrantly violated in many parts of the world. A number of social workers play an important role in working for the protection of civil and political rights, through work with advocacy groups, refuges, prison reform, attempting to secure adequate legal representation for people, work on behalf of the relatives of the 'disappeared', work in community legal centres, and so on. As a direct result of the work they do, social workers themselves can sometimes be the victims of the first generation human rights abuse. Consideration of the second generation of economic, social and cultural rights moves a human rights discourse to the core of the mainstream social work. Social workers in the public welfare system are concerned with poverty. The right to adequate income and standard of living, and the right to income security are central to the work of such social workers. The conventional approach to social work suggests that these second generation rights can best be met by the provision of social services to provide the guaranteed basic minimum standards of health, housing, education and so on. Social workers working in organisational practice, for example in management roles and in organisational development, can also be seen as playing a role in securing second generation human rights. Such rights are commonly met through the working of social agencies, whether within welfare state, in the so-called 'third sector' (the community sector, or non-profit, non-governmental sector) or in the private sector. It is argued that the western undervaluing of third generation rights is paralleled in western social work, which is more casework centric, marginalising other methods like community work, community organisation or community development. However, in promotion of third generation rights the social work method of community work/ community development becomes critically important. Further these interventions are particularly relevant for the development of third world Asian, African and Latin American countries, and promoting of third generation rights thereon.

2.5 LIMITATIONS AND ALTERNATE PARADIGMS OF HUMAN RIGHTS

Human rights discourse has serious limitation because of too much focus on the first generation of civil and political rights. In any discussion on human rights it is the human rights record of a country that comes first rather than the countries overall socio-economic development signalling the performance of all the three generations human rights. It is rightly noted that first generation rights are necessary prerequisite for a just society, but they themselves do not produce social equality or social justice. If such goals are to be achieved, at least second generation rights also need to be taken into account, and strong case can be made for the inclusion of third generation rights as well, as preconditions for social justice (Ife, 2001). Reichert (2003) rightly noted reference to three generations or sets of human rights inhabit understanding of those rights as well as the concept of indivisibility. Unfortunately, the notion of different sets of human rights continues to exist. A better approach is to avoid reference to different sets and acknowledge that all human rights are equally important. Further the concept of human rights has also been questioned for being overly dominated by western ideas and rooted in

individualistic ways of seeing the world which do not meet the needs of more collectivist cultures elsewhere (Dominelli, 2004).

In order to overcome the limitations there is a need to visualise human rights beyond the narrow understanding and interpretations. As is rightly noted, human rights discourse should move: beyond the legal, beyond the western and beyond the patriarchal constructions. Ife (2001) even went to the extent of proposing reconstruction of human rights towards the post-modern context. Interestingly and encouragingly even with these alternate paradigms of human rights social work has synergetic perspectives. Dominelli (2004) has noted that social work, with its traditional commitment to the individual within his or her social context, is well placed to balance postmodernist concerns which celebrate individual identity and empowerment with modernist rooted in the idea of universal rights that support the realisation of social justice and personal development.

2.6 MATRIX OF SOCIAL WORK AND HUMAN RIGHTS IN INDIA

The discussion on human rights seems incomplete without reviewing the position of human rights in world largest democracy i.e. India. The Constitution of India of India amply provides scope for protecting and promoting human rights and fundamental freedoms of citizens. A plethora of positive and negative constitutional injections bind the state to be responsive to issues of human rights. A bird eye view of available institutional mechanism for upholding human rights will help social work professionals to understand human rights situation in the country and the legal framework that can be invoked in case of human rights violation.

The Preamble Indian Constitution reflects the solemn resolve of the people of India to secure to all its citizens: justice, social economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunities; and to promote among them all fraternity assuring the dignity of the individual. The part III and part IV of constitution clearly and categorically provide for the rights of the citizens and the duties of state in ensuring fundamental freedoms and dignified living. The part III contains Fundamental Rights of the citizens which are justifiable and parallel the rights enumerated in the UN Covenant on Civil and Political Rights. Like first generation human rights fundamental rights are also called negative injections that outline basic minimum rights that can not be denied to people of India and can be directly claimed in the apex courts in case of violation. Unlike part III, the part IV deals with Directive Principles of State Policies which are not justifiable but are very much like UN Covenant on Economic, Social and Cultural Rights. However, it is prescribed that the principles therein (Part IV) laid down are nevertheless fundamental in the governance of the country and it is the duty of state to apply these principles in making laws. Many a times in enjoying our rights we transgress the freedoms of others and do not feel responsive to the collective rights (like safe environment, development etc.). The Constitution (Forty-Second Amendment) Act, 1976 prescribes the Fundamental Duties of all every citizen of India (Article 51A). These can be instrumental in facilitating people to inculcate respect for the rights of all members of the human family.

Further Government of India is signatory to International Human Rights documents and the legislature of the state has formulated policies and enacted a number of legislations, including The Protection of Human Rights Act, 1993 to this effect. These legislations particularly social legislations provide powers to the citizens, punishment to offenders and legal mechanism to executive to enforce the violation of rights to survival, sound living and right against exploitation in any form. Most recent and important in the list of legislations that can be used in protecting human rights is The Right to Information Act, 2005. The human rights activists and social workers as well, can make liberal use of RTI Act in taking stock of situations and efforts made by government machinery in the enforcement of laws to control and overcome human rights abuse and violation. Furthermore the independent judiciary and judicial activism has come a long way in the protection and promotion of human rights. For example Article 32 gives power to any citizen to move the Supreme Court or High Courts whenever there is an infringement of fundamental rights. The Supreme Court has broadened the scope of Article 32 with the liberal extension of the notion of *locus standi* — which signify the legal right of a person to file a suit or conduct a litigation in a court of law. In one of its judgements Supreme Court ruled that any member of the public having “sufficient interest” can approach the court for enforcing constitutional or legal rights of other persons and redressal of a common grievance. This has paved the way for the wide use of PIL (Public Interest Litigation) by human rights stakeholders which also include social work professionals. Further in case of violation of social legislations it is ruled that that social legislations are passed to ensure availability of fundamental rights to even those citizens who otherwise can not have access to these rights and hence permitted invoking Article 32 in case of violation social legislations and moving directly to higher courts.

It is this constitutional and legal mechanism that social workers should comprehend and apply in their professional commitments and practices and thus contribute in the protection and promotion of human rights in India.

2.7 LET US SUM UP

The proposition that all individuals who inhabit planet Earth share inherent privileges and rights has great attraction. Human rights cover domestic, as well as international circumstances. A human rights perspective upholds both individual rights and collective rights and are universal and inalienable and have spatial (e.g. across communities or nations) and temporal (intergeneration rights) dimensions as well. Human rights starting formally with Universal Declaration of Human Rights are not static but have evolved over the period of time in waves with varying currents or what is called as the three generation of human rights. The nature of each generations of rights reflects the influence of specific philosophy or ideology and hence the dominance and scope of particular for disciplines/professions.

The United Nations Declarations, Covenants and Conventions provide the basic framework and guidelines to the state governments who are signatory to these documents or have ratified these. The state governments in further pursuance of these documents have uphold and enforced these and also formulated their own policies and designed related legal mechanism to ensure effective implementation of human rights. Social work professionals who uphold humanitarian values and are guided by principles of human rights and justice need to understand the legal,

spatial and temporal matrix of human rights as enshrined in international documents and committed by state governments, for smooth practice and promotion of human rights. They should also note that taking action to support human rights many a times means negotiating risks, either with respect to client system or in relation to themselves, and the outcome of these negotiations can not be guaranteed. However, they are only to be cautious of rather than being bamboozled with risk factor. Nevertheless, the social work professionals should also be proud of the fact that a human rights orientation is reflection of social workers commitment to empowerment perspective.

2.8 KEY WORDS

Declaration : In respect to human rights documents, a declaration presents a formal and solemn non-binding statement listing general principles and broad obligations.

Covenant, Convention and Treaty : In contrast to the nonbinding nature of declaration, the United Nations has adopted the use of various instruments that do impose specific obligations on those countries signing and ratifying the instruments. Those instruments are known as covenants, conventions and treaties.

Dignity : The lexical meaning of dignity is 'intrinsic worth'. Thus when UN Charter refers to the 'dignity and worth' of the human person, it uses two synonyms for the same concept. The other instruments speak of 'inherent dignity' an expression that is close to 'intrinsic worth'.

Social exclusive : Being left out of mainstream society through lack of access to social resources.

Social inclusion : Being brought into mainstream society, usually through opportunities that allow individuals to improve themselves.

Notes

- 1) This document takes as its starting point the definition of social work adopted separately by the International Federation of Social Workers (IFSW) and International Association of Schools of Social Work (IASSW) at their respective General Meetings in Montreal, Canada in July 2000 and then agreed as a joint one in Copenhagen in May 2001. The document was approved at the General Meetings of the IFSW and the IASSW in Adelaide, Australia, October 2004.

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UNIT 3 WELFARE ECONOMICS AND DEVELOPMENT

Structure

*Chinmoy Biswal**

- 3.0 Objectives
- 3.1 Introduction
- 3.2 Welfare Economics
- 3.3 Capability Approach to welfare Economics
- 3.4 Health, Education and Women's Empowerment
- 3.5 Let Us Sum Up
- 3.6 Key Words
- 3.7 Further Readings and References

3.0 OBJECTIVES

This Unit is designed to provide you a basic understanding of welfare economics and the rationale behind focus on Health, Education and Women's Empowerment. After reading this Unit, you should be able to:

- define welfare economics;
- define Pareto optimality ;
- discuss social cost benefit analysis;
- discuss the rationale behind public spending on health and education; and
- explain why women's empowerment is a vital component of development.

3.1 INTRODUCTION

In this block so far, you have read about the goal of directive principles of state policy to establish a Welfare State in India. This essentially means that the State has the primary responsibility of welfare of its citizens. Welfare is understood synonymously as 'well being' which may be understood differently in different contexts. The idea is that the goal of social betterment should be to maximize the welfare of the population. As you read in earlier blocks, more wealth is no guarantee of higher welfare if measured in terms of human development. In this Unit, we will discuss the importance of health, education and women's empowerment in the overall well being of a society. Some of these ideas have already been discussed in the units on human development. But here you will get to know how a branch of Economics discipline measures welfare.

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3.2 WELFARE ECONOMICS

Welfare economics is a branch of economics which deals with the measurement of welfare and the distribution of resources in an economic system. It uses microeconomic techniques to simultaneously determine the allocation of efficiency within an economy and the income distribution associated with it. It analyzes *social welfare* in terms of economic activities of the individuals that comprise the society. Individuals are the basic units of a group, a community or a society. Thus social welfare is considered to be the aggregate of individual welfare.

There are two categories of economic analysis: positive and normative. Positive analysis means what is or is to expect, while normative means what ought to be or what is desirable. Welfare economics falls in the latter category and investigates the methods or technique for measuring the desirability of outcomes and obtaining a social order. It is an applied science which gathers together the pertinent theoretical relationships from positive or “pure” economics in terms of a single end: the economic welfare of a community (Rottenberg, 1961). It serves as a guide for public policy.

The structure of welfare economics can be described as follows. The welfare end (goal) is denoted by E. The present state of the economy is S. There are a set of public policies P. Any change in P will lead to a new state of S. Each policy will be considered as a means to reach the end E. The job of welfare economics is to compare the various states reached in terms of the degrees to which they fulfill the welfare goal E.

There are two sides to welfare economics: economic efficiency and income distribution. Efficiency is largely “positive” and deals with how to grow the resources, or the “size of the pie”. Income distribution is much more “normative” and deals with how to distribute the resources, or “dividing up the pie”. Since Economics is considered the science of individuals aiming to maximize their utility or welfare, “welfare economics” has always been concerned with the problem: When can economics say that a society is better off as a result of a certain change? Or alternatively, when can we say that social utility has been increased or maximized (Rothbard, 1956). This question has been answered differently by two approaches to welfare economics, namely the early *neoclassical approach* (*Traditional welfare economics*) and the *New welfare economics approach*.

Traditional welfare economics

The old approach was grounded in Benthamite ethics of utilitarianism (Bentham and J.S. Mill were famous English philosophers). Any action is to be judged in terms of its contribution to overall ‘utility’, which means satisfaction, happiness or pleasure derived. The best criterion for any policy would be to provide the “greatest happiness for the greatest number of people”. The social optimum or maximum social welfare was thus defined as the allocation of resources whereby the sum of individual utilities is the highest.

You may have heard about the famous ‘law of diminishing marginal utility’. It states that marginal utility (i.e. utility derived from the last unit of the commodity consumed) diminishes as one consumes more and more units until it becomes zero and beyond it negative. If you start eating pastries at a friend’s birthday party, for instance, the first pastry tastes very good — giving you the maximum satisfaction. The second pastry may give you more satisfaction if you are very eager, or slightly

less. The third pastry will give you still less satisfaction. This satisfaction (utility) will decrease to a point until you do not want to have any more. If beyond that you continue having, you will be left with a bitter feeling (negative utility). The neoclassical welfare economists applied this concept to measuring social welfare too. A man's marginal utility of money diminishes as his money income increases. Therefore, the marginal utility of a rupee is less to a rich man than what it is to a poor man. So, social utility is maximized when some part of the rich man's money is taken out and given to the poor. This approach advocates a progressive income tax which takes from the rich and gives to the poor, thus maximizing social welfare. This called for an egalitarian distribution of incomes and put the question of equity central in the discussion. **A.C. Pigou** was the chief exponent of this old welfare economics.

However, the main problem with utilitarian approach was its assumptions that utilities can be objectively measured and also compared across people. **Vilfredo Pareto** opposed this notion, arguing that utility is merely an ordinary representation of personal preferences between different consumption bundles. These "number of utilities" can neither be added nor compared across people. He then came up with a technique to measure the optimum social welfare, which is now known as Pareto optimality.

Pareto Optimality

The Pareto criterion is a technique for comparing or ranking alternative states of an economy in terms of their efficiency. Suppose there can be two arrangements (states) of an economy A and B. In the first state A, it is possible to make one person better off without making another person worse off. In the second state B, it is not possible to make someone better off without making someone else worse off. This implies that the resource allocation (distribution) in state B is optimal whereas there is scope for reallocation of resources in state A. So, state B is in a Pareto optimal condition and more efficient than state A. In the Pareto criterion, welfare is said to increase (or decrease) if at least one person is made better off (or worse off) with no change in the positions of others. When it comes to distribution, any economic reorganisation is said to increase social welfare, if the welfare of some persons is increased without any decrease in the welfare of others (Jhingan, 2000).

For example, suppose a new technology is introduced which lowers the prices of food and at the same time, does not harm anyone by causing unemployment to the farmers or reduced profits to the sellers. The introduction of such a technology would be a **Pareto improvement** to achieve greater efficiency.

If a society finds itself in a position from which there is no feasible Pareto improvement, such a state is called a Pareto optimal state. So, a Pareto optimal state is defined as a state from which it is impossible to make one person better off without making another person worse off.

It is important to note that Pareto optimality does not imply equity in resource distribution. Suppose there is a total stock of 100 slices of bread. A gets 20, B gets 30 and C gets 50. Now, can the share of A be increased without taking some from the share of either C or B? So this is a Pareto optimal allocation even though there is high disparity in individual shares.

To say that a society should make movements that are Pareto improvements is a value judgment but it enjoys widespread acceptance. Many would, however,

disagree on such Pareto improvement measures if policies continuously make the rich richer while the poor remain unaffected.

If the economy is not at Pareto optimum, there is some inefficiency in the system. It is always theoretically possible to make everyone better off in moving from a Pareto inferior position to a Pareto superior position. Hence, Pareto optimal states are also referred to as Pareto efficient states and the Pareto criterion is also referred to as an efficiency criterion. Efficiency in this context is associated with getting as much as possible for society from its limited resources. Also note that Pareto criterion can be used to compare two inefficient states as well. That is, one inefficient state may represent a Pareto improvement over another inefficient state.

Criticisms

There has been considerable debate over the questions of assuming Pareto-optimum allocation as social optimum. According to **Wicksell**, there are an infinite number of Pareto-optimal allocations — one of which is the social optimum, while another one is the competitive equilibrium, but they need not be the same. There is no guarantee that the optimum obtained under free competition would be satisfactory from a social point of view or will produce the greatest possible social advantage.

Clearly, as a concept of “efficiency”, Pareto-optimality may seem quite adequate, but as a concept of “optimal”, in any ethical sense, it is definitely not sufficient. As **Amartya Sen** (1970) notes, an economy can be Pareto-optimal, yet “perfectly disgusting” by any ethical standards. It is thus of crucial importance to recall that Pareto-optimality, is merely a *descriptive* term, a property of an allocation, and that, at least *a priori*, there are *no* ethical propositions about the desirability of such allocations inherent within that notion. Thus, there is nothing inherent in Pareto-optimality that implies the maximization of social welfare.

New Welfare Economics

The new welfare economics attacked the earlier utilitarian approach. It contests the notion that individual utilities can be measured or compared. **Lionel Robbins** argued that consequently, social welfare is necessarily a *normative* concern, a value judgment and *thus* not within the scope of economic which is a “science”, as different from ethics. Economics is incapable of deciding as between the desirability of different ends as it is fundamentally distinct from Ethics.

This new school believes that the desirability of an economic system is to be determined in terms of its efficiency: how efficiently resources are allocated. This is measured by the concept of Pareto optimality already discussed. But an additional criterion was developed by **Hicks, Kaldor and Scitovsky** which came to be known as the “compensation principle”.

Compensation Principle

An economy can be said to be efficient when four criteria are satisfied. Efficiency is:

- when no consumer can be made better off without making others worse off,
- when it is impossible to increase the production of any good without reducing the production of other goods,
- when marginal physical product of a factor is the same for all firms producing a good, and
- when the production process exactly matches the consumer wants.

To determine whether an activity is moving the economy towards Pareto efficiency, **two compensation tests** have been developed. Any change usually makes some people better off while making others worse off. So these tests ask what will happen if the winners were to compensate the losers. Using the **Kaldor criterion** (named after Kaldor), an activity will contribute to Pareto optimality if the maximum amount the gainers are prepared to pay is greater than the minimum amount which the losers are prepared to accept. That means social welfare is said to have increased if some people are made better off and others worse off, the gainers from the change could more than compensate the losers, and yet be better off themselves. Under the **Hicks criterion** (named after Hicks), an activity will contribute to Pareto optimality if the maximum amount the losers are prepared to offer to the gainers in order to prevent the change is less than the minimum amount the gainers are prepared to accept as a bribe to forgo the change. The Hicks compensation test is from the losers' point of view, while the Kaldor compensation test is from that of the gainer. If both conditions are satisfied, both gainers and losers will agree that the proposed activity will move the economy toward Pareto optimality. This is referred to as **Kaldor-Hicks criterion**.

Fundamental Theorems

Welfare economics has two fundamental theorems. The **first fundamental theorem** states that “any competitive equilibrium (also called Walrasian equilibrium) leads to an efficient allocation of resources”. The first theorem says in other words what **Adam Smith** described as the “invisible hand of the market”, namely that a competitive market without any external regulation tends towards efficient allocation of resources. It supports a case for non-intervention (by State or any other external agency) in ideal conditions: let the markets do the work and the outcome will be desirable. These ideal conditions, known as perfect competition, do not however exist in the real world. Any particular market situation may differ from these perfect conditions in more or lesser degree, and the degree of this variation must factor into policy choices.

The **second fundamental theorem** is the converse of the first. It says “any efficient allocation can be sustainable only by a competitive equilibrium”. It states that out of the infinity of all possible Pareto efficient outcomes one can achieve any particular one by enacting lump-sum wealth redistribution and then letting the market take over. This appears to make the case that intervention has a legitimate place in policy — redistributions can allow us to select from among all efficient outcomes for one that has other desired features, such as distributional equity. However, it is unclear how any real-world government might enact such redistributions. The second theorem argues that any Pareto-optimal allocation can be achieved as a competitive equilibrium once a social planner undertakes an *appropriate* redistribution of endowments. Consequently, the social optimum is achievable as a competitive equilibrium if accompanied by the appropriate social policy.

Welfare Maximisation and Cost Benefit Analysis

Cost benefit analysis is a specific application of welfare economics techniques, but excluding the income distribution aspects. It is an economic tool to aid social decision-making, and is typically used by governments to evaluate the desirability of a given intervention in markets. The aim is to gauge the efficiency of the intervention relative to the status quo. The costs and benefits of the impacts of an

intervention are evaluated in terms of the public's willingness to pay for them (benefits) or *willingness to pay* to avoid them (costs). Inputs are typically measured in terms of opportunity costs—the value in their best alternative use. The guiding principle is to list all of the parties affected by an intervention, and place a monetary value of the effect it has on their welfare as *it would be valued by them*.

Cost benefit analysis is done while designing any project, whose aim is to maximise the welfare of public. Assessment of the welfare effect can lead to designing different parameters of the project. The attempt is to investigate the net social benefits of a particular project with a particular scale, design and so on. The concept of welfare maximisation is also important in deciding which set of a large group of potential projects should be adopted. Government funds are generally limited. Hence, not all projects can be undertaken. The set of projects to adopt should be chosen to maximise the discounted net social benefits, given the funding constraint. One project may not be appropriate unless some other one is also adopted. However, one should bear in mind the possibilities for improving social welfare by altering individual projects designs. Also, existing prices are likely to be altered to a greater extent when many projects are undertaken than when a single project is implemented. Any cost-benefit analysis or welfare analysis should also consider the interactions among projects where substantial cross-effects may exist. The methodology of applied welfare economics is sufficiently general to lend guidance on these issues at least when a sufficient empirical base of information is available.

Check Your Progress I

Note: Use the space provided for your answer.

- 1) Discuss the origin of welfare economics, and the trajectory it has taken,

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- 2) Discuss the shortcoming of New Welfare Economics.

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3.3 CAPABILITY APPROACH TO WELFARE ECONOMICS

Welfare economics is concerned with the evaluation of the level of individual and social welfare, and the welfare impact of economics and social policies. The welfare of the individuals is represented by utility, usually understood as desire, fulfillment or preference satisfaction. Although there is some debate on the exact properties

and characterisation of the notion of utility, there is general agreement that utility as used in economics is a one-dimensional concept. Social welfare is an aggregation of the individual welfare by means of an aggregator function which can be interpreted as a social welfare function. Social welfare functions can have different forms, implying that some of them will take distributional considerations into account while others will not. If the social welfare function is the maximization of the sum of the individual welfares, then it is a utilitarian social welfare function. In applied welfare economics, utility is routinely measured by monetary variables. This is valid only under restrictive assumptions about the individual and the market.

Lately, welfare economics has undergone a reorientation thanks to the contributions of **Amartya Sen** who was awarded the Nobel Prize in Economics for his “contribution to welfare economics”. Sen is critical of the individualistic utilitarian focus of welfare economics because the same distribution of individual welfare may coexist with very different scores on other dimensions that are important to social evaluation (Atkinson, 1998). A theory of welfare must be based on more than individual utilities. Emphasizing the need to take a broader view, Sen notes that “One of the extraordinary features of standard welfare economics has been the neglect of information about health, morbidity and longevity. Though these variables have often been taken seriously in the development literature, they have typically been ignored in welfare-economic treatises” (Sen, 1986).

Amartya Sen’s approach is known as the capabilities approach about which you have read in some detail in the previous block. According to Sen, the assessment of the standard of living should focus on “neither commodities, nor characteristics, nor utility, but something that may be called a person’s capability” (Sen, 1985).

Most researches in welfare economics use individual utility as the exclusive basis of welfare judgments. This tradition, which has been dominant for the last two centuries, is called “welfarism”. However, in recent decades several important departures from welfarism have been made, by including non-utility factors in the evaluation of individual welfare. The measurement of standard of living, inequality and poverty use much broader basis than just utilities. It is in this departure from welfarism that the capability approach can be situated.

Capability refers to the freedom that a person has in terms of choice of functionings, which refer to what a person can achieve (such as being able to take part in the life of the community). Sen illustrates how a commodity gives a person certain capabilities. For example, a bicycle which has the characteristics of transportation, gives a person the ability to move about in a certain way that he may not be able to do without it. So the transportation *characteristic* of the bike gives the person the *capability* of moving in a certain way. This capability may generate utility, but it is the capability to function that comes closest to the notion of standard of living.

The capability approach may be interpreted in two different ways. It may be concerned with the actual *chosen* functioning, or with the *options* that a person has- the capability set. For example, two people are starving. One has no food to eat while the other is starving out of choice (fasting). The end outcome is the same — starvation. Evaluation in terms of actual functioning (i.e. starvation in both cases) is closer to traditional welfare economics which is concerned with outcomes. But this does not capture the difference between the two people, which is that the second person has the options to make a different choice. That means the process through which outcomes are generated has a significance of its own. The

functionings of a person are thus the set of things that she does in life, whereas the capability of that person is the alternative combination of functionings that this person can achieve and from which she can choose one set of functionings.

The functionings as measures to welfare are much broader and capture its essence in a more fundamental manner than the monetary measure of income. We have already seen in Block 2 that although countries can be ranked in an order in terms of income (as a measure of welfare), the rankings are radically altered when it comes to functionings such as life expectancy, infant mortality and child death rates (refer to GNP versus life expectancy table). Using only these three very basic functionings, Sen shows that the ranking of countries based on GNP per capita can be quite different from the ranking based on the selected functionings. He also applied this approach to examine sex bias in India, finding that females have worse achievements than males for a number of functionings, including age-specific mortality rates, malnutrition and morbidity.

The capabilities approach presents a radical alternative to measuring welfare in terms of money incomes or expenditures. The evaluation of welfare thus measured in terms of functionings differs significantly from those measured in terms of income or expenditure. As a consequence, rankings of welfare levels of countries and regions are different when they are performed according to standard welfare economics or the capability approach (Kuklys and Robeyns, 2004).

Check Your Progress II

Note: Use the space provided for your answer.

- 1) Elucidate the basics of capabilities approach to welfare.

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3.4 HEALTH, EDUCATION AND WOMEN'S EMPOWERMENT

Health and education are now treated as the main goals of development. **Jean Dreze and Amartya Sen** (2006) explain that health and education are valuable for a person's freedom in five distinct ways. Note that in this approach, development is understood as expansion of freedom.

Intrinsic importance: Health and education are valuable achievements in themselves and their presence and absence in a person directly affects his or her effective freedom. A healthy and educated person can lead life in a manner fulfilling to them.

Instrumental personal roles: Health and education are also valuable because of their enabling functions. They can bring economic opportunities of work and income, social status and participation in public life by an individual.

Instrumental social roles: A healthy society is capable of much greater achievements than one which has to deal with ill-health at mass level. Education enables greater participation among people in democratic processes, builds accountability, raises public awareness of utilization of services and also addresses the social issues like the threat of epidemics, environmental degradation and population growth.

Instrumental process roles: Although the aim of schooling is to impart education, the process of schooling can achieve other benefits too, such as bringing back children to school can reduce the incidence of child labour. Schooling also gives a social space for children to grow through interactions with fellows.

Empowerment and distributive roles: Education and health are tools of empowerment for disadvantaged people who have to battle social oppression and exclusion. Greater literacy and educational attainment among such groups as adivasis, dalits and women equip them better to claim their positions and reduce social inequality.

How does health and education become matters of public policy? Social interventions in provision of health and education are required to overcome the market failures in supplying these resources universally. Private health care and education can reach only a section of the population while the majority of population will remain untouched by it.

Public provision of social security, health and education is practiced by a state structure called Welfare State. It is not a socialist state, but one that spends considerably from its national income on health and education of its people, besides taking care of the well being of elderly people. The expenditure is raised through taxation of the affluent people. Even in the so called market economies of North America and Europe, public expenditure accounts for nearly 35 to 40 percent of the GDP. Scandinavian countries like the Netherlands, Denmark, and Norway have sent an ideal in this mechanism whereby the State spends over 23 percent of its GDP on welfare expenditures. Western European countries are the early industrialised ones but they built a structure of high public expenditure in health and education. Even South East Asian countries like Korea, Taiwan, and Malaysia which are late industrialised countries emphasized on these two crucial areas of development. As a result their labour productivity is very high and the high levels of human resource development have enabled the economies of these countries to surge ahead of others.

How a focus on health and education has contributed to overall welfare can be ascertained from the famous “Kerala Model” of development. With moderate levels of economic growth, Kerala is far ahead in social indicators — while India’s life expectancy is around 63 years which is much lower compared to China’s 70 years – Kerala’s life expectancy is 74 years, much higher than China’s. Likewise, the infant mortality rate of 71 per thousand live births in India is quite higher than China’s 30, however Kerala’s rate is 14-much lower than China’s. With regard to literacy rate, the entire India’s figure is lower than China’s while Kerala’s figure remains significantly higher than China’s. Even female literacy rate in Kerala is higher than even every individual province of China. As **Dreze and Sen** (2006) point out, such development in social parameters have been possible thanks to the State committing itself to build an efficient primary health care and school education systems.

Empowerment of disadvantaged groups, particularly women, is a key element to fight against poverty in the process of development. Empowerment has been defined as ‘the enhancement of assets and capabilities of diverse individuals and groups to engage, influence and hold accountable institutions which affect them. Social inclusion is the removal of institutional barriers and the enhancement of incentives to increase the access of diverse individuals and groups to assets and development opportunities’ (Bennett, 2002).

Empowerment as a process

Gender has become an important aspect of development after major international organizations have devoted attention to women’s issues. Studies have shown that investments in women yield high returns in productivity, child health and family welfare.

Empowerment is a process through which one gets control over resources, opportunities to exercise political power to reach the goal. According to **Kabeer** (2001) ‘choices’ comprise three interrelated components, namely resources, agency and achievements. Resources and agency are the two most common components of empowerment. There are plenty of variables which are often considered as proxies for empowerment. For instance, education and employment are described as enabling factors of empowerment. Achievement refers to welfare. The empowerment process cannot be put to practice without some achievement as the targeted goal. In the context of evaluation, achievements are best treated as outcomes of empowerment. Through the process of empowerment, the outcomes may be seen in women’s status, strategic positions or welfare. Agency is the essence of women’s empowerment which can help to improve their positions through the actions of women themselves.

Gender is an important aspect in understanding the socio-cultural, political and economic contexts in which development takes place. When women internalise their subordinate status and view themselves as persons of lesser value, the sense of their own rights and entitlements is diminished. You have already read these in the previous block.

Check Your Progress III

Note: Use the space provided for your answer.

- 1) It is important for Governments to intervene to secure health and education of the people. Discuss.

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3.5 LET US SUM UP

In this Unit, we discussed the basic tenets of welfare economics and the three approaches to measure welfare, namely the traditional utilitarian, Pareto optimality criterion and the Kaldor-Hicks criteria. The limitations of traditional utilitarians

and the New Welfare Economics were also discussed. An alternative method of measuring welfare has been devised by Amartya Sen, whose capabilities approach places value on 'functionings' instead of income as an index of welfare. Health, Education and women's empowerment are vital areas of development where there is a case for state intervention for public expenditure.

3.6 KEY WORDS

Welfare Economics : It is a branch of economics that uses microeconomic techniques to simultaneously determine allocative efficiency within an economy and the income distribution associated with it.

Pareto Improvement : A movement from one allocation to another that can make at least one individual better off without making any other individual worse off is called a Pareto Improvement.

3.7 FURTHER READINGS AND REFERENCES

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UNIT 4 INDIAN JUDICIAL SYSTEM

Structure

*Ranjana Sehgal**

- 4.0 Objectives
- 4.1 Introduction
- 4.2 The Fountainhead of the Indian Judicial System
- 4.3 The Indian Law
- 4.4 The Organization of the Judiciary: The Courts of India
- 4.5 Civil Procedure
- 4.6 Criminal Procedure
- 4.7 Why You should Know About Legal Practitioners
- 4.8 Let Us Sum Up
- 4.9 Key Words
- 4.10 Further Readings and References

4.0 OBJECTIVES

This Unit focuses on the Indian Judicial system, as it exists in India. The purpose is to make the learner understand its different faces. After studying this Unit you will be able to:

- understand how the Constitution serves as a fountainhead of the Indian judicial system;
- enumerate the main sources of law;
- analyze how our judicial machinery is structured and organized at different levels;
- understand the procedures prescribed under the law for civil and criminal cases; and
- outline the main duties and responsibilities of the legal practitioners.

4.1 INTRODUCTION

The Government of India, officially referred to as the Union Government and commonly known as the Central Government, is the governing authority of the Republic of India and was so established by the Constitution. To carry out the judicial responsibilities of our vast and diverse nation, the Indian judicial system is structured like a federal hierarchy. The Supreme Court of India is at the apex, followed by a number of High Courts for each state. Each High Court has numerous District Courts and tribunals under it. The majority of India's population which resides in its villages falls under the jurisdiction of the Panchayats. The basic civil and criminal laws governing the citizens of India are set down in the

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Indian Penal Code, Criminal Procedure Code, and code of civil procedure. The Union and individual state governments consist of executive, legislative and judicial branches. The legal system as applicable to the federal and individual state governments is based on the English common and statutory law. There are broadly two categories under which the Indian law operates namely the Indian civil law and the criminal law. The Indian civil law takes cognizance of its multi-cultural population and imbibes the diverse religious sentiments. While location, religion and history play a role in judgments under the Indian civil Law, the criminal law is binding across all religions and calls for a much stricter adjudication.

4.2 THE FOUNTAIN HEAD OF THE INDIAN JUDICIAL SYSTEM

Indian Constitution

Historically, India was a collection of kingdoms and empires constantly at war with each other. However, modern India has evolved with the British rule. They ruled India till 1947, when India became an independent nation. As a consequence of over a century of subjugation to British rule, a vast portion of our law and legal institutions are based on British law and legal system.

The Indian Constitution was framed by the Constituent Assembly and came into effect from 26th November 1949 (Article 1). The Indian Constitution was in part modeled on the Government of India Act 1935 (an Act passed by the British Parliament) and the Constitutions of other nations such as the Irish Constitution. It is divided into parts and further into chapters and articles. The Constitution provides for a quasi-federal nation consisting of a Union of States (Article 1). The Constitution of India has as its goal social transformation for the welfare of the people and provides the directions as well as the legal and administrative framework and processes for the same. The three main organs of the State, namely, the Legislature, the Executive and the judiciary have to perform their functions in a well coordinated manner, supplementing each other to achieve the common goal of unity and integrity of the nation and its people.

The Constitution provides for separate executives and legislatures for the Union and for each of the States and demarcates the powers of each. The President acts as the head in all executive functions of the Union Government and performs these functions with the aid and advice tendered by the Council of Ministers, provided the advice is not 'ultra vires' of the Constitution. The President can return any proposal or call for such information pertaining to the administration of the affairs of the Union, as he deems fit and it is the Constitutional duty of the Prime Minister and the concerned minister, to comply with the directions. The President can in case of default take action against the defaulter u/s 9(1) of the Representation of Peoples Act, 1951 for disqualification. This is an inbuilt mechanism in the Constitution to maintain discipline among the elected representatives.

The Constitution itself can be amended by a special majority of the union legislature. Amendments to the provisions of the Constitution dealing with the States require the consent of the legislatures of at least half of the States (Article 368). The Constitution can be amended fairly and extensively, but the amendments cannot violate the basic features of the Constitution such as the independence of the judiciary, the sovereign democratic and republican structure of the nation, the rule of law and free and fair elections.

The Union Executive

The Union Executive is headed by the President of India who is the nominal head of the State. The real power lies with the Union Council of Ministers (the cabinet) headed by the Prime Minister. The President is elected for a period of 5 years by an electoral college consisting of the members of the Union and State legislatures (Articles 55 & 56). A President can be re-elected for any number of terms and can be impeached for violation of the Constitution (Article 61 and 54). A Vice-President is elected for a period of 5 years by the members of the Union Legislature and can be removed by a mere resolution passed by both the Houses of the Union legislature (Articles 63-67). The Prime Minister is, generally, the leader of the political party commanding a majority in the House. The Prime Minister, who is also the head of the Council of Ministers, is the most powerful person in India.

The Union Legislature

The Union legislature (the Parliament) is bicameral in nature, consisting of an Upper House called the Council of States or the Rajya Sabha and a Lower House called the House of People or Lok Sabha. The Rajya Sabha is largely comprised of representatives of the States elected by the members of the legislatures of the States and is a permanent house, with one-third of its members retiring every second year. The Vice-President is its Chairman. The Lok Sabha on the other hand, consists of members chosen by the citizens of India, through direct election. The House of the People or the Lok Sabha continues for a term of five years, unless dissolved earlier.

The State Executive

The Constitutional structure of the State is by and large similar to that of the Union. The executive power of each State is vested into the Governor of the State. The Governor of each State is appointed by the President on the advice of the Union Council of Ministers. The Governor is appointed for a term of five years but holds office during the pleasure of the President and can be removed any time.

The Governor acts on the advice of the State Council of ministers headed by the State Chief Minister. The Chief Minister is normally the leader of the political party commanding a majority in the House of the State Legislature.

The State Legislature

The legislature of most States consists of only one House (the Legislative Assembly) whose members are directly elected by Indian citizens residing in that State. The Legislature Assembly is elected for a period of 5 years, unless dissolved earlier. The legislature power of the State Legislature extends to all matters mentioned in the State List and in the Concurrent List of the seventh schedule to the Constitution. The legislative power of the State extends only to the territory of that State.

Division of Legislative Powers

“The Constitution has devised a structure of power relationship with checks and balances and limits are placed on powers of every authority or instrumentality under the Constitution” (A.I.R. 1980SC1824) The division of legislative power between the union and the States is a distinguishing feature of the Constitution. The Legislative power of Union Legislature extends to all matters mentioned in the

Union list and in the Concurrent list of the seventh schedule but does not extend to any of the matters mentioned in the State list of the seventh schedule. It also has the residuary legislative powers. Legislative enactments of either the Union or the States are often challenged on the ground that the enactments are beyond the legislative competence of the legislative authority, which is then decided by the higher judiciary.

Check Your Progress I

Note: Use the space provided for your answer.

- 1) How are legislative powers of the Union and States enshrined in our Constitution?

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4.3 THE INDIAN LAW

Primary Source

The law or Enactment passed by the Parliament or the State Legislature is the primary source of law in India. In addition to these the President and the Governor have limited powers to issue ordinances when the Parliament or the State Legislature is not in session. These ordinances will lapse in six weeks from the re-assembly of the Parliament or the State Legislature. These laws are later published in the Official Gazette (The Gazette of India or the State Gazette). Most enactments delegate powers to the executive to make rules and regulations for the purposes of the Acts. These rules and regulations are periodically laid before the legislature (Union or State as the case may be). This subordinate legislation is another source of law.

Manual of Central Laws is an exhaustive collection of laws enacted by the Parliament together with decisions of the Supreme Court and the High Court on these laws.

Secondary Source

There is another important secondary source of law, which is the judgments of the Supreme Court and High Court and some of the specialised Tribunals. The judgments of these institutions not only decide legal and factual issues between the parties but in the process interpret the law. The Constitution provides that the law declared by the Supreme Court shall be binding on all courts within India, as they constitute binding precedents to be followed by all the other courts and tribunals. The Supreme Court is not bound by its own decisions. However, decisions of a larger bench of the Supreme Court are binding on benches of equal or lesser strength. The Supreme Court has used its powers to venture into judicial activism going far beyond the traditional view that courts should only interpret the law and not make new law. Judgments of the Supreme Court on public interest litigation, protection of the environment and protection against arbitrary State action can be viewed more as (judge-made law), than mere technical interpretation of the law.

The judgment of a State High Court is binding on itself and on all subordinate courts and tribunals in the State. However, a larger bench of the High Court can overrule a decision of a numerically smaller bench. Judgments of a High Court are not binding on another High Court or on courts subordinate to another High Court, but are of great persuasive value. Judgments of specialized tribunals are binding on itself but not on the courts or other tribunals.

Check Your Progress II

Note: Use the space provided for your answer.

- 1) Describe the main sources of law in India?

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- 2) What is precedent and judge made law?

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4.4 THE ORGANIZATION OF THE JUDICIARY: THE COURTS OF INDIA

The judicial system of independent India began under the British, and its concepts and procedures resemble those of Anglo-Saxon countries. The Indian justice system, although administered separately by the Union and the States, consists of a unitary system at both state and federal level.

Our Judicial Branch can be classified as:

- | | |
|-----------------------|-----------------------|
| 1. National Judiciary | 1. Higher judiciary |
| 2. State Judiciary | or 2. Lower Judiciary |

If we look at the first classification, the National judiciary comprises of the Supreme Court of India, located at Delhi and the State judiciary includes the high Courts of each State, followed by the District and Sessions courts and other lower courts. Alternatively, if we classify the judicial branch into Higher and Lower judiciary, the Supreme Court and the High Courts, both fall in the first category, whereas lower judiciary comprises ordinary civil and criminal courts. While the Higher Judiciary is regulated by the Constitution, the lower judiciary derives its jurisdiction from the legislation enacted by the Parliament supplemented by the State law.

National Judiciary

Today, almost all trials are conducted by the judges and there is no jury. The Judiciary is independent from the executive in India. Although the Parliament has

powers to impeach a judge of the Supreme Court or the High Court, this is a power which has hardly been exercised in practice. Judges of the Supreme Court and the High Court enjoy enormous freedom from political and other interference during their tenure.

The Supreme Court has original, appellate and advisory jurisdiction. The Supreme Court in India is the ultimate interpreter of the Constitution as well the laws of the land and is the ultimate court of appeals for the nation. It hears appeals from the High Courts and acts as a court of review over subordinate tribunals. It has appellate jurisdiction over all civil and criminal proceedings involving substantial issues concerning the interpretation of the Constitution. Its exclusive original jurisdiction also extends to any dispute between the Government of India and one or more states or between two or more states, if the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends. In addition, Article 32 of the Indian Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It can also issue writs in the nature of habeas corpus, mandamus, prohibition, and certiorari and quo warranto for the enforcement of fundamental rights. Supreme Court consists of a Chief Justice and such number of associate judges as the Union Legislature may legislate. The judges of the Supreme Court are appointed by the President in consultation with the Chief Justice of India. The senior-most judge is normally appointed as the Chief Justice. A judge of the Supreme Court holds office until he attains the age of 65 years. The appointments do not require Parliament's concurrence. He could be removed earlier by a presidential order charging "proved misbehavior or incapacity", by impeachment before both the Houses of Parliament, where each house of Parliament passes, by a vote of two-thirds of the members in attendance and a majority of its total membership.

The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one state high Court to another state high court, or from a subordinate court to another state high court. Although the proceedings in the Supreme Court arise out of the judgments or orders made by the subordinate courts, of late the Supreme Court has started entertaining matters in which interest of the public at large is involved. Such an initiative is known as public interest litigation or social action litigation and is perhaps unique to the Supreme Court of India, which has been exercising this extraordinary jurisdiction. The Court may be moved by any individual or group of persons either by filing a writ petition or by addressing a letter to the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. The Supreme Court is also empowered to give advisory rulings on issues referred to it by the President and has wide discretionary powers to hear special appeals on any matter from any court except those of the armed services.

State Judiciary

The state judiciary consists of high courts and subordinate courts for each State.

The High Court stands at the head of a State's judicial administration. The Union Territories come under the jurisdiction of different state high courts. Each high court comprises of a Chief Justice and such other judges as the President may, from time to time, appoint. Each high court has powers of jurisprudence over all subordinate courts within its jurisdiction, namely the district and sessions courts and other lower courts. It can call for returns from such courts, make general

rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be maintained. The high court hears appeals from the subordinate courts and tribunals and also acts as a court of revision for them. The high court like the Supreme Court has powers to issue writs of habeas corpus, certiorari etc. and also entertains applications on Public Interest Litigation. A high court judge holds office till the age of 62 years and can be impeached in the same manner as a Supreme Court judge.

Writs

Writ is a particular prayer seeking a specific relief. Writs are commands issued by the High Courts and the Supreme Court to do or not to do a certain thing. It could be a direction to a Government authority (mandamus), a direction to a lower court to stop a hearing (prohibition), an order quashing a judgment (certiorari), a direction to produce a detained person (habeas corpus), a direction disqualifying a person from holding a Government post(quo warranto). Writ petition to the Supreme Court under Article 32 of the Constitution would lie in case of any act or omission of the State or any of its agencies in case of the violation of the fundamental rights. A writ petition can be filed in the high court in case of the violation of any right, challenging the validity and propriety of an order or in exercise of supervisory jurisdiction over the courts subordinate to it, under Articles 226 and 227 of the Constitution of India. A writ should not be filed when the party has a right to appeal or an alternate remedy.

Lower Judiciary

Subordinate courts are divided into criminal and civil courts. The district and session courts comprise the highest level of courts in a district for civil and criminal cases, respectively. A district judge presides over civil cases, whereas a session judge, over criminal cases. These judges are appointed by the Governor of the state in consultation with the State's high court. There is a hierarchy of judicial officials below the district level who are selected through competitive examination by the state's public service commissions. The nomenclature, jurisdiction and structure of the criminal courts are derived from the Criminal Procedure Code, a central law and that of ordinary civil courts by the Code of Civil Procedure in force in each State. Other lower courts are regulated by the special and local enactments, relevant to them. For example special judges are appointed under the Criminal Law Amendment Act, 1952 to deal with cases under the Prevention of Corruption Act, 1947. Family Courts have been constituted under the Family Courts Act, 1984 to deal with family matters consumer forums were set up under Consumer Protection Act, 1986 among others. Claims for compensation caused by motor accidents are decided by the Claims Tribunals constituted under the Motor vehicles Act of 1939. Specialized tribunals are established under various enactments such as the Income tax Appellate Tribunal, the Company Law Board, the Sales Tax Appellate Tribunal, the Central and State Administrative Tribunals, the Debt Recovery Tribunal. All these tribunals are under the superintendence of the High Court within whose territorial jurisdiction they function. Thus, apart from the existing courts, special courts can be created by the competent legislative authorities, whenever required.

Civil Courts

According to the Code of Civil Procedure States are divided into districts and within each, there is a district Court presided over by a district judge who is the

head of the judiciary, having unlimited original civil jurisdiction over the districts. The courts inferior to the district court are called differently in different States. Civil cases at the sub district level are filed in *sub district or munsif courts*. The civil courts consist of munsif courts and courts of subordinate judges. Appeals normally lie from these courts to the district Court and then to the high court. A litigant is normally entitled to two appeals-one appeal on facts and law and a second appeal on law alone.

Criminal Courts

The criminal courts consist of magistrates of first or second class and the court of session. Appeals lie to the court of session and then to the High Court. Lesser criminal cases are entrusted to courts of magistrates functioning under the sessions Judge. The following structure of the criminal courts exists at the district level under the Code of Criminal Procedure, 1973:

- 1) The Court of Session headed by the Sessions Judge
- 2) The Court of Chief Judicial Magistrate
- 3) The Courts of Magistrates of the First Class
- 4) The Courts of Magistrates of the Second Class
- 5) Courts of Executive Magistrates headed by the District Magistrate

In the metropolitan areas the Courts of Metropolitan Magistrates headed by the Chief Metropolitan Magistrates have original jurisdiction.

At the village level, disputes are frequently resolved by Panchayats that are appealable to the District and Sessions Court.

Check Your Progress III

Note: Use the space provided for your answer.

- 1) Explain the jurisdiction and powers of the Higher Judiciary and evaluate the extent of its independent functioning ensured by our Constitution?

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- 2) Describe the structure of the criminal and civil courts in our country?

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- 3) What is a writ and explain different kinds of writs.

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4.5 CIVIL PROCEDURE

The civil rights emanate from the Constitutional Law, personal Law, customary Law, common law and precedents. The procedure for filing suits under the civil law is laid down in the Civil Procedure Code, 1908 (CPC). While the manner of leading evidence in both criminal and civil procedure is governed by the Indian evidence Act, 1872, other Acts relevant to civil remedies are the Court Fees Act, 1870, the Specific Relief Act, 1963, and the Limitation Act, 1963.

What a Plaintiff or Petitioner should Know?

Jurisdiction is the power of a court to entertain a petition or proceeding and execute such order as may be consequently passed. A court can entertain a case only when it has 'jurisdiction' which in turn is determined by the following two factors:

Place: the correct place from where the case can be filed

Forum: the correct court in which one should file one's case

What should a plaint contain?

Under civil law, a person against whom a civil wrong has been done can file a suit in the civil court having jurisdiction. While filing the plaint, the plaintiff should ensure that it should contain the following:

- Name of the court in which the suit is to be filled;
- Name, description and place of the residence of the plaintiff and the dependant;
- Whether the plaintiff/defendant is a minor or of unsound mind;
- A detailed chronological description of the facts which led to the filing of the suit;
- Specific and detailed pleadings;
- For every prayer, separate averments justifying the prayer;
- Cause of action;
- Clause on jurisdiction;
- Value of the suit;
- Clause on limitation;
- Relief sought/ prayer
- Affidavit duly signed, verified and affirmed in support of the plaint;
- List of documents with document exhibited in support of averments made in the plaint;

An additional application for interim relief may also be filed along the main plaint. Further the plaintiff must take care not to miss the deadline for filing the complaint which can vary for different cases. Requirements of the plaint may differ according to the rules of different High Courts.

Summons signed by the judge or the appointed officer may be issued to the defendant(s) demanding that he or she may appear in the court. A copy of the plaint or the petition has to be attached to the copy of summons. The summons state the date and place where the defendant has to appear.

Written Statement

On receipt of the summons, it is mandatory to file a written statement within thirty days. The written complaint should comprise the following:

- Preliminary objections
- Detailed facts according to the defendant
- Specific denial of each and every allegation in the plaint. An allegation not denied is taken to be admitted
- List of documents in support of the written statement.

Enforcement of Court's Orders

Contempt of Court: In the case of disobedience of the court's orders the aggrieved party can file petition under section 2 of the Contempt of Court's Act, 1971 as disobedience constitutes an offence of civil contempt.

Executive petition: The final judgment given by the civil court is called a 'decree'. This decree can be implemented by filing an Executive Petition.

Check Your Progress IV

Note: Use the space provided for your answer.

- 1) What are the things a plaintiff should know for filing a civil suit?

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4.6 CRIMINAL PROCEDURE

The law on criminal procedure is universally applicable in India except the State of Jammu and Kashmir and some areas of North-East and is contained in the code of Criminal Procedure. This code is applicable to offences under the Indian Penal code, under the State and Central laws, other than those special laws that provide a different procedure on a particular matter. The Criminal Procedure Code is a very comprehensive law that covers various aspects of pre-trial and trial stage, such as arrest, detention, investigation, confessions, various classes of offences and matters such as, availability of bail, compounding of offences etc. It also provides for the jurisdiction of criminal courts. As it is not possible to have a detailed discussion on the code, an attempt is made here to acquaint the learner with some of its vital aspects.

What is an F.I.R.?

The term First Information Report (F.I.R.) has not been defined under the Cr.P.C. but to put it simply, it is that information which is given to the police, first in point of time. The report first recorded by the police relating to the commission of a cognizable case is called the FIR. This is usually made by the complainant or someone on his behalf and is that information on the basis of which the investigation with regard to the crime commences. Though, it does not constitute as substantive evidence, it is important as it conveys the earliest information about the commission of crime.

Arrest and Detention

A citizen can be arrested by temporarily curtailing the freedom of movement and liberty where there is a prima facie involvement in communication of crime or intercept in criminal proceedings. Arrest can be done with warrant without a warrant. A warrant is an instrument issued by a competent Magistrate authorizing a police officer who has the power to make an arrest or a seizure or a search, to make such an arrest or seizure or search.

Cases where police officer can arrest without warrant

- 1) when a person is suspected of cognizable offence.
- 2) when a person is a proclaimed offender
- 3) when a person is found carrying implement for house breaking or stolen property
- 4) deserter from the armed forces

Rights of a person when arrested

The Constitution lays down that “no arrested person can be detained in custody without being informed soon of the grounds for arrest, nor can be denied the right to consult and defended by a legal practitioner of his choice.” This article 22(1) of the Constitution finds an echo in the Section 50 of the Criminal Procedure Code.

The code further provides that a police officer cannot detain in custody a person arrested without warrant beyond a reasonable time. This period should not, in the absence of a special order of a magistrate, exceed 24 hours, including travel time.

Procedure for Investigation of offences

In case of cognizable offences, the information of the offence can be given to the police or a complaint can be made to a competent Magistrate. In case of non cognizable offence, it cannot be directly investigated by the police, hence, a complaint can be made to a competent Magistrate, who can then hold an enquiry or order the police to investigate. On April 27, 1994, the Supreme Court issued a ruling that enhanced the rights of individuals placed under arrest by stipulating elaborate guidelines for arrest, detention, and interrogation. (www.indianchild.com/judicial_system_india.htm).

Steps of Investigation

In the case of cognizable offence the following steps are usually followed:

- Registering an FIR — First Information Report with the police. A copy has to be given to the informant, free of cost.
- on the spot investigation
- measures for arrest of the offender
- calling of witnesses to the police station and recording their statements
- getting the confession or statement of the accused as the case may be
- search of premises, if required
- getting from the magistrate an order for remand of the accused to appropriate custody
- On the completion of the investigation sending the report of investigation to the magistrate.

Commonly Used Terms We Should Know

1) **Bailable and non-bailable offences**

Bail is release of persons who are accused of an offence pending the trial. Bailable offences are those for which a person may obtain bail as a matter of right. Non-bailable offences are those for which bail may be granted or refused by the court in the exercise of its discretionary power. Non-bailable offence does not mean that a person cannot get bail, however, he cannot obtain it as a matter of right. Whether an offence is bailable or non-bailable is given in the classification of offences in the first schedule to the Code of Criminal Procedure.

2) **Summons and warrant cases**

A warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. A summons case means a case punishable with imprisonment for two years or less. A case, thus assumes the character of a summons or warrant case depending on the nature and measure of the punishment which the law attaches to the offence. Serious cases are thus, tried under the procedure laid down for the warrant cases and minor cases under the procedure prescribed for summons cases. While in the summons no charge may be framed, in a warrant case a formal charge is necessary. In a summons case the complainant may withdraw his case with the permission of the Court and on such withdrawal the accused is acquitted. In a warrants case no such withdrawal is permitted, except when the offence is a compoundable one.

3) **Compoundable and non-compoundable offences**

Compounding of an offence denotes that the dispute between the parties has been settled or adjusted by an agreement. Compoundable offences are those offences which can be compounded or compromised. The legal effect of composition is an acquittal of the accused with whom the offence has been compounded. Compounding once made cannot be withdrawn. In a non compoundable case a compromise without the sanction of the court cannot be made. The court exercises the discretion whether in the interest of justice the parties should be allowed to compromise.

4) Cognizable and non-cognizable offences

Cognizable offences are serious offences in which the state undertakes the responsibility to prosecute the offender as these are considered crimes against the State. For cognizable offences arrest can be made without a warrant, on the basis of suspicion. Here it is not necessary that the victim sets the prosecution in motion. Usually to arrest a person, the police should have a warrant from the magistrate. Such offences are called non cognizable offences. Non-Cognizable offences are offences for which a police officer cannot arrest the accused without a warrant or without the orders of a Magistrate.

Principles of Natural Justice

It is a settled law that anybody or any authority that performs judicial or quasi-judicial functions must observe a certain minimum judicial procedure so as to ensure at least a semblance of justice to the parties. This minimum judicial procedure is that the authority is bound to observe the principles of Natural Justice, whether or not it is expressly laid down in any law. Natural justice is not capable of precise definition, however, two rules have long been recognized and established as fundamental to the concept. The two fundamental rules of Natural Justice are:

1) Audi alterem partem rule

This term literally means 'hear the other side also'. It means that 'both parties must be heard' or that no man should be condemned unheard. The affected party must be afforded a full and fair opportunity of being heard in defence. The opportunity of being heard must be effective and not an empty formality. This means each party must have reasonable notice of the case it has to meet and a reasonable opportunity of presenting the case.

2) Nemo Judex in Causa Sua

The second rule of Natural Justice literally means that 'no man shall be a judge in his own cause or matter'. A person occupying the seat of judgment must act impartially and with a sense of justice. He should not have any interest or bias in favour of any party. For instance the presumption of bias or interest will arise where the judge is personally related to one of the parties or he has a pecuniary interest in the subject matter in dispute.

Check Your Progress V

Note: Use the space provided for your answer.

- 1) Explain in brief the procedure for the investigation of cognizable offences as provided in the Indian criminal law?

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- 2) Distinguish between compoundable and non compoundable offences.

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4.7 WHAT YOU SHOULD KNOW ABOUT LEGAL PRACTITIONERS?

The legal practitioners have a great role to play in the efficient working of our judicial system. They should not only maintain their respectability but actively participate and facilitate the disposal of cases. They are the torch bearers to the judiciary as well as the legislature. They can elevate the legal profession to a level where it commands public faith and trust by adhering to a code of conduct and honestly discharging their duties.

Right to services of lawyer: The accused has the right to engage a lawyer in its defense. If he cannot afford to do so then the court can assign a lawyer for his defense at the expense of the State. Particularly in criminal cases, the state provides lawyer at the trial of those who are poor and unable engage a lawyer.

Legal Practitioners: Lawyers are the basic legal practitioners and the only persons allowed audience as a matter of right in the civil and criminal courts. A lawyer must possess a degree in law from a recognized university and has to be enrolled as an advocate with the Bar Council of the State in which he intends to practice. A lawyer is subject to disciplinary proceedings by the State Bar Council against whose decision an appeal lies to the Bar Council of India. The Bar Council consists of ex-officio and elected members from the practitioner lawyer. Chartered Accountants, Company Secretaries and other persons with prescribed qualifications are allowed to appear before most of the Tribunals. Some Tribunals like the Family Courts expressly bar lawyers from appearing except with the permission of the tribunal. Legal practitioners are under an obligation to aid the administration of justice and abide by a code of conduct in their legal practice. However, of late we have seen an erosion of the traditional values of the legal profession. It is therefore, imperative that we know a few facts about the legal practitioners such as their duties, the rules and regulation and the code of conduct they should follow. Unless we are aware of our rights, we cannot ask for them when we engage their services. Till the Advocate Act, 1961 was introduced, various classes of legal practitioners existed in the various courts. The Act has introduced two autonomous bodies, the Bar Council of India and the State Bar Council, the former at the national and the latter at the state level.

Important Functions of Bar Council

- prescribe standards of professional conduct for advocates
- safeguard the rights and interests of advocates
- promote legal reforms
- promote legal education
- supervise the functioning of the State Bar Councils
- recognize degrees of law
- organize legal aid to the poor

Both the councils have the power to constitute disciplinary, executive, legal aid and other committees, with specific duties to perform.

Duties of Advocates

Members of the legal profession enjoy a high status and this carries with it equally high responsibilities. An advocate is expected to uphold the interests of the client and perform important professional tasks, some of which are enumerated below:

- An advocate should not refuse to take up a case, if paid a fee consistent with standing
- once accepted, he or she should not withdraw without sufficient cause. If it is done then the fees should be partially refunded
- must not act on the advise of anybody, except the client
- if he has any relation with the opposite party in the litigation, he should not conceal it from the client
- should not plead or appear for the opposite party.
- should not purchase property sold in execution of a court order, in a case for which he appeared, for his own benefit

Lawyers must ensure that professional standards are maintained and legal ethics do not take a backseat.

Check Your Progress VI

Note: Use the space provided for your answer.

- 1) What are the duties of the advocates and explain why it is important for us to know about the provisions regulating the conduct of the legal practitioners?

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4.8 LET US SUM UP

The unit aims at developing an understanding in the learner about our Indian judicial system. To carry out the judicial responsibilities of our vast and diverse nation, our Indian judicial system is structured like a federal hierarchy. The Supreme Court of India is at the apex, followed by a number of high courts for each state. Each high court has numerous district courts and tribunals under it. The majority of India's population which resides in its villages falls under the jurisdiction of the Panchayats. The division of legislative power between the union and the States is a distinguishing feature of the Constitution. The Legislative power of Union Legislature extends to all matters mentioned in the Union list and in the Concurrent list of the seventh schedule but does not extend to any of the matters mentioned in the State list. It also has the residuary legislative powers. Legislative enactments of either the Union or the States are often challenged on the ground that the enactments are beyond the legislative competence of the legislative authority, which is then decided by the higher judiciary. Enactments passed by the Parliament or the State Legislatures are the primary source of law in India. There is another important

secondary source of law, which is the judgments of the Supreme Court and High Court and some of the specialised Tribunals. The Indian justice system, although administered separately by the Union and the States consists of a unitary system at both state and federal level. Our judicial branch can be classified into higher and lower Judiciary. Higher judiciary comprises the Supreme Court and the High Courts whereas lower judiciary comprises ordinary civil and criminal courts. While the higher judiciary is regulated by the Constitution, the lower judiciary derives its jurisdiction from the legislation enacted by the Parliament supplemented by the State law. The Supreme Court has original, appellate and advisory jurisdiction. The Supreme Court of India is the ultimate interpreter of the constitution and the laws of the land and is the ultimate court of appeals for the nation. It hears appeals from the High Courts and acts as a court of review over subordinate tribunals. It has appellate jurisdiction over all civil and criminal proceedings involving substantial issues concerning the interpretation of the constitution. The High Court stands at the head of a State's judicial administration. Each High Court comprises a Chief Justice and such other Judges as the President may, from time to time, appoint.

Subordinate courts are divided into criminal and civil courts. The district and session courts comprise the highest level of courts in a district for civil and criminal cases, respectively. District Judge presides over civil cases, while session Judge over criminal cases. These judges are appointed by the Governor of the state in consultation with the state's high court. There is a hierarchy of judicial officials below the district level.

The basic civil and criminal laws governing the citizens of India are set down in major parliamentary legislation, such as the Indian Penal Code, Criminal Procedure Code and Civil Procedure Code etc. The Criminal Procedure Code is a very comprehensive law that covers various aspects of pre-trial and trial stage, such as detention, investigation, confessions etc. The learner has been acquainted with some vital aspects such as various classes of offences and matters such as arrest availability of bail, compounding of offences. The civil rights emanate from the Constitutional Law, personal Law, customary Law, common law and precedents. The procedure for filing suits under the civil law is laid down in the Civil Procedure Code, 1908 (CPC). Little less known facts about advocates such as their code of conduct and duties have been discussed in brief.

The judicial system retains substantial legitimacy in the eyes of many Indians despite its politicization since the 1970s. In fact, as evident from the rise of social action litigation in the 1980s and 1990s, many Indians take recourse to the courts to redress their grievances with social and political institutions. The contradiction between the principles of parliamentary sovereignty and judicial review that is embedded in India's constitution has been a source of major controversy over the years but role of Indian judiciary in our country's growth needs to be recognized and saluted.

4.9 KEY WORDS

- Court Fees** : Court fees is the money one has to pay while filing certain types of suits in the court which are determined by the Court Fees Act, 1870.
- Letter Patents Appeal** : Internal appeals within the High Court, the aggrieved party can appeal against the decision of the single judge to the Division Bench comprising two judges.

Offence	: An act of default or conduct, which is liable to punishment according to law.
Plaint	: The document filed by the plaintiff in a civil court on which the proceedings commence.
Plaintiff	: The party who complains or sues in a civil action.
Prosecution	: The conduct of the trial of a criminal action. The term is also for the party conducting the prosecution.
Respondent	: The party against whom a petition or appeal is filed.
Suit	: Legal proceedings of civil nature instituted by one person against another in the court.
Summary proceedings	: A procedure used for trial or proceedings before a judge, without following the usual legal formalities and procedures, for speedy disposal of the case.
Summons	: A document issued from the office of a court of law, calling upon a person to attend before a judge or court.
Warrant	: An instrument issued by a competent Magistrate authorizing a police officer who has the power to make an arrest or a seizure or a search, to make such an arrest or seizure or search.

4.10 FURTHER READINGS AND REFERENCES

Kashyap, Subhash C. (ed.) (2003) *The Citizen and Judicial Reforms under Indian Polity*, Universal Law Publication Co. Pvt. Ltd, Delhi.

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