
UNIT 5 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) AND THE UN COVENANTS

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5.1 INTRODUCTION

Human rights has been one of the main areas of work to which the United Nations has consistently devoted its time and efforts. When the Second World War came to an end, fundamental human rights were perceived as a prerequisite for international peace and friendly relations among nations. The United Nations has been concerned with the universal respect for, and observance of, human rights since its inception in 1945. Its beginnings were pronounced in the UN Charter where the phrase ‘human rights and fundamental freedoms’ were repeatedly mentioned. The Charter also provided for the establishment of a subsidiary body under the Economic and Social Council for the promotion and protection of human rights. That subsidiary body came to be known as the Commission on Human Rights (now replaced by Human Rights Council). It is the Commission that took up the task of drafting a human rights document for the possible adoption by the General Assembly. Soon after, the Universal Declaration of Human Rights (UDHR) was adopted in 1948, which was intended to prevent the kind of atrocities that Nazis had committed during the Second World War. The UDHR championed almost all the fundamental rights of the individual; it was hailed as ‘the Magna Carta of Mankind’ by its chief architect, Eleanor Roosevelt.

The Universal Declaration of Human Rights did not create any binding obligations for the member states of the United Nations. Hence, the UN Commission on Human Rights

immediately took up the task of drafting a binding international treaty of Human Rights. However, that proposed treaty was divided into two separate Covenants – International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Two Optional Protocols to ICCPR, one on individuals' right to petition and the other on the abolition of death penalty, were adopted in 1966 and 1991 respectively. The drafting of the Covenants and the First Optional Protocol (to the ICCPR) took 18 years. They are the most comprehensive and basic human rights treaties ever prepared by the international community. They contain almost all the basic rights of the individual – civil, political, economic, social and cultural rights – and provide measures for their implementation. These five human rights instruments are known as the “International Bill of Human Rights”. This unit will also discuss the two bodies (Committees) that have been created as part of the monitoring framework of the two Covenants.

Aims and Objectives

This Unit will help you to understand

- the importance of United Nations' contribution in the field of human rights;
- the provisions and significance of the Universal Declaration;
- the features, provisions and implementation of the two Covenants; and
- the similarities, differences and interdependence between the two Covenants;

5.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (the UDHR), as the name suggests, was adopted as a resolution of the General Assembly on 10 December 1948 after nearly two years of deliberations and efforts of countless individuals went into preparing that *vision*. Small countries and non-Western perspectives found voice during its drafting and owing to their participation; fierce, vigorous discussions took place on philosophical and cultural aspects of human rights. In view of the religious, philosophical and ideological divisions prevailing at that time, the Commission on Human Rights steered itself clear of endorsing *a particular* philosophical or religious stand on the issue (Freeman, p.35). Instead, the Declaration evolved from a complex and such diverse moral, philosophical, political and cultural inputs to establish a ‘common standard for all peoples and all nations’ (Eleanor Roosevelt cited in Lauren, p.226). This was no mean an achievement in a world that was sharply divided on ideological and other grounds. The Universal Declaration of Human Rights subsumes an entire range of human rights, both the civil-political rights and the socio-economic-cultural rights, and the individual and the collective rights. Universal Declaration acts as a reference point for any effort to understand the nature and substance of rights.

5.2.1 Provisions of the Universal Declaration

Two principles come across as the most important pillars of human rights norm-setting effort in the post-Second World War period. Those are the principles of equality and non-discrimination. The principles appear in the initial articles (Articles 1, 2 and 7) of the Declaration and the two Covenants as well. Article 1 says that all are ‘born free and equal in dignity and rights’ and Article 2 sets forth the principle of non-discrimination in

the broadest sense including most of the categories on the basis of which discrimination can and does occur. It grants entitlement to rights to everyone ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status’. However, one must remember that inclusive and broad nature of provision on non-discrimination does not preclude special treatment meted out to certain categories of persons in order to ensure greater equality and rights. For example, although discrimination on the basis of sex is not allowed, states can have laws for differential treatment of women to improve their status in society. Equality, non-discrimination and rights of the individual are the flavour of the Declaration.

The other provisions in the Declaration are relating to the civil-political rights (Articles 3-21) and socio-economic-cultural rights (Articles 22-29). The civil-political rights include the all too familiar right to life, liberty and security of the person (Article 3), the prohibition provisions (slavery in Article 4, torture and other degrading ill treatment in Article 5 and prohibition against arbitrary arrest in Article 9), the right to a fair trial, presumption of innocence until proven guilty and non-interference in personal and family life (Articles 10, 11 and 12 respectively), freedom of movement, freedom of opinion, freedom of assembly, right to asylum and right to a nationality (Articles 13, 19, 20, 14 and 15), and right to marriage, right to own property, right to freedom of thought, conscience and religion and right to take part in one’s government (Article 16, 17, 18, 21). Some provisions in the Declaration have been controversial and have received criticism from non-western ideological quarters. For example, Article 17 on right to own property and that no one shall be arbitrarily deprived of one’s property is seen as promoting the private capitalist system that precludes any systemic change in the society. Likewise, the provision in Article 21 on direct or indirect participation in one’s government arguably places a premium on direct and representative democracy in comparison to other political systems.

Economic, social and cultural rights (Articles 22-29) include the right to social security (Article 22), the right to work, free choice of employment with equal pay for equal work and just and favourable conditions of work (Article 23), the right to rest and leisure (Article 24), the right to an adequate standard of living (Article 25) and the right to education (Article 26). The lone provision on cultural rights is included in Article 27 that seeks to guarantee the right to participate in the cultural life of the community. This provision is also seen as a collective right as against the individual rights preceding it. Article 29 is the only provision that imposes duties on every individual towards the community and the permissible lawful limitations on the exercise of the rights in the interest of ‘the just requirements of morality, public order and the general welfare’.

5.2.2 Significance of the Universal Declaration

The origins of the Declaration undoubtedly flow from the principles of liberal democracy and the contribution of such luminaries as Rene Cassin, Eleanor Roosevelt and John Humphrey. Therefore, the Declaration bears a strong accent on individual rights and the institutions of liberal democracy. However, the Declaration has received wide endorsement from countries belonging to every shade of ideology, from non-governmental organizations, and from people world over that makes it a truly universal document (Hurst Hannum, p.353).

It is often suggested that it is only a Declaration, it is not a *binding treaty*, and that it does not create any obligations on the member states (consequently, it is not a very effective instrument). Having said that, it is pertinent to note here that the Declaration is

one of the most important documents that were designed to proclaim a vision by the United Nations, and as a set of goals that states aspired to pursue and accomplish; it has cast tremendous legal, political, moral and normative impact. In order to emphasise that the Declaration belonged to and was morally binding on everyone, the word “universal” was inserted in the title instead of the more commonly used term “international”. In addition to it, the Declaration proclaimed rights in the name of “all peoples and all nations” (in the preamble), the ‘inherent dignity’ and worth of the person, that everyone was born free and equal – obliquely taking recourse to the theory of natural rights and rejecting in the same breath that it was the prerogative of the governments to grant rights (Lauren, p. 227). The Preamble of the Declaration points out that the individual, not the State or the government, is “the foundation of freedom, justice and peace in the world”. In one stroke, the Declaration brought individual to the centre of human rights debate and made him/her the *object* as well as *subject* of international human rights law.

Secondly, it has spawned the adoption of several human rights instruments across the world. To say that it is only a Declaration is to understate the incredible influence it wields and the remarkable acceleration it has lent to the development of human rights legal instruments at the global and regional level. Many of those documents acknowledge the Universal Declaration as their source of authority (Freeman, p. 36). Thirdly, many countries that gained independence in the decade of 1950s and 1960s after years of colonial subjugation incorporated the rights and principles (such as equality and non-discrimination) found in the UDHR in their national constitutions, statutory laws, policies and programmes designed to protect fundamental rights and freedoms. Fourthly, it has become something like a moral force, a ground for justification and legitimacy, for all those struggling to ensure respect for human rights. The adoption of human rights instruments, the creation of customary international human rights law, every demand for human rights practices within the states, the moral justification for the activities of several NGOs – all these dramatically get nestled, either entirely or in part, in the principles and norms enunciated by the Declaration. The global reach and influence of the Declaration has been constantly widening without having to rely on binding obligations on the member states. It provides moorings for every conceivable discourse on human rights in the post-1948 period as also act as a basic reference point for international human rights – it is considered to be an authoritative elucidation of the phrase ‘human rights and fundamental freedoms’ mentioned in the UN Charter.

The Declaration is the best-known and most cited human rights document in the world. In UN organs, the Declaration has an authority surpassed only by the Charter. It is invoked constantly in the General Assembly, the Security Council and other organs. The International Court of Justice also has invoked the Declaration in the *Iranian Hostages Case*. Kofi Annan, then Secretary-General of the United Nations, has rightly remarked on the occasion of the 50th anniversary of the UDHR that it has served “as the foundation for all subsequent human rights work and become ever more deeply integrated into the fabric of national and international life, both ethically and juridically. ... [t]he Declaration has lost none of its relevance as a blue print for human dignity and well being” (*UN Briefing Papers*, p.5)

In sum, the moral, political and legal significance of this historic Declaration can be illustrated better by citing the opinion of Mary Robinson, former UN High Commissioner for Human Rights and the President of Ireland, who wrote, “A famous British historian ... (Lord Acton) said of the two pages of the 1789 French Declaration of the Rights of

Man that they weighed more than whole libraries and more than all of Napoleon's armies. The remark is also fitting for the Universal Declaration" (Robinson, p. 120).

5.3 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Following the adoption of the Declaration, the UN members turned towards the drafting of the International Bill of Rights, i.e., a treaty of human rights. However, the Covenants and the First Optional Protocol (to the ICCPR) took inordinately long time, eighteen years to come to fruition. This delay is attributed to many reasons. First, the Covenants were the most comprehensive human rights treaties; they contained not only almost all the basic rights of the individual – civil, political, economic, social and cultural rights – but also provided measures for their implementation. Second, since the UN membership saw a considerable increase while these Covenants were being drafted, discussion on individual articles became unwieldy and it also became difficult for UN bodies to accommodate and harmonise the interests of all the nations. When the Covenants were being drafted, the Commission on Human Rights decided to divide the rights enumerated in the Universal Declaration into two legal instruments: (i) the International Covenant on Civil and Political Rights embracing the traditional civil and political rights recognised in Western societies and cultures, and (ii) the International Covenant on Economic, Social and Cultural Rights to satisfy the aspirations of the socialist and third world societies. Also, an (First) Optional Protocol was appended to the ICCPR that granted individual's right to petition to the monitoring body of the Covenant (Human Rights Committee, see below). Another (second) Optional Protocol has also been added to the ICCPR on the abolition of death penalty.

5.3.1 Provisions of the ICCPR

The states parties are under an obligation to respect and ensure to all individuals within their territories the civil and political rights set out in the ICCPR. Like Universal Declaration explained above, the Covenant too opens with a proclamation of the principles of non-discrimination (Article 2) and equality (Article 3) in addition to the right of self-determination of all peoples (Article 1). There are two sets of rights that one has to consider while understanding the rest of the provisions of ICCPR – **derogable** and **non-derogable** rights. The Covenant allows member states to take measures to derogate from the obligations contained in the Covenant to meet situations of emergency that threatens the life of a nation or its existence. The member states can suspend or limit certain rights during war, internal conflict or other such situations. These are known as derogable rights. Simply put, derogable rights allow a state to suspend them during the time of external or internal emergency, to impose reasonable restrictions in the interest of public order, morality and the realisation of rights by others, or to enter reservations and declarations with respect to those rights. However, the principle of non-discrimination has to be respected even while derogating from the obligations. The other set of rights are the non-derogable rights which cannot be derogated from, limited or suspended under *any circumstances*. Also, a state cannot derogate from these rights in the sense that no *reservations* or *declarations* can be made by a state with regard to these rights while ratifying the Covenant. Article 4 of the Covenant enumerates seven non-derogable rights. These are right to life, freedom from torture or cruel, inhuman or degrading treatment (Article 6, 7), freedom from slavery (Article 8), right not to be imprisoned for failing to fulfill contractual obligation (Article 11), no punishment on account of retroactive application

of law and the right to be recognized as a person before the law (Article 15, Article 16), and finally, right to freedom of thought, conscience and religion (Article 18).

Some of the other important rights are, the right to liberty and security (Article 9), the right of detained persons to be treated with humanity (Article 10), freedom of movement and choice of residence (Article 12), freedom of aliens from expulsion (Article 13), the right to a fair trial (Article 14), freedom of opinion and of expression (Article 19), freedom of association (Article 22), the right to marry and found a family (Article 23), political rights, such as right to vote, right to contest elections, right to participate in the governance and to have access to public services (Article 25), equality before the law (Article 26), and the rights of minorities (Article 27). This is an extensive, if not an exhaustive, list. The rights of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language is guaranteed in Article 27. In fact, ICCPR is the only international treaty that contains enforceable provision for comprehensive minority rights under Article 27.

5.3.2 Implementation of the ICCPR

Part IV of the Covenant (Articles 28-45) provides for the establishment of an 18-member Human Rights Committee to monitor the implementation of the Covenant. It is also known as a treaty body. The Human Rights Committee was established in 1976 as a monitoring body of the ICCPR. Like any other committee (treaty body) in the United Nations system, it also performs two basic functions of (a) monitoring the implementation of ICCPR through various mechanisms and (b) issuing of general comments on the provisions of the ICCPR. The Human Rights Committee (HRC) has 18 independent experts as members who are elected for a period of four years. As the most prestigious and successful committee, the HRC meets thrice a year for sessions of three weeks.

It has issued several general comments that have created a body of jurisprudence on issues related to human rights besides helping in the implementation of the Covenant better. Within the UN human rights treaty regime, the Human Rights Committee is widely seen as an important body that has developed and redefined the human rights standards through its general comments on the provisions of the ICCPR and through its suggestions and recommendations on applications received under the individual communications procedure. The Committee thus contributes to the maintenance of an elaborate human rights regime which, in many ways, has become the defining feature of the United Nations system.

HRC has become very systematic in its pre-sessional work by establishing Country Report Task Forces that prepare list of issues and questions related to a state report. After the consideration of a state report, the Committee issues concluding observations specific to that state. The concluding observations are comprehensive in that they include comments on the state report, positive developments, areas of concern, and difficulties in implementation, suggestions and recommendations. These observations serve as an evaluation or 'value judgment' of the general human rights situation in that country. HRC also monitors the progress made on its concluding observations by the member states through a Special Rapporteur on Follow Up, whose job it is to request the state party to give information on the implementation of concluding observations and report the same to the Committee. This system evolved by HRC shows that the Committee believes in the continuous assessment and monitoring of a state party's compliance.

The General Assembly has also adopted two Optional Protocols (OPs) to the ICCPR. The First OP allows individual communications procedure whereby any person who feels

that his rights (guaranteed under the Covenant) have been violated, may bring his grievance before the Human Rights Committee after exhausting all the available domestic remedies. However, this procedure is available only to the citizens of those member states that have ratified the OP. India has not yet ratified this OP. HRC has been the most successful body in dealing with the consideration of individual communications brought before it. The proceedings are held in private and the decisions are quasi-judicial in nature. Although the Committee's decisions in individual cases cannot be enforced, the member states have, by and large, adhered to those decisions and implemented them. The system therefore relies heavily on the willingness of state parties to implement the decisions. Some countries have denounced or adversely reacted to this procedure whenever the Committee has criticised their country. On the other hand, some countries like Canada have largely complied with the Committee's recommendations and have even made the necessary changes in their domestic laws to give effect to HRC's decisions. It has been generally observed that those countries that have good domestic human rights regimes accept this procedure more willingly, abide by the Committee's decisions diligently, and thereby help in making the system a success.

Some areas of concern do remain in the implementation procedure. The Covenant text is such that it accords a very limited participation to the specialised agencies. There is not much cooperation and interaction with other treaty bodies either. Occasionally, there have been members of HRC who are also members on other committees but that apart, a formal mechanism to involve members of other committees in the work of HRC is missing. If other committees are to learn from the enriching experience of HRC, some avenues of coordination and participation will have to be etched out. In addition to it, the Committee has not been able to consider the reports or individual communications on time. The Committee, as the most successful body to receive overwhelming number of communications, suffers from time constraints.

5.4 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

It is now clear that the ICCPR evolved from the initial provisions in the Universal Declaration. While the Western countries tirelessly championed for the protection and promotion of the civil-political rights, pressure was building from the Soviet bloc for the endorsement of socio-economic rights on the same lines as the civil-political rights. The other part of the Universal Declaration (Articles 22-29) on the socio-economic-cultural rights was expanded to form the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two Covenants were originally destined to be part of the same binding treaty but they were eventually bifurcated into two separate documents owing to differences in the nature of the two sets of rights, ideological positions, and the implementation mechanism envisaged for them. Like ICCPR, the General Assembly has adopted an Optional Protocol to the ICESCR in 2008 that makes individual communications procedure available for the non-fulfillment of socio-economic and cultural rights. However, this optional procedure has not entered into force yet. With the adoption of the OP on individual communications, the distinction between ICCPR and ICESCR in terms of their primacy and implementation has become less relevant.

5.4.1 Provisions of the ICESCR

Part I of the ICESCR is similar to the corresponding part in the ICCPR in that it provides for right to self-determination and non-discrimination. Then there are obligations

of the member states defined in Part II. Part III is devoted to the substantive rights enumerated in the Covenant. Some important economic, social and cultural rights protected by the ICESCR are, right to work (Article 6), right to just and favourable conditions of work including fair wages, equal pay for equal work and holiday with pay (Article 7), right to form and join trade unions, including the right to strike (Article 8), right to social security (Article 9), protection of the family, including special assistance for mothers and children (Article 10), right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions (Article 11), right to the highest attainable standard of physical and mental health (Article 12), right to education, primary education being compulsory and free for all, and secondary and higher education generally accessible to all (Article 13 and 14), and the right to participate in cultural life and enjoy the benefits of scientific progress (Article 15). Compared to the ICCPR, the number of articles devoted to the substantive provisions in this Covenant is fewer. Moreover, there is no separate list of non-derogable rights in this Covenant. Also, it appears that the area of cultural rights has been paid relatively less attention than the economic and social rights, for there is only one article devoted to the cultural rights as against multiple provisions found on other aspects. In fact, the Committee was also lagging behind in issuing a general comment on Article 15. One remarkable fact, however, is that there is greater elucidation of each of the provisions through general comments issued by the Committee on Economic, Social and Cultural Rights. In fact, in some cases, there has been more than one general comment on different aspects of a provision, e.g., there are Article four general comments on Article 11 (two on the right to housing, one on the right to food and one on the right to water). We will discuss the Committee's structure, position and functioning in the next section.

5.4.2 Implementation of the ICESCR

The Committee on Economic, Social and Cultural Rights (CESCR) is the only one that has not been established by the treaty whose provisions it seeks to promote and monitor. The ICESCR did not provide for a monitoring body in its text because of the nature of rights contained therein. It was felt that the economic and social rights were essentially group rights to be implemented progressively and gradually over a period of time and that they did not require a monitoring mechanism of the kind that was found essential for the individual rights contained in the other Covenant, i.e., the ICCPR. Eventually, the Economic and Social Council (ECOSOC) adopted a resolution in 1985, to establish the Committee consisting of 18 independent experts elected directly by the ECOSOC for a term of four years.

The functions of this Committee are to monitor the implementation of the rights protected in the Convention through the consideration of periodic reports submitted by the states parties and issuing general comments to elaborate the various provisions of the Conventions for the benefit of the states parties. The Convention has recently introduced the individual communications procedure that is yet to come into force. The Committee holds two annual sessions of three weeks' duration. The Committee held extra-ordinary sessions in 2000 and 2001 to clear the backlog of reports.

One striking feature of CESCR's work is that it was the first committee to initiate formal, close cooperation with UN organisations and specialised agencies. CESCR is an important player in the international dialogue on such economic and social issues as poverty alleviation and structural adjustment programmes with agencies like the International Monetary Fund, the World Bank and the United Nations Development Programme (UNDP). This Committee is also known for encouraging interaction with and participation

of NGOs working in the field of human rights and development. Hence, it is seen as the most NGO-friendly of all the committees. Many NGOs enjoy consultative status with this Committee that has enabled it a more realistic appreciation of the realisation of economic, social and cultural rights. Notwithstanding the interaction between the Committee and the NGOs, it needs to be noted here that, ironically enough, there are far greater number of NGOs working in the field of civil-political rights than in the field of socio-economic rights. With regard to the Committee's other function of issuing the general comments, it has done a commendable job by issuing 15 general comments. Most of them are based on substantive articles of the Covenant with the exception of two general comments which relate to rights of two particular groups, disabled and older persons. In some cases, as mentioned earlier, it has published more than one general comment.

5.5 THE INTERDEPENDENCE BETWEEN ICCPR AND ICESCR

Any understanding of the interdependence between these two sets of rights must begin with the different nature, origin and trajectory of development witnessed by the two Covenants. The distinctions mainly concern three aspects: *terminology, the obligations of the States Parties, and the implementation mechanism and the system of monitoring those rights*. The socio-economic rights were predominantly understood as positive rights that required active involvement of the state in their implementation. The state not only needed to recognise these rights but was also to be an important interlocutor in their implementation. Since socio-economic rights require allocation of resources by the state and policy planning for their implementation, they are dependent on state support. The difference in the nature of the two sets of rights is reflected in the language (terminology) in which the provisions are couched in the Covenants. The civil-political rights often begin with an assertion on behalf of the individual as 'everyone has the right to...' while the socio-economic rights benefit the individual indirectly or derivatively as 'states parties recognize the right of everyone' to these rights. Ideologically, the intellectual impetus for the civil-political rights came from the liberal countries who stressed on their primacy over socio-economic rights. The communist countries led by the former USSR emphasized socio-economic rights. Most (not all) of the civil-political rights prohibited certain action on the part of the state (such as 'no one shall be...deprived of his life', 'no one shall be subjected to torture') and hence could be implemented **immediately**; socio-economic rights required availability of resources for their implementation and were therefore to be realised **progressively** over a period of time. For example, the right to a fair trial could be enacted into law immediately, whereas right to health would require programmes of action over a period of time such as appointment of doctors, construction of hospitals, enrolment of people in health schemes, etc.

However, the distinctions enumerated above have to be seen in the context of similarities between these two Covenants. Many provisions such as the ones related to formation of trade unions and associations, the cultural rights and the minority rights (Article 15 and 27 of the ICESCR and ICCPR respectively), the right to self-determination of peoples and non-discrimination provision are similar in both the documents. Both the Covenants have implementation mechanism by way of committees. The members of these committees are independent experts in the subject field who work in their individual capacity. These Committees receive periodic reports from the member states regarding the progress in the implementation of the obligations contained in the Covenants. There is an Optional Protocol that provides for individual communications procedure. Lastly, the Committees

have issued from time to time “**General Comments**” elaborating the provisions of the Covenants for the benefit of state parties. These general comments are an important contribution to the development of human rights norms and standards.

The distinctions have further been arguably blurred by the acceptance on various occasions by the international community that the two sets of rights are *interdependent* in nature and that the fulfillment of one set of rights is contingent upon effective realisation of other set of rights as well. Moreover, not all the provisions of the ICCPR can be implemented immediately. Many analysts argue that an innocuous-looking legal right such as right to a fair trial can neither be implemented immediately nor is it possible to do so without planning or the allocation of resources by the state. Right to a fair trial requires setting up of various courts, recruitment of judges, creating public awareness about accessing judicial remedies etc. which require long-term planning and implementation besides being as arduous as the implementation of the ICESCR provisions. On the other hand, the provision on non-discrimination in the ICESCR is understood to be implemented immediately. The 1993 Vienna Declaration of World Conference on Human Rights and the third general comment by the Committee have reaffirmed the similarities and interdependence between these rights. The third General Comment states that “[w]hile great emphasis has sometimes been placed on the difference between the formulations used in this provision [Article 2(1) of the ICESCR on state obligations] and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. There are some obligations of Member States, which have to be met almost immediately”, contrary to the assertions of those who argue that the ICESCR requires gradual implementation.

5.6 THE SIGNIFICANCE OF INTERNATIONAL BILL OF HUMAN RIGHTS

The late Secretary-General of the United Nations, U. Thant, stressed the importance of the adoption of the International Covenants, on 16 December 1966, by the following inspired words:

Today’s decisions are the culmination and the outcome of sustained and complex preparatory work to which the United Nations has devoted itself since 1947. It was then decided that human rights and fundamental freedoms which had been referred to in general terms in the Charter and which were soon to be proclaimed “standards of achievement” in the Universal Declaration of Human Rights must be made the subject matter of legally binding obligations in international treaties... in the philosophy of the United Nations, respect for human rights is one of the main foundations of freedom, justice and peace in the world.... (Vijapur and Savitri, p. 139)

With the adoption of these Covenants in 1966 and other relevant instruments, it can be said that a solid legal foundation of human rights law has now been laid down for application at all levels of society: local, national and international. The International Covenants and the two Optional Protocols constitute a positive, effective and realistic step towards the international protection of the individual. Both the Covenants entered into force in early 1976 – almost a decade after their adoption. It was only these two Covenants that took so long to get the minimum ratifications required to become operational; this could be due to the nature of the obligations contained in them which were broad and intended to restrict the sanctity of state sovereignty. It is encouraging to note that more and more states are ratifying these Covenants in recent years. Until May

2010, the ICCPR has been ratified by 165 States and the ICESCR by 160 States, whereas the First and Second Optional Protocols have been ratified by 113 and 72 States respectively. India has ratified both the Covenants on 10 April 1979, but it has not ratified either of the Optional Protocols.

5.7 SUMMARY

In this Unit we have seen how the Universal Declaration of Human Rights became the starting point for UN action and treaty-making in the field of human rights. Since the Universal Declaration was not a binding treaty, many Covenants and Conventions were later adopted by the United Nations to give effect to the promotion and protection of human rights. The Universal Declaration also acts as an elucidation of and commitment towards the human rights provisions seen in the UN Charter. The Declaration has grown in stature and importance over a period of time and has been a philosophical cornerstone and anchor of the universal, regional and national action in the field of human rights.

As a logical step thereafter, the two Covenants have subsumed the essential provisions of the Universal Declaration and have set the ball of UN human rights treaties rolling. Both the Covenants have implementation procedures in the form of committees as we have seen above. The distinction in language and implementation of the two Covenants is no longer held to be tenable by the principle that both are interdependent and in some sense reinforcing in their essence. The Universal Declaration, the two Covenants together with their Optional Protocols is known as the International Bill of Human Rights.

5.8 TERMINAL QUESTIONS

1. Discuss the provisions and significance of the Universal Declaration of Human Rights.
2. Bring out the fundamental differences between the UDHR and the Covenants.
3. Critically examine the implementation mechanisms of the UN Covenants on Human Rights.
4. Explain the interdependence between the ICCPR and ICESCR.
5. What is the importance of the International Bill of Human Rights?

SUGGESTED READINGS

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UNIT 6 MAJOR CONVENTIONS AND DECLARATIONS

Structure

- 6.1 Introduction: UN Human Rights System
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- 6.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
 - 6.2.1 Provisions
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 - 6.3.1 Provisions
 - 6.3.2 Problems
- 6.4 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)
 - 6.4.1 Definition and Provisions
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6.1 INTRODUCTION

Promotion and protection of Human Rights has been one of the principal areas of UN activities. The UN human rights system has developed into a complex web of institutions, treaties and declarations. One of the significant achievements of this system has been to develop the rules and principles governing the rights and duties of individuals. Every convention or treaty drafted by the United Nations draws on customs and practices of

various societies. They also derive their inspiration from 'justice', 'morality' and a general regard for the 'dignity' of the individual.

The human rights instruments seek to protect either a group of people (e.g., women, children) or protect from certain kinds of violations (such as racial discrimination and torture), or, yet again, to promote certain types of rights (e.g., civil-political or socio-economic and cultural rights). For the present, we deal here with what are considered as **core conventions**. There are many other important human rights conventions adopted by the UN but they are not considered as core treaties because they do not have monitoring bodies, e.g., the Genocide Convention of 1948, and the Convention Relating to the Status of Refugees, 1951. ***The distinguishing feature of the core conventions, therefore, is the provision for monitoring bodies.*** The monitoring mechanism available in each of the core conventions is known as the committee system. Member states are obligated under the conventions to provide information regarding the implementation of rights and obligations to the respective committees through periodic reports. Many of the conventions enumerated above also have optional protocols that allow either individual communications procedure or the protection against specific type of violation falling within the general framework of that convention.

The core conventions adopted by the UN till now are:

1. International Covenant on Civil and Political Rights, 1966;
2. International Covenant on Economic, Social and Cultural Rights, 1966;
3. International Convention on the Elimination of All Forms of Racial Discrimination, 1965;
4. International Convention on the Elimination of All Forms of Discrimination Against Women, 1979;
5. Convention against Torture, Inhuman and Degrading Treatment or Punishment, 1984;
6. Convention on the Rights of the Child, 1989;
7. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990;
8. Convention on the Rights of Persons with Disabilities (CRPD), 2006; and
9. International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (yet to enter into force).

While there are *nine* core conventions enumerated above, we will not take up the first two Covenants for discussion here as they have already been dealt with in the preceding Unit. The Convention on Enforced Disappearance will also not be discussed as it has not entered into force. The important provisions, optional protocols and the committee system for implementation will be discussed under each of the conventions.

This Unit also deals with two important UN declarations – one on Minority Rights and the other on the Rights of Indigenous People. The declarations are an expression of intent and concern of the international community towards protecting those rights or groups of persons; they are not binding documents and do not impose any specific obligations on the member states. Usually a declaration is the beginning of the process of eventual

adoption of convention on that subject. Most Conventions that we see today such as the ones on women (CEDAW) and Children (CRC) have evolved from declarations that were adopted many years prior to the adoption of the conventions. India has ratified all the conventions except the Convention Against Torture, (which it has signed but is yet to ratify it) and Convention on Enforced Persons. India is not a party to most of the Optional Protocols except those of CRC.

Aims and Objectives

This Unit would help you to understand

- the UN human rights system by surveying the major conventions that are considered to be the core ones;
- the contents and implementation mechanisms available in these instruments;
- two major UN Declarations – one on Minority Rights and the other on the Rights of Indigenous People;
- the nature and impact of these Conventions and Declarations in establishing a regime of human rights

6.2 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly on 21 December 1965 and it entered into force on 4 January 1969. As on 5 July 2010, it has been ratified by 173 States. Its principal objective is to eliminate all forms of discrimination based on race, colour, ethnic origin, descent or nationality. In the early 1960s, two events led to the eventual adoption of this Convention. Firstly, increasing membership of the African states in the United Nations brought to the fore the issue of discrimination faced by the blacks because of their race and colour. Secondly, several anti-Jewish and discriminatory incidents occurred in various parts of the world in 1959-1960. The apartheid regime in South Africa too officially justified and practised discriminatory policies against the black population there. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the UN General Assembly condemned all manifestations and practices of racial, religious and national hatred in all spheres of life. The apartheid regime in South Africa provided immediate reason for the adoption of this convention. Accordingly, the Convention sought to counter the justification of the apartheid regime by laying a great emphasis on both prohibition and prevention of racial discrimination.

6.2.1 Provisions

The Convention contains a preamble and 25 articles that are divided into three sections. Article 1 of the Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which affects the enjoyment or exercise of human rights and fundamental freedoms. Among the important provisions, Articles 2 and 5 are significant. Under Article 2, each state party undertakes not to engage in any act or practice of discrimination against any person, to refrain from sponsoring, supporting or defending racial discrimination, and to prohibit and

bring to an end any policies or practices of racial discrimination in the country. Under Article 5, each state party is to ensure equality before the law and non-discrimination to everyone in the enjoyment of their rights. Article 5 further guarantees various civil-political and socio-economic rights to be guaranteed to everyone without any distinction based on race, colour, ethnic or national origin.

The Convention was the first international treaty to provide for an implementation mechanism. Under Article 8, a Committee of 18 independent experts (known as the Committee on the Elimination of Racial Discrimination) was to be established to oversee the implementation of the Convention through consideration of periodic reports submitted by the member states. This is a compulsory procedure that obligates every state party to report on the measures taken to give effect to the provisions of the Convention. The Convention is unique in the sense that it was the first international human rights treaty that incorporated a provision for the individual communications system (Article 14) in the treaty itself. However, this provision is *optional* and is applicable to individuals of only those states that have accepted this obligation through a *declaration*. Since it is not part of a separate optional protocol, it does not require ratification; mere declaration would suffice. This provision recognises the competence of the Committee to receive and consider communications from *individuals* or *groups of individuals* who claim to be the victims of racial discrimination or any of the rights set forth in the Convention.

Since this was one of the earliest human rights treaties adopted by the United Nations and concerned with only one type of violation, that is racial discrimination, it is a relatively brief treaty with only 25 Articles. Though brief, the significance of this Convention lies in the fact that it provides for a legal framework to address the problem of racial discrimination and that it is also a moral document that reflects international community's condemnation of racist ideology and the idea of racial superiority.

6.3 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

This Convention was adopted by the General Assembly on 18 December 1979 and came into force in September 1981. It was the first of the core conventions to deal with a specific group of individuals, i.e., women. The reasons for the adoption of a women-specific treaty were not far to seek. The international community realised that though the ICCPR and the ICESCR provide an extensive list of rights and protection to all individuals, it was difficult to extend these rights to vulnerable groups such as women and children. Moreover, some problems and aspects specific to certain vulnerable groups were lost in the general treaties addressed to all. This understanding motivated the elaboration of more specific international treaties for women, children and disabled groups in the form of CEDAW, CRC and CPRD.

CEDAW spells out in general the standards of non-discrimination and a wide variety of rights for women. It rests on the basic principle of equality between men and women, and it recognises such equality in both public and private spheres. For example, social, economic and political equality belong to the public domain whereas equality in family life and marital relations concern the private life of an individual. CEDAW also has the second largest number of ratifications (186 up to 5 July 2010) after the CRC. Another significant aspect of CEDAW is that there was no standard benchmark to measure the

gender sensitivity and gender equality in a society prior to this Convention. To that extent, CEDAW is both a treaty and a yardstick notion to measure the status of women across societies.

6.3.1 Provisions

Discrimination against women is systematic and rooted in the institutions, attitudes and mindset of the society. The Convention aims to combat both structural and widespread discrimination against women. It aims to dissolve every institution of patriarchy to achieve equality and non-discrimination. Furthermore, it 'entrenches and expands the rights afforded to women in other international human rights instruments' (Cusack and Cook, p.205). Hence, Article 1 of CEDAW has the most comprehensive definition of discrimination against women, that is any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition, enjoyment or exercise of human rights by women in political, social, economic, cultural, civil, or any other field. The stated object and purpose of the Convention is to eliminate 'all forms of discrimination against women, with a view to ensuring formal and substantive equality' (Cusack and Cook, p. 206).

The Convention consists of 30 articles divided into a Preamble and six parts. Articles 1-16 consist of substantive provisions containing various rights for women based on the principle of equality and non-discrimination. Articles 2 on state obligations, Article 9 on nationality, Article 16 on marriage and family life are very important. These are also precisely the articles that have invited widespread reservations.

Article 17 provides for a Committee of 23 independent experts to monitor the implementation of the Convention. This Committee is the largest one in terms of its strength. The Committee receives periodic reports from the state parties that allow it to monitor the compliance of the obligations of the states parties. The Committee meets once every year for a two-week session in Vienna, Austria. The Convention also has an Optional Protocol that allows for an additional procedure whereby individuals and groups of women can send communications to the Committee if any of their rights contained in the Convention have been violated (and if their country has accepted the procedure), and, secondly, an inquiry procedure. This Protocol came into force on 22 December 2000 but currently it has been ratified by 99 states. If more countries were to agree to be bound by it, it can become a very effective tool to address the concerns of women. It is gratifying to note that huge case law has emerged on the Protocol.

6.3.2 Problems

As a forward looking, progressive document, CEDAW has also suffered from some serious problems. It has the highest number of reservations and declarations entered to it that allow the member states to ratify a treaty without accepting obligations under certain provisions which might be against their interest, ethos, or culture. For example, Article 2 of CEDAW obligates the member states to eliminate all forms of discrimination against women through legislative, administrative and policy measures and also to protect women from discrimination. Many member states have entered reservation to this article. Reservations by the member states cripple and weaken the impact and effectiveness of an otherwise good treaty. Some of the reservations related to Article 16 on marriage and family matters are so extensive that they are incompatible with the 'object and purpose' of the Convention. However, the Committee's constant questioning of the rationale of reservations has led many states to specifically withdraw their reservations (as in the case

of Singapore withdrawing its reservation to article 9) and has generally *reordered* the discourse on women's rights.

6.4 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CAT)

This is the only core convention that deals specifically with one form of violation, i.e., torture. This Convention was adopted by the General Assembly of the United Nations in 1984. As of 5 July it has been ratified by 147 states only. Article 7 of the ICCPR and regional conventions like the European Convention on Human Rights (ECHR) prohibit torture absolutely. It is an absolute prohibition in the sense that nothing can justify or no circumstances – of war or peace – can permit torture of any kind. This treaty is an elaboration of provisions found in other regional and universal documents and it develops an entire legal framework within which practices of torture are sought to be both prevented and punished.

6.4.1 Definition and Provisions

Article 1 of the Convention defines torture as involving any act by which severe mental or physical pain or suffering is intentionally inflicted on a person for an express purpose to fulfill such objective as extracting information, forcing confession of guilt or merely to intimidate the victim. The prohibition of torture is so absolute that if an individual is expected to be put to torture in a country upon reaching there, such an individual cannot be deported, extradited or otherwise returned to that country. This important provision is known as 'non-refoulement' or not to push back a person to a country where he is at risk of being tortured. If torture is committed outside one's national boundaries, the state whose nationals are involved in the crime can ask for the extradition of those offenders. Thus, those involved in perpetrating torture cannot go unpunished irrespective of where they are staying. The law enforcement agencies like police, armies etc. are to be suitably educated and sensitised so that they do not resort to torture in their methods of work. Moreover, as a safety net for the individual, Article 15 of the Convention provides that evidence gathered through torture cannot be used in courts.

In every civilised society, torture is denounced as barbaric, cruel and against human dignity. Yet one may find several instances of torture inflicted by the state, its agencies or even public. Prohibition of torture in absolute terms has also led to a common opinion at the international level that it is a rule of general international law binding on all states. Hence, whether a country ratifies CAT or not, it is still bound by the principles contained in that Convention. This customary law also lends moral force to the prohibition of torture.

Part II of the Convention provides for an implementation mechanism through a 10-member Committee that is empowered to receive and consider periodic reports from the state parties. One unique power invested in this Committee is that it can decide to take urgent action if reliable information about *systematic practice* (not an isolated incidence) of torture is received. This power is applicable only to torture and not to incidences of cruel, inhuman or degrading treatment. Subsequently, the Committee can make visits and investigate or launch inquiry by one or more of its members. The powers invested in this Committee are slightly more intrusive than other treaty bodies.

There is also an Optional Protocol to the Convention that has been adopted by the General Assembly in 2002. The Optional Protocol, which entered into force in June 2006, is currently ratified by 51 states. It provides for the establishment of a new 10-member Sub-committee against Torture that will make regular visits to places of detention. This would, by far, be the most intrusive mechanism of a human rights treaty but this Optional Protocol has not yet received requisite number (twenty) of ratifications and hence it has not yet come into force. The Convention, however, suffers from certain shortcomings. It empowers the Committee to only work in a *reactive* way. It takes action only when acts of torture have taken place and are reported. There is very little emphasis on the prevention of torture and institutionalisation of mechanisms of prevention.

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

The Declaration of the Rights of the Child (20 November 1959) was the springboard initiative to draft a convention on the subject. The UN Convention on the Rights of the Child (hereafter CRC) was subsequently adopted by the UN General Assembly on November 20, 1989 and entered into force in record time on September 2, 1990. With 193 states parties as on 5 July 2010, the Convention has become the first human rights instrument to achieve near-universality in the UN system. Only the United States remains outside the treaty regime (though it has signed the Convention on 16 February 1995). This development is all the more remarkable, because CRC is the most comprehensive, holistic and focused treaty in the field of human rights.

In addition to the Convention, the UN General Assembly adopted two Optional Protocols to the CRC on 16 May 2000: First Optional Protocol to CRC on the Involvement of Children in Armed Conflict and Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. With the adoption of these two Optional Protocols the scope of CRC has been widened. These Protocols entered into force on 18 January and 12 February 2002 and have been ratified by 132 and 137 states respectively as on 5 July 2010.

6.5.1 Provisions

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

The Convention emphasises the importance of the family and the need to create an environment that is conducive to the healthy growth and development of children. It recognises that "for the full and harmonious development of his or her personality," a child "should grow up in a family environment, in an atmosphere of happiness, love and understanding."

Four general principles capture the spirit and philosophy of the treaty: (a) Non-discrimination (Article 2); (b) Best interests of the child (Article 3); (c) The right to life,

survival and development (Article 6); and (d) Respect for the views of the child (Article 12). The substantive rights and freedoms granted in the Convention are grouped under four categories:

Survival Rights Right to life and needs basic to a child's development;

Development Rights those rights that children need to achieve their full potential, such as freedom of expression (Article 13), right to education (Article 28), etc.;

Protection Rights those rights that are needed to safeguard the children from neglect, abuse and exploitation, such as protection of privacy (Article 16) and freedom from abuse and neglect (Article 19);

Participation Rights those rights that allow children to participate in decision-making and in affairs that concern them, such as respect for the views of the child (Article 12).

6.5.2 Implementation Mechanism and Problems

The CRC establishes the Committee on the Rights of the Child (18 experts), to monitor the implementation of the treaty by states parties (Article 43 (1)). The composition of the Committee is multidisciplinary, including experts in such fields as law, medicine, economy, sociology, and education. They consider periodic reports of states parties on the measures adopted to give effect to the rights of children and on the progress made in the enjoyment of such rights. The reports are submitted by the state party concerned, initially after two years from the entry into force of the Convention, and thereafter every five years.

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

6.6 THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, 1990

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) represents the culmination of the development of various conventions of the International Labour Organization (ILO) in this field. This comprehensive treaty on migration and human rights was adopted by the General Assembly in 1990 but it is a fairly recent treaty in the sense that it became effective only on 1 July 2003. As on 5 July 2010, it has received only 42 ratifications and 31 signatures. The ICRMW defines a migrant worker as a 'person who is to be engaged, is engaged or has been

engaged in a remunerated activity in a state of which he is not a national' (Article 2(1)). The Convention aims to prevent and eliminate the exploitation of migrant workers by creating obligations for both the host and home countries. It addresses several issues related to economic migration such as illegal recruitment, trafficking, workers' welfare, education to their children, etc. The Convention covers regular and irregular migrant workers.

6.6.1 Causes of Migration

In the last two decades, economic migration has grown manifold owing to such reasons as the inequality of wealth between different countries of the world arising from political turmoil, economic despondency, unemployment due to natural and man-made disasters, and effects of certain economic policies as structural adjustment programmes that has resulted in serious economic destabilisation in some countries. These are known as the 'push factors' that have led to migration of workers from some of the poorest countries of the world to the developed part of the globe.

On the other hand, there are also 'pull factors' that compel the host countries to encourage and attract migrant workers to their shores. In many developed countries, higher standards of living, better healthcare facilities, and greater employment opportunities have resulted in low fertility rates and longer life expectancy, which means that the proportion of ageing population is greater than the able-bodied skilled and unskilled workforce. This gap between the supply of eligible workers and demand for skilled and unskilled labour can be effectively filled by the migrant workers. Migrant labour caters to certain needs of the host countries while fulfilling its own aspiration for gainful employment. In advanced countries, increased instances of interconnectedness and competition have resulted in the growth of services sector on the one hand and the deregulation of labour markets on the other. As a result, labour markets in advanced countries have seen a spurt in lower-end jobs that are no longer preferred by their nationals. Migrants are recruited to perform low-skilled jobs in agriculture, construction, manufacturing and low-wage sectors like domestic work and health-care services (de Guchteneire and Pecoud, pp.2-4). The migrant workers also contribute significantly to their home country's economy by sending their earnings to their kith and kin. For example, Indians working in Gulf countries contribute to India's foreign currency earnings when they send their remittances to their family and relatives living in India.

The process of sending and receiving workers, though significant, is not very simple. Their rights are routinely violated that include racism, discrimination, torture, forced labour, inappropriate working conditions, restriction on freedom of movement, withholding their travel documents, inadequate wages, etc. While all migrant workers face such labour and human rights violations, illegal migrant workers are at greater risk. Globalisation and terrorism have further exacerbated the problem leading to a general sense of mistrust between the natives and the immigrants. These violations can occur in country of origin or in transit, or, yet again in the host country. Added to this, migrant workers also encounter social and cultural handicaps flowing from living in an alien country and in an altered socio-cultural matrix with little mastery over language and legal rules in the host country (de Guchteneire and Pecoud, p.3).

6.6.2 Provisions

The ICRMW addresses these issues and problems concerned with migrant workers and it reinforces the standards set out by the ILO Convention on the equal treatment of

nationals and immigrant workers (ILO Convention number 97 that has been reiterated in Article 25 of the ICRMW), on protection of human and labour rights of both regular and irregular immigrants (ILO Convention number 143), and the rights of migrant workers and their families. The Convention is the most comprehensive treaty among the core ones with 93 Articles divided into IX parts. Part III lists the rights of all migrant workers, Part IV has specific rights applicable to regular migrants, Part V deals with rights of specific categories of migrants and Part VI specifies the obligations and responsibilities of states. It has a Committee of eleven members to oversee the implementation of the Convention. The Committee is still a nascent one. It met for the first time in March 2004. One will have to wait for a while to assess the efficacy and evaluate the working of this body.

The Convention took inordinately long time to come into effect. It became effective 13 years after it was adopted by the General Assembly. The main problem of this treaty is that very few states have ratified it in these many years. Moreover, none of the Gulf countries which have a major portion of migrant workers has ratified the Convention. This reflects the vulnerability of the migrant workers in the face of state apathy. Despite these problems, it should be noted that the ICRMW is the most comprehensive legal shield that the migrant workers have as yet.

6.7 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), 2006

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the General Assembly on 13 December 2006 and it entered into force in 2008. This Convention was long overdue since it was felt that disability was the missing link in the human rights framework with no mention of it in any of the core treaties, except the CRC. The negotiation process was an inclusive one that involved the highest participation by the representatives of disabled persons, civil society organisations, etc. It represented a continuing partnership between the UN and the persons with disability. The international community received and signed the treaty with ‘an unprecedented enthusiasm’ (Kayess and French, p.4).

6.7.1 Models of Understanding Disability

Traditionally persons with disability are seen as ‘objects of pity’, charity, ‘as a burden on their societies and families’, and as persons requiring treatment to cure and restore ‘normalcy’. Disability is perceived as a ‘personal tragedy’ and disabled persons ‘either passively come to terms with a condition’ or bravely overcome their ‘limitations by great mental or physical effort’ (Kayess and French, p.5). This model of understanding disability is known as the **medical model** that was the prevailing notion until a different approach was proposed in the late-twentieth century. The medical model believes that the problems of and solutions to disability are largely situated within the body of individuals – as *internal conditions* – without any external causes or contribution by the society.

The **social model** of disability on the other hand situates the experience of disability in the *external social conditions* – as a systemic disadvantage and social oppression. Disabled persons are often excluded and segregated by the society since their impairment is seen as a deviation from the norm rather than as a diversity of human existence. Such a view creates physical and social barriers, structures, and practices that impede full participation of disabled persons in society. The need for rights of the persons with

disability stems from the fact that formal equality, available in human rights treaties, is *difference-blind* in that it requires that everyone be treated same and thus strengthens the existing patterns of social disadvantage.

6.7.2 Provisions and Significance

The earliest initiative for the CRPD came from Mexico. The demand for the rights of the disabled was couched in terms of social development and linked to the Millennium Development Goals (2000). It was argued that since disabled persons constituted a disproportionately large part of the world's poorest of the poor, any effort at the eradication of poverty and global development had to address their concerns and needs. CRPD contains a detailed Preamble and 50 Articles. It does not create any new rights or entitlements; rather it phrases the existing human rights provisions in a manner that addresses the needs of the disabled persons. The Convention is firmly based on the social model and eschews reference to prevention or treatment of impairment.

The Convention avoided any definition of disability owing to opposition from member states and the other actors in negotiations. However, Article 1 includes long-term impairment, as against short-term or episodic impairment, as the criteria to determine persons with disability. Article 1 also mentions the general purpose of the Convention and the three obligations of the states to promote, to protect and to ensure human rights and fundamental freedoms for persons with disability. Articles 3-9 detail general obligations such as dignity of the individual, equality and non-discrimination, effective participation, accessible 'environment', and the obligation of the state to promote a fundamental change in the attitudes. Articles 10-30 contain specific provisions in the form of civil-political rights and economic, social and cultural rights. Articles 31-40 provide for the implementation mechanisms through the establishment of a new treaty body.

The Optional Protocol has 18 Articles and provides for two procedures – individual communication procedure in case of violation of the CRPD rights and, an inquiry procedure in cases of *gross violations* of CRPD rights. CRPD represents a 'paradigm shift' away from a social welfare approach to a rights-based approach to disability. The latter approach, advocated by UN High Commissioner for Human Rights, views persons with disability as direct bearers of rights, 'able to claim those rights as active members of society' (Kayess and French, p.3), rather than as passive recipients of welfare.

6.8 MAJOR UN DECLARATIONS IN THE FIELD OF HUMAN RIGHTS

There are many declarations adopted by the United Nations that have had a great deal of impact on the universal human rights system. Some of these declarations should have become treaties but have not been successful owing to certain disagreements, apprehensions and reservations on the part of member states. Whenever the UN is faced with such deadlock, it prefers to adopt a declaration which is less likely to receive opposition owing to the fact that declarations are not binding on the member states.

6.8.1 UN Declaration on the Rights of Persons Belonging to Minorities, 1992

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was adopted in 1992 after years of deliberation and effort. The main reasons for the delay were the lack of consensus on the definition of the term

minorities, the anxiety of the member states towards providing group rights that might later lead to a demand for the right to self-determination, and a general reluctance on the part of the United States and the Latin American countries to recognise the existence of minorities in their countries. The question of minorities was usually dismissed as a European problem, more specifically East European or Balkan problem.

This Declaration is seen as an elaboration and authoritative interpretation of Article 27 of the ICCPR concerning the rights of minorities. Francesco Capotorti, an Italian member of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities was the first to suggest that a declaration for minorities within the framework of principles set forth in Article 27 should be adopted. Accordingly, he conducted a detailed study on the definition, nature and problems of minorities. Although there is no single commonly agreed definition on minorities, Capotorti's definition is considered to be the most acceptable definition of the concept of minority.

It is a very brief document consisting of a Preamble and nine Articles. The Preamble recognises that promotion and protection of minority rights leads to political and social stability. Article 1 addresses the issues of *identity* and *existence* of minorities. Article 2 sets forth a series of rights and freedoms for persons belonging to minority groups regarding enjoyment, assertion of and participation in culture, religion, language, social and economic affairs. These rights are exercised *individually* and in community with other members of the group (Article 3). Articles 5, 6 and 7 provide for national policies and programmes, cooperation and assistance among member states. Article 8 categorically states that protection of minorities shall not in any way affect the sovereign equality, territorial integrity and political independence of the member states.

Initially there was no mention of implementation mechanism since it is a non-binding declaration. Article 9 merely placed the responsibility on the specialised agencies and other organisations of the UN system. However, the Economic and Social Council established a *Working Group* in 1995 to review the implementation of the Declaration. It is the first UN document dealing exclusively with minority issues. The Declaration is a more candid recognition of the group dimension of individual human existence.

6.8.2 UN Declaration on the Rights of Indigenous Peoples, 2007

This Declaration shares many similarities with the one on minorities discussed above. It took inordinately long time for this Declaration to come to fruition owing to disagreements and anxieties shared by member states on such issues as definition of the concept of 'indigenous peoples', their right to self-determination, and lastly, the provision regarding the control over natural resources.

The earliest effort at recognising the rights of the indigenous peoples by way of a declaration came in 1982 when following the study conducted by Jose Martinez Cobo, the Economic and Social Council established a Working Group on Indigenous Populations (WGIP) in order to: (a) review developments pertaining to human rights of indigenous populations and (b) elaborate international standards to protect those rights. WGIP took its second mandate seriously and formulated a draft declaration in 1993 for possible adoption by the United Nations. However, there was a deadlock on some issues and the Commission on Human Rights set up another Working Group specifically to enable negotiations between the member states and the representatives of the indigenous groups. As a result of this long process the Declaration was adopted by the General Assembly on 13 September 2007.

Similar to the Declaration on Minorities, this Declaration too nowhere defines the term indigenous peoples. There are difficulties in arriving at a common, strict definition that can subsume the diversity and difference prevailing among the indigenous communities and be applicable on a universal basis (Errico, p.746). Hence, the Declaration leaves the matter open-ended; they can determine their identity based on their customs and traditions (Article 33). It can be deduced from the Preamble and other provisions that indigenous groups are understood as those displaying distinct features with regard to their organisation, political and economic institutions, culture, customs and language, in addition to sharing a common experience of marginalisation and discrimination deeply rooted in their historical experiences. In order to address the concerns of the member states regarding the right to self-determination, the Preambular paragraph says that it should be ‘exercised in accordance with international law, the UN Charter and that this right should not be seen as encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States’ (provision in the Declaration, cited in Errico, pp.757-758). The aim of the Declaration is to protect the cultural distinctiveness of the indigenous groups and give them basic rights, which are mostly collective rights. The declaration aims to provide those ‘minimum standards’ necessary for the survival, dignity and well-being of the indigenous populations (Article 43).

6.9 SUMMARY

The international human rights system promotes human rights norms for individual rights and protects these rights from violation by the state, society or other individuals. It is pertinent to note here that the human rights Conventions have been able to check absolute control of states over individuals and have made them accountable for how they treat their own citizens. The states are obligated to provide information on implementation of rights contained in these conventions through periodic reports to the various committees. However, while the international community attempts to check the absolute control of the states, the monitoring bodies simultaneously make an effort to establish a dialogue with the member states because the member states remain important agents in the implementation system, which means that it is the state that has to ultimately ensure that the rights are available to its citizens.

Most of these Conventions are plagued by the problem of reservations and declarations entered by the member states that seriously hampers their effectiveness. A concerted effort will have to be made to overcome this problem. Notwithstanding these problems, they have made significant contribution to the promotion and protection of human rights by laying down the legal framework within which an individual and groups of individuals can seek protection. These Conventions have come to symbolise a potent weapon against state oppression and a yardstick notion to measure the human rights norms and practices. Besides the core treaties, the Declarations on Minority Rights and the Rights of Indigenous People have also been landmark developments in the UN human rights framework. Although non-binding in nature, they have played a significant role in setting norms and standards, and have achieved a modicum of success in generating a consensus on their adoption. It is hoped that they will be adopted as binding treaties in future.

6.10 TERMINAL QUESTIONS

1. Why are some human rights instruments known as core human rights treaties?

2. Discuss the features of CEDAW and explain the problems from which it suffers.
3. Distinguish the powers and functions of the Committee against Torture and the CEDAW Committee.
4. What are the causes of migration? Is the ICRMW successful in promoting the rights of migrant workers?

SUGGESTED READINGS

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UNIT 7 HUMAN RIGHTS VIOLATIONS

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7.1 INTRODUCTION

Since the adoption of the Universal Declaration of Human Rights in 1948, the United Nations has adopted nearly 100 human rights instruments. These instruments, among others, deal with the rights of children, women, minorities or indigenous people, prohibition of torture, slavery, genocide, racial or religious discrimination, etc. Regional organisations like the Council of Europe, African Union, Organization of American States, and the Arab League have adopted scores of treaties and declaration on human rights. It is estimated that there are now approximately 200 international instruments. Besides these international documents on human rights, most of the states have incorporated bills of rights in their constitutions and have ratified many international treaties on human rights. Notwithstanding the existence of many human rights laws and the commitments of states to comply with the international obligations to protect, ensure and guarantee human rights of their citizens and individuals within their boundaries, a large number of states are guilty of indulging in massive and gross violations of human rights. Both the state and non-state actors have been engaged in committing these violations. Millions of people have lost their lives in political persecution by dictatorial regimes. Millions were killed in Nazi extermination camps and during Stalin's rule in the former Soviet Union. Gross violation of human rights were seen in China, Cambodia, Chile, Iraq, Argentina, Guatemala and Haiti, Bosnia-Herzegovina and the apartheid regime of South Africa, although on a smaller scale.

Whether human rights have become universal phenomenon or not, their violation has certainly become a global phenomenon. This Unit attempts to map some of the violations of human rights.

Aims and Objectives

After reading this Unit, you would be able to understand

- Various kinds of violations of human rights;
- The mechanisms available to address these violations under different human rights treaties; and,
- The various ways to promote human rights.

7.2 MAJOR TYPES OF HUMAN RIGHTS VIOLATIONS

There are many types of violations of human rights. We discuss below some of the common and gross violations that abound all over the world.

7.2.1 Slavery

Internationally, slavery was prohibited by the League of Nations in the Slavery Convention in 1926. In 1953, through a protocol the League's task was transferred to the United Nations and in 1956 a supplementary convention was adopted. The Convention forbids slave trade and aims at ending all forms of slavery. It is striking that only 93 states are parties to this Convention. It is curious to note that Saudi Arabia has ratified the Convention, although it is commonly known that slavery is still being practised in that country. Similarly, India has also ratified it, though according to one study, nearly 2.6 million bonded labour existed in 1978. However, the Bonded Liberation Front, a NGO working for the emancipation of these labourers estimate that there are more than 5 million bonded labourers (Vijapur, 1991, p.127).

According to the UN's Working Group on Contemporary Forms of Slavery, there are many forms of slavery, such as, traffic in persons, the sale of children, child prostitution, child pornography, the exploitation of child labour, the sexual mutilation of female children, the use of children in armed conflicts, debt bondage, traffic in the sale of human organ, the exploitation of prostitution, exploitation of migrant worker, and sex tourism. The Working Group makes recommendations to the states on the ways to end these forms of slavery. Other modern forms of slavery are the repression of women in general and traffic women in particular. This is prohibited in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Others of 1948; this Convention entered into force in 1951, has been ratified by states (February 2012).

7.2.2 Torture

Torture is prohibited everywhere. In 1984, the UN adopted the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention entered into force in 1987. It has an Optional Protocol, adopted in 2002, allowing for individual petition system to be considered by Committee against Torture. The Convention defines the concept of torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act

he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

It is true that torture has been practised by police and armed forces in every country. The greatest victims of this are detainees and Prisoners of War. Although the Geneva Convention III (on POW) obligations are binding on ratifying States, these are observed more in breaches. A recent example of breaches is provided by the ill-treatment of Iraqi detainees by the US Coalition Forces, in particular in Abu Ghraib prison in Baghdad. Subsequent to complaints from Iraqi citizens, from various international human rights organisations and from ICRC on 19 January 2004 Lt. General Richardo Sanches, the Senior US Commander in Iraq, requested US Central Command to investigate the matter. Major General Antonio M. Taguba, who was appointed to conduct the investigation, completed his report on 26 February 2004. The Taguba Report found evidence of systematic and illegal “sadistic, blatant, and wanton criminal abuses ... inflicted on detainees” in Abu Ghraib prison. Those abuses consisted, inter alia, of physical abuses, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several hours at a time, a male MP guard having sex with a female detainee, intimidating and frightening detainees using military working dogs, etc. The Report was not made public until graphic pictures depicting US soldiers abusing Iraqi prisoners were aired by CBS on “60 Minutes II” on 28 April 2004 (Taguba Report, 2004).

7.2.3 Genocide

On 9 December 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article 11 of the Convention describes genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

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

Persons charged with genocide are to be tried by a competent tribunal of the state in the territory of which the act was committed, or by such tribunal (like International Criminal Court) as may have jurisdiction. This article has remained a dead letter, so far. States parties to the Convention can submit disputes relating to the interpretation, application or fulfillment of the Convention to the International Court of Justice. This has happened only once so far, when Bosnia-Herzegovina submitted a complaint against the Federal Republic of Yugoslavia (Serbia and Montenegro). With regard to the mass killings by the Khmer Rouge in Cambodia (1975-79), which resulted in the deaths of between one and two million people, NGOs have urged governments to file a state complaint against Cambodia

because of its violation of the Genocide Convention. The (non-governmental) Cambodia Documentation Commission in New York had collected extensive documentation material about genocide in Cambodia, on the basis of which it urged states to arrive at an international condemnation of the crimes committed by the Khmer Rouge. However, no government was willing to undertake such initiative.

History has witnessed many incidents of genocides, especially in the 20th century, such as, in Australia, the aboriginal population was shot for sport in the early years of colonisation; in Europe nearly 60 years ago, 6 million Jewish and Romany populations were the victims of a mass extermination policy by the Nazi Germany, besides 5 million non-jews who became victims of Nazi policy (as Hitler followed the policy of Aryan supremacy over other races); in 1970 West Pakistani military killed nearly a million East Pakistanis (Bangladeshis), and, more recently, “ethnic cleansing” along religious divides in the former Yugoslavia. We saw that the Rwandan Genocide was the slaughter of an estimated 800,000 to 1 million Tutsis and some moderate Hutus, during a period of 100 days from 7th April to 16th July 1994 (The population of Rwanda is 9 million.) Statistics suggest that during this period of terrible slaughter, more than 6 men, women and children were murdered every minute of every hour of every day. This brutally efficient killing was maintained for more than 3 months. The genocide had been carefully planned. For months, a death list of prominent Tutsis’, members of the political opposition and moderate Hutus who refused to back extremist Hutu power ideology was circulating freely in the capital, Kigali. These people were among the first killed. But in the south of Rwanda, there were no large-scale massacres for the first two weeks, because the provincial governor was a Tutsi. Many frightened Tutsis’ fled to the town hall for protection, but when the mayor was replaced by a Hutu, killings began immediately. Once the prepared lists were exhausted, the killers’ rage turned against the Tutsi population in general. Not all victims were Tutsis, but all Tutsis’ were victims and were hunted down by the execution squads.

It is gratifying to note that the newly established ICC (it is functioning since 2002) can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute genocide.

7.2.4 Problem of Child Soldiers

Armed conflicts in recent decades have increasingly involved children, with an estimated 300,000 children currently participating in military activities in over fifty countries from Sri Lanka to Sudan, Congo, Ivory Coast, Liberia, Nepal, and Guatemala. In Colombia, children as young as eight years old have fought for paramilitary forces. In Sierra Leone, ten thousand children fought in that country’s civil war, while Myanmar has over 50,000 young soldiers, the largest in the world. Child soldiers carry guns, serve as human mine detectors, participate in suicide missions, carry supplies, act as spies and messengers, and provide sexual services. Dissent groups, ethnic separatist groups, paramilitary forces, and guerrilla fighters, as well as states, find them to be excellent soldiers. Life in uniform offers children protection from problems of daily struggle for shelter, food, and a security and structure often absent from civilian life (Karns and Mingst, 2005, p.413).

To deal with the issue of child soldiers, the UN General Assembly adopted in 2000 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict. This Protocol is ratified (by March 2012) by 144 states and it prohibits governments and nongovernmental armed groups from using children under 18

years of age in combat. The NGOs have criticised the Protocol as it permits voluntary enlistment / recruitment at 16 years, although proof of age and consent are required. The United States initially opposed the 18 year minimum age for combat, having previously sent 17 year old combatants into Gulf War, Somalia, and Bosnia, but it ratified the Protocol in 2002. The ILO Convention No. 182 (adopted in 1999) makes child soldiering one of the worst forms of child labour and bans recruitment of children under eighteen.

7.2.5 Disappearances

In the 1960s and 1980s some Latin American countries were engaged in a new form of gross and systematic violations of human rights which is infamously known as “disappearances”. Dissidents who were opposing the military regime in countries such as Guatemala, Argentina, Chile and Uruguay suddenly disappeared. When the relatives of the disappeared persons enquired from the authorities, they were told that nothing was known about the case. Officials would suggest that the missing persons might have gone to visit their girlfriends or maybe they were in financial debt etc. Since the disappeared persons were political opponents of the regimes, the relatives did not accept such false explanations. Soon it was realised that those persons were put to death.

The erstwhile UN Commission on Human Rights (now Human Rights Council) established a Working Group (WG) on Enforced or Involuntary Disappearance. During the first year of its existence in 1981, the WG received information about between 11000 and 13000 cases of disappearances. When the WG issued its report in December 1996, there were 43890 unresolved cases of disappearances. In fact, the WG had concluded by that year that the problems of disappearances in the Western Hemisphere have ended. The WG expressed its serious concern about hundreds of cases of disappearances occurring in many countries for more than ten years and urged states in 1996 to invite it for a visiting mission. Countries like Bolivia, Colombia, Cyprus, Guatemala, Mexico, Peru, the Philippines and Sri Lanka accepted the call of the WG, but countries like India reacted negatively (though in Punjab between 1991 and 1993, nearly 2000 persons had disappeared and were killed in police encounters and cremated secretly). Not only Latin America but also some European states, like Yugoslavia have experienced the problem of disappearances. For example, according to Amnesty International data, in the former Yugoslavia, between 1991 and 1995, an estimated 20,000 persons disappeared or were missing (Baehr, 1999, p.30).

To deal with the problem of disappearances, the UN adopted in 1992 a Declaration and in 2006 International Convention on the Protection of All Persons from Enforced Disappearance. The Convention has been ratified by 31 countries (as on 1 March 2012) only. It has entered into force in December 2010. The Convention defines in Article 2 “Enforced disappearance” as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article of the Convention further states that No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

The widespread or systematic use of enforced disappearance is further defined as a crime against humanity in Article 6.

The Convention is monitored by a Committee on Enforced Disappearances elected by its parties, who are obliged to report to it on the steps they have undertaken to implement the Convention obligations within two years of their ratification. The Convention includes an optional complaints system whereby citizens of parties may appeal to the Committee for assistance in locating a disappeared person. Parties may join this system at any time, but may only opt out of it upon signature.

7.2.6 MNCs and Violations of Human Rights

Many TNCs have been violating human rights. If states are guilty of violating human rights, the United Nations can hold them accountable and sanction them. But if non-state actors like TNCs are violating human rights, nothing can be done as there does not exist any treaty or binding norms to deal with the situation. Corporate Human Rights violations include, among others, assassination, torture, kidnapping, environmental degradation, abusing public funds, violently repressing worker rights, releasing toxins into pristine environments, destroying homes, and causing widespread health problems. Corporations carry out some of the most horrific human rights abuses of modern times. For instance, for years, the Caterpillar Company has provided Israel with the bulldozers which are used to destroy Palestinian homes. Despite worldwide condemnation, Caterpillar has refused to cut off their sales to the Israeli military. Look at another example. From 1964 to 1992, a toxic “Rainforest Chernobyl” was unleashed in Ecuador when Texaco (now owned by Chevron) left more than 600 unlined oil pits in pristine northern Amazon rainforest and dumped 18 billion gallons of toxic production water into rivers used for bathing water. The toxic crude oil and formation water seeped into the subsoil, contaminating surrounding freshwater and farmland. As a result, local communities have suffered severe health effects, including cancer, skin lesions, birth defects, and spontaneous abortions.

Between 1989 and 2002, eight union leaders from Coca-Cola bottling plants in Colombia were killed after protesting the company’s labour practices. Hundreds of other Coca-Cola workers have been kidnapped, tortured, and detained by paramilitaries who intimidate workers to prevent them from unionising. In India, Coca-Cola extracted 1.5 million liters of deep well water, which they bottled and sold under the names Dasani and BonAqua. The groundwater was severely depleted, affecting thousands of communities with water shortages and destroying agricultural activity. The remaining water became contaminated with high chloride and bacteria levels, leading to scabs, eye problems, and stomach aches in the local population.

Dow Chemical has been destroying lives and poisoning the planet for decades. The company is best known for the ravages and health disaster for millions of Vietnamese and U.S. veterans caused by its lethal Vietnam War defoliant, Agent Orange. In 2001, Dow inherited the toxic legacy of the worst peacetime chemical disaster in history when it acquired Union Carbide Corporation and its outstanding liabilities in Bhopal, India. Dow refuses to address its liabilities in Bhopal or even admit their existence.

The US addiction to oil is linked with a host of human rights and environmental problems, including human rights abuses in countries such as Nigeria, Ecuador, Sudan, South Africa and Indonesia. It has prompted the US government to cozy up to human rights violating governments such as that of Saudi Arabia; pushed indigenous people off their land;

destroyed hundreds of thousands of acres of rainforests; fueled wars for oil, such as the war in Iraq; and polluted cities, endangering the health of millions of people. Automobiles are the single largest consumer of oil in the US, and among US automakers, Ford is the worst. Ford has the worst overall fuel economy and highest greenhouse gas emissions.

Nestlé buys cocoa beans for its chocolate from farms that use illegal and forced child labour. The company is the third largest buyer of cocoa from the Ivory Coast, has processing, storage and export facilities there, and is well aware that even the US State Department estimates that some 109,000 children are working on cocoa farms in the Ivory Coast under the worst and most hazardous form of child labour. This summer, the International Labour Rights Fund and a Birmingham law firm filed a class-action lawsuit against Nestlé and several of its suppliers on behalf of former child slaves.

Nearly five million lives per year are claimed by the tobacco industry, whose product results in premature death for half the people who use them. Among tobacco companies, Philip Morris is notorious. It is the world's largest and most profitable cigarette corporation and is also a leader in pushing smoking with young people around the world. Although the company says it does not want kids to smoke, it spends millions of dollars every day marketing and promoting cigarettes to youth. Overseas, it has even hired underage Marlboro girls to distribute free cigarettes to other children and sponsored concerts where cigarettes were handed out to minors. Pfizer is the largest pharmaceutical company in the world, and is also one of the worst abusers of the human right to universal access to HIV/AIDS medicine. Pfizer produces the anti-retroviral drug fluconazole under the name Diflucan, and sells it at prices that poor people with AIDS cannot afford. The company refuses to grant generic licenses of fluconazole to governments in countries like Brazil, South Africa, or Dominican Republic, where patients are forced to pay \$20 per weekly pill, though the average national wage is only \$120 per month.

7.2.7 Human Rights Violation and Terrorism

Terrorist attacks by non-state actors and counter-terrorism measures by the states also cause human rights violations. For instance, according to the 2010 US Department of State report on Human Rights, in Pakistan alone terrorist and extremist attacks and operations to combat terrorism and extremism resulted in 7,400 deaths, of which nearly 1,800 were civilians, over 450 were security forces, and over 5,100 were terrorists or insurgents. There were numerous reports of politically motivated killings in Karachi and Balochistan. According to a report by *Dawn*, 1,981 persons were killed in political violence in Karachi, of which 748 were targeted killings. According to Human Rights Watch, the targeted killing and disappearance of Baloch leaders, activists, and civilians increased in 2010. Another study reports that between 1988 and 2001 in the state of Jammu and Kashmir alone 30,750 people have been killed, including 11,377 civilians in violence and terrorist attack. According to another study, it is estimated that state-sponsored terrorism is more monstrous as it has caused over 70 million casualties during the 20th century whereas some 100,000 people died in non-state terrorism for the same period of time. Also, terrorism has been causing great economic losses. For instance, 9/11 terrorist attack on World Trade Centre in New York caused losses to the tune of \$80 billion (Vijapur, 2011, pp.ix-xi).

7.2.8 Violation of Women's Rights and Violence against them

Discrimination against women is a global phenomenon. Even societies like the UK and

USA, where universal education is achieved and are supposed to be modern, industrialised and egalitarian, show that gender inequalities persist in them. Men are still considered heads of households, though large number of female-headed households exists. Over 50% of women in these societies experience physical violence at the hands of their husbands, and there is a high incidence of rape and physical violence. Within the US, the Equal Remuneration Act has still to be passed, and abortion is a criminal offence in many societies.

US Census Bureau data reveals that women earn 75% of the salary offered to men with same qualifications.

In the industrialised world discrimination persists. In UK of all managers of large establishments in 1966, 87% were men and 13% women. Women made up 3% of all barristers in the USA, 4% in UK and 7% in Sweden. A mere 0.06% of all engineers are female in UK, 0.07% in US and 3.7% in France (Bhasin, 2000, p.25). The **1995 UNDP Human Development Report** reveals that globally women hold only 14% senior management positions; the ratio between women's salaries in the US continues to be 3:5 and this has not changed in the last 100 years. 70% of the world's poorest and illiterate people are women. Human Development Report 1995 was on gender. Its main gist was **"Human development, if not engendered, is endangered". That is the simple but far-reaching message of this report.** Women's productive and reproductive work is generally not assigned much economic value. The invisible and unpaid work contributed by women, annually, is worth US \$ 11 trillion. Among the developing world's 900 million illiterate people, women outnumber men two to one. And girls constitute 60 per cent of the 130 million children without access to primary school. Since population has grown faster than women's education has expanded in some developing regions, the number of women who are illiterate has increased (UNDP 1995). The following data from UNDP's Human Development Report 2000 further provides a global scenario of gender gap.

Gender Gap in Governance

Parliament 7 %

Cabinet 9%

Local Government 20%

Civil services 9%

Judiciary 6%

In India also we find many violations of women's rights. Domestic violence is very common. Let us just give here two examples of gross violations. (1) On 8th October 1983, The Minister of State for Home Affairs informed the Lok Sabha that 1979 cases of bride/women burning were registered in Delhi alone during March 1980 to November 1983 (and this happened when a woman was still Prime Minister). More recently, the Parliament was informed that the incidence of dowry deaths in, various states and Union Territories during 1990-1993 totaled 20,537. The number of deaths increased to 5,582 in 1993 from 4,962 in the previous year, 5,157 in 1992 and 4,836 in 1990. (2) Human Rights NGOs estimate that at least 10,000 cases of female infanticide occur each year throughout the country despite the governments of Maharashtra and Haryana have banned such tests by enacting legislation. The Central Government also enacted legislation in 1994

in this regard.

7.2.9 Other Gross Violations: A Global Snapshot

There is no country in the world where human rights are not violated as a matter of routine. Gross violations of human rights are found not only in the developing countries, but also in the developed world. Following are some examples:

1. Rights of dalits (Scheduled Castes) are violated throughout India despite strong laws created to protect them. The official statistics for the decade 1990-2000 indicate that a total of 285,871 cases of various crimes against dalits were registered countrywide, of which 14,030 were registered under the Protection of Civil Rights Act and 81,796 under the Prevention of Atrocities Act. This means that an average of 28,587 cases of practice of untouchability and atrocities against SCs were registered every year during the 1990s. These include 553 cases of murder, 2,990 cases of grievous hurt, 919 rapes, 184 kidnappings/abductions, 47 dacoities, 127 robberies, 456 cases of arson, 1,403 cases of caste discrimination and 8,179 cases of atrocities. **In other words, every hour more than three cases of atrocities against SCs are registered, and every day three cases of rape and at least one murder are reported.**
2. Custodial violence and deaths is another area that has caught the serious attention of NHRC. It may be noted that the huge increase of the number of cases/complaints considered by it from 276 in 1994-95 to 11,153 in 1995-96 showed the awareness among the people of the human rights situation in the country and the willingness of the victims to approach the NHRC for relief. Around 444 custodial deaths were examined by the NHRC during 1995-96, excluding 39 cases of disappearance of persons arrested by the police. Quite a few fatalities, 308 were of persons in judicial custody. Other police 'excesses' probed by the NHRC included torture of the suspects during investigation to extract confessions.
3. The Apartheid government of South Africa, controlled by white minority, was guilty of violating human rights of black majority people. Throughout its existence, till 1994, South African government violated human rights. Sometimes it used to innovative novel methods of terrorising people. For instance, on 21 March 1960, when several thousand Africans had assembled at Sharpeville to demonstrate against the racial discrimination laws and to get arrested, they were frightened by South African authorities not only by low flying jets but also by ordering police to open fire. This resulted in the killing of 69 Africans and wounding more than 200. Similarly, the authorities resorted to use of force on 19 June 1976 against black school children who were demonstrating against apartheid laws and demanding education in English medium in Soweto town. This resulted in the killing of around 100 people, mostly children, and more than 800 injured. After this incident, there was a proposal in the Security Council to expel South Africa from UN for violating systematically human rights of its people, which could not be adopted due to veto exercised by USA, UK, and France (as these states had their large investments in South Africa). However, the General Assembly did not accept the credentials of South African delegation to participate in its sessions and as a result South Africa did not attend its sessions between 1976 and 1994 (Vijapur, 1991).
4. *The State of the World Children 2012*, released recently by UNICEF, gives

shocking information on the plight of children especially in urban areas. Hundreds of millions of them live in urban slums, many without access to basic services. The report reveals that about 215 million girls and boys aged 5-17 were engaged in child labour in 2008, 115 million of them in hazardous work. As of 2008, 67 million primary-school-aged children were still out of school, 53 per cent of them girls. It further reveals that nearly 2.5 million people are in forced labour as a result of trafficking – an estimated 22 to 50 per cent of them children. Even in the absence of trafficking, many children are forced to work to survive. About 215 million girls and boys aged 5–17 were engaged in child labour in 2008, 115 million of them in hazardous work. More than 350,000 women died in pregnancy and childbirth in 2008, and every year many more sustain injuries that can turn into lifelong, ostracising disabilities. Many such deaths and injuries can be averted if expectant mothers receive care from skilled professionals with adequate equipment and supplies, and if they have access to emergency obstetric care.

5. By 1980, the official statistics about refugees had risen to 6 million and 2 million internally displaced persons in the world. By 1995, the number of refugees had doubled to some 13.5 million, while the number of internally displaced persons had reached the staggering total of some 30 million – and this is only the official figure. By the end of the century, the refugee crisis had worsened, due in no small part to the terrible atrocities that took place in Rwanda and the former Yugoslavia. Between 1990 and 1999, over one million refugees from the former Yugoslavia took up asylum in Western Europe, making it easily the largest population. Similarly, following the 1994 genocide and civil war in Rwanda, over two million refugees had fled to neighbouring countries (O’Byrne, 2003, pp.346-47). There is no guarantee that the rights of refugees are respected and protected in the countries where they find themselves.
6. In the UK, till 1970s, there were no laws to provide equal pay for equal work for both men and women. Earlier the British society had restricted the access of women to higher paying job opportunities in law, engineering, and other professions. Women were often employed in low paying jobs. They formed 97 per cent of canteen assistants, 88 per cent of hairdressers, 92 per cent of nurses, and 82 per cent of shop assistants. In contrast only 4 per cent were architects and 6 per cent were solicitors (Hargopal, 1997, p.69). In US, racial discrimination of blacks continued till recently. In the 1960s and 70s the blacks were in poor conditions than their white counterparts. Whites held 80 per cent of white-collar jobs but majority of blacks held blue-collar positions and a disproportionate number of black white-collar employed is in sales and clerical positions rather than in management or technical professions. About 75 per cent of ghetto population is black and most of them live in constant fear of crime and are always hopelessly in debt. There were nearly 6, 00,000 homeless people in USA. Their number has been increasing. 1,00,000 children go to sleep homeless every night. Between 9 and 12 million children younger than 18 have no health insurance (Hargopal, 1997, pp.72-77).
7. Poverty is another cause for human rights violations. “Poverty anywhere is a threat to prosperity everywhere”, declared the constitution of ILO in 1919. It is estimated that one-third of all human deaths, some 50,000 daily, are due to poverty-related causes, to malnutrition and to diseases that can be prevented or cured cheaply by providing better nutrition, safe drinking water, mosquito nets, re-hydration packs,

vaccines, and other medicines. This adds up to 270 million deaths in just 15 years (up to 2004) from the end of the Cold War – more deaths than were caused by all the wars, civil wars and government repression of the entire twentieth century. Yet our politicians, academics, and mass media show little concern for how such poverty might be reduced or addressed. They are more interested in possible military interventions to stop human rights violations in developing countries, even though such interventions –at best– produce smaller benefits at greater cost. This Western priority may be rooted in self-interest. But it engenders, and is sustained by, a deeply flawed moral presentation of global economic cooperation. The Western-supported new global economic order aggravates global inequality and reproduces severe poverty on a massive scale. Thomas Pogge considers that on any plausible understanding of our moral values, the prevention of such poverty should be our foremost responsibility (See Pogge, 2001, pp.6-24).

7.3 MECHANISMS TO DEAL WITH HUMAN RIGHTS VIOLATIONS

The violation of human rights is a global phenomenon. Although many human rights have been adopted and are now in force, violations continue to occur. Under major human rights treaties and conventions, monitoring mechanisms are available to review the state compliance of international human rights norms and obligations. These are, Human Rights Committee (under International Covenant on Civil and Political Rights), Committee on Economic, Social and Cultural Rights (under International Covenant on Economic, Social and Cultural Rights), Committee on Torture (under Torture Convention), CEDAW Committee (under Convention on Elimination of All Forms of Discrimination against Women), Committee on Rights of the Child (under CRC), Committees on the rights of Migrant Workers, Enforced Disappearance, and Disabled Persons (under respective Conventions). All the State parties are required to submit periodic report on implementation of human rights obligations. These Committees review, criticise, and publicise the violations of human rights. National and international NGOs also participate in these international forums to put pressure on state parties to improve their human rights record.

7.4 SUMMARY

Since 1948, hundreds of human rights treaties / documents have been adopted at the international and regional levels. Human rights now have become truly international. Notwithstanding the proliferation of these documents, human rights observance has not become universal. What has become universal is their violations. In this Unit we have seen that there are many forms of gross violations of human rights, such as, genocide, slavery, violence against women, children, minorities, etc. Violations of human rights are also perpetrated by the state agencies, like police and paramilitary and military forces. Terrorism and counterterrorism are also responsible for violations of human rights. Under different human rights treaties mechanisms to protect human rights and to achieve state compliance of international human rights obligations are available. There are treaty-monitoring bodies to review the domestic implementation of human rights. The members of these committees offer constructive criticisms on state reports. Their adverse remarks are publicised by NGOs, which may compel states to improve their human rights record. There is also the ICC to try the perpetrators of genocide. Moreover, individual complaints and inter-state complaint procedures are available in most human rights treaties.

All these measures are adequate to address human rights violations.

7.5 TERMINAL QUESTIONS

1. Define the term “genocide” and various incidents of genocide that have taken place in the 20th century.
2. Examine the problem of child soldiers and explain the measures that the international community has undertaken to regulate and combat it.
3. Discuss the problem of disappearances.
4. Survey major violations of human rights around the world.
5. Explain the gender discrimination that prevails in many parts of the world.
6. Do MNCs violate human rights? Illustrate your answer with examples of violations perpetrated by them.

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UNIT 8 CONTEMPORARY DEBATES ON HUMAN RIGHTS

Structure

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8.1 INTRODUCTION

There are many debates in human rights from the time the concept has come into existence. These debates have, over a period of time, helped in clarifying the concept of rights, in crystallising its understanding, in lending dynamism to its development, and in paving the way for demand and recognition of newer kinds of rights. Every prevailing understanding of rights has been challenged by an alternative view of rights and has generally enriched the debate about concept of human rights. In this sense, it is important to bear in mind that there is no single, immutable conception of human rights that can be held to be true for all times and all climes. However, a general consensus has emerged at the international level as to what constitutes a set of universal, core human rights that are taken as inviolable. It also reflects the understanding that human rights are interrelated, indivisible and are not bound by territoriality. All other set of rights, including the understanding of the concept of rights itself, has generated debate and disagreement. While there are many debates in the human rights discourse regarding the nature, primacy, approach, implementation, recognition and justification of rights, in this Unit we consider some of the main currents and contents of this debate.

Contemporary debates in human rights does not merely symbolise the divergent views regarding the various rights; it also symbolises the constant efforts by various groups to bring forth the need for acknowledging the newer forms of violations and an effective legal mechanism to contain those violations. Debate about human rights provide a viable mechanism to justify, universalise the need for protection as also render a sense of immediacy and responsibility to acknowledge their codification, recognition and, eventually, their implementation. In fact, the boundaries of debate about ‘contemporary’ human rights has widened because it symbolises ‘the logics of *inclusion*’ as opposed to ‘the logics of *exclusion*’ of ‘modern’ human rights (Baxi, 2010, p.118). However, all rights do not exist

by virtue of state recognition and international codification; human rights can and do exist even in the face of fierce opposition by state. Human rights are guaranteed by the state and their codification strengthens the commitment that is required of both the international community and the state.

There are many debates in human rights that have occupied the centre-stage in the post-Second World War era. However, in this Unit we will look at *some of the major* debates surrounding the primacy of a set of rights, the notion of human rights, the various areas where debates arose and how these debates have been resolved, accommodated or circumvented by the various stake holders such as human rights groups, member states and the international community. The focus in this Unit is on those debates that have hindered agreement on such fundamental aspects as definition or rights to be accorded to a group. It has often led to difficulty in the process of standard-setting or codification of rights. We will also look at the struggle for, and resistance to, recognition by some newer rights and their claimants. People organise themselves into groups and communities to articulate their demands and constantly engage in finding newer means to do so. This entire process of organisation of groups, bringing to the fore newer demands, and, finally, determining means to achieve the goals, has lent dynamism, ingenuity and creative element to the evolution of human rights.

Aims and Objectives

This Unit would enable you to understand

- The importance of understanding contemporary debates in human rights;
- How the debates influenced the concept, formulation, codification and implementation of certain category of rights;
- Major areas of debates in human rights discourse; and
- The differing viewpoints that have been accommodated or circumvented.

8.2 THE PRIMACY OF A SET OF RIGHTS

One of the earliest debates to unfold in the human rights discourse was regarding the *primacy* of one set of rights over others. Soon after the end of the Second World War and the establishment of the United Nations, earnest efforts to promote and protect human rights resulted in the adoption of the Universal Declaration of Human Rights in 1948 and the two Covenants, namely, the ICCPR and the ICESCR. During this period, the countries of the western hemisphere- led by the United States- argued that the civil and political rights were of significance to individual freedom and to his/her protection against the possible violations by others including the state. It was believed that the widespread violations of human rights and fundamental freedoms during the Second World War was a result of absence of recognition of civil-political rights of the individual as reflected in their evolution in the western liberal-capitalist political thought. This set of rights eventually came to be known as the first generation rights since they had chronologically originated earlier than the other set of rights. In the initial years of the establishment of the United Nations in 1945, the Western and Latin American countries laid greater emphasis on and paid attention to the codification and protection of the civil-political rights.

The economic and social dimension to the concept of human rights was added by the socialist countries led by the former USSR and the eastern European states. The socialist/communist ideology emphasised the need for the protection and promotion of the social and economic rights such as the right to work, social security, health, education, housing, adequate standard of living among others. The socio-economic rights were predominantly understood as positive rights that required active involvement of the state in their implementation. The state not only needed to recognise these rights but was also to be an important interlocutor in their implementation. Since socio-economic rights require allocation of resources by the state and policy planning for their implementation, they are dependent on state support. These came to be known as the second generation rights since they evolved and attained salience after the civil-political rights. Hence, the intellectual impetus for the civil-political rights came from the liberal countries who stressed on their primacy over socio-economic rights. The Communist countries led by the former USSR emphasised socio-economic rights. Although the use of the term first and second generation rights respectively was only symptomatic of their chronological development, it unfortunately formed the core of debate surrounding the primacy of civil-political rights over the social-economic rights. Besides the chronological origin, the nature, the trajectory of development and the mechanism of implementation only added to the complexity of the primacy debate.

The problem of determining the primacy of rights was further complicated by the emergence of concerns that were of significance to the developing countries, most of which had suffered colonial rule and exploitation. The developing countries stressed on such rights as self-determination, right to peace, and right to development which were seen as both collective rights and third generation rights. In the tussle between the first and second generation rights for attaining primacy, the third generation rights were relegated to a background.

8.2.1 The Interdependence between ICCPR and ICESCR

The debate has been finally put to rest and the distinctions between the two sets of rights have been arguably blurred by the international community by pointing to the fact that the two sets of rights are *interdependent* in nature and that fulfilment of one set of rights is contingent upon effective realisation of other set of rights as well. The 1993 Vienna Declaration of World Conference on Human Rights and the third general comment by the Human Rights Committee have reaffirmed the similarities and interdependence between these rights. The third General Comment states that “[w]hile great emphasis has sometimes been placed on the difference between the formulations used in this provision [Article 2(1) of the ICESCR on state obligations] and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities” (Vijapur and Savitri, 2010, p. 142). There are some obligations of Member States, which have to be met almost immediately, contrary to the assertions of those who argue that the ICESCR requires gradual implementation.

This entire debate reflected the complexity of disagreements over the nature of rights, the content of rights and the diversity of groups of nations whose interests were involved as indicated in the introduction in the preceding pages. This debate affected the priority attached to the implementation of these rights at the domestic level within the countries.

8.3 UNIVERSALISM AND CULTURAL RELATIVISM

The second major debate in human rights discourse has been regarding the *approach* to

understanding human rights. The question that arises here is whether there can be a particular understanding of human rights that can be considered as universal in its nature, in appeal and independent of its socio-cultural milieu. Since the earliest struggles for and proclamations of rights as we understand today was witnessed in the countries of Western Europe, chiefly France and the Great Britain, and the United States of America, it came to be generally held that the notion of human rights as understood in the western hemisphere presented a valid template for the entire world. In other words, various human rights as embodied in the international instruments were of equal and indisputable relevance to one and all. Paul Sieghart and Jack Donnelly are two of the leading exponents of this view. They contend that universal human rights transcend geographical boundaries and are typically designed to be culturally and ideologically neutral. Universal human rights for all became the slogan and anthem for all countries and people irrespective of their unique history, culture and tradition.

In contradistinction to this universal notion of human rights, the Oriental and African societies argued that while the general notion and understanding of human rights can be universal in nature, relevance of particular rights and their implementation is rooted in the culture, tradition, religion and social practices. In other words, human rights are culturally and ideologically specific and not neutral. Abdullah Ahmed An-Na'im (1991), Joanne R. Bauer and Daniel A. Bell (1999) point to the challenge posed by the cultural relativists to the universalists. The notion and content of human rights are contingent upon ideological moorings (liberal or socialist), regional diversity (Western or Eastern), historical experiences (Northern, developed or Southern, developing), and religious beliefs (Christian, Hindu, Buddhist or Islamic). This analogy can be further extended to prove that the very conception of rights and the trajectory of their evolution have been different in traditional non-western societies where there has been a greater emphasis on the collective notion of rights rather than the individualistic orientation of human rights. The relativist notion of rights shifts the very *locus* of the subject of rights from individual to the collective. While the UDHR and the two UN Covenants made the individual as the subject of international human rights law and invested rights in the individual, the collectivist notion often makes the society/group as both the repository of rights and the site of decision-making. Violations of rights in one culture may be seen as part of cultural practices and religious traditions in others. The differing notion of rights as violations or socially sanctioned cultural practice has rendered debate on rights on the same plane very difficult. Cultural relativists who contend that rights are culturally specific contest the claim of universality. For them, the *universal* element in human rights discourse 'is the idea or the concern for human rights and not a particular model of human rights' (Vijapur, 2010, p.56). Hence, cultural specificity has to be accorded recognition while formulating and implementing human rights standards. This debate on universalism and relativism has impacted the implementation of a myriad of human rights as also the struggle for recognition of newer rights.

8.4 MINORITY RIGHTS: PROBLEM OF DEFINITION

Any discussion on minority rights is imbued with many intricate and complex issues. It has been riddled with difficulties in arriving at a universally accepted definition (who is a minority?), nature of protection to be accorded to the minority groups within the state, the issue of self-determination, and the nature of rights to be granted – equality versus special rights and individual versus collective rights - to the minority groups. Both internationally and within the state, there has been little agreement on the above mentioned aspects. In

the academic realm, efforts have been made, by Will Kymlicka for instance, to reconcile the apparent divergent position of equal rights and non-discrimination on the one hand and a distinct framework of minority protection or collective rights on the other (why minority protection is needed?). The need for debate on minority is imperative because of the increasing instances of ethnic and other crises in many parts of the world. One of the critical reasons for these is due to the fact that there is little scope for minority groups to participate in decision-making and power sharing within their country. Moreover, any scheme for accommodating diverse groups or a formal arrangement for power-sharing largely depends on the kind of relationship the majority and minority groups share, and vision and aspirations of the people as expressed in such a formal document. Let us now consider the issues of debate on minority rights.

The first problem encountered by the United Nations in drafting a treaty for minority protection was the lack of a universally accepted definition of what constitutes a minority. The Permanent Court of International Justice (PCIJ) defined a minority community in *Graeco-Bulgarian Communities* case in 1930 as “a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united... in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance.” But this definition was not acceptable to many members and therefore, the UN Sub-Commission appointed Francesco Capotorti as the Special Rapporteur to work on a definition of minorities. He defined minority as a group that is numerically inferior to the rest of the population in the state, in a non-dominant position, possessing distinct ethnic, religious or linguistic characteristics and show, if only implicitly, a sense of solidarity, towards preserving their culture, traditions, religion or language. While Capotorti’s definition is academically most widely accepted, none of the above-mentioned two definitions were acceptable to the members of the UN Sub-Commission. Hence, the 1992 UN Declaration on Minorities (*Declaration on the Rights of Persons Belonging to Ethnic, Religious, or Linguistic Minorities*) was adopted without attempting to define the term minority. The Framework Convention for the protection of National Minorities (1995) adopted at the regional level in Europe also failed to define the concept of ‘minority’ (Cited from Vijapur, 2006, p.371).

Provisions regarding protection of minority groups and their rights are scattered in various international treaties and documents but there is no single comprehensive treaty that cogently enunciates the rights and protection of minorities. The 1992 UN Declaration on Minorities is only a declaration and hence is not a binding document. The member states are not obligated to implement the provisions contained in it. The 1948 UN Convention on the Prevention and Punishment of Genocide provides for right to physical existence and protection from genocide but it does not include linguistic minorities. Although this is a treaty and therefore binding on the member states, it protects only one right of the minority groups, i.e., the right to exist. The International Convention on the elimination of All Forms of Racial Discrimination (CERD) protects only racial groups and provides for ‘special measures’ to be granted to racial minorities. Article 27 of the International Covenant on Civil and Political Rights pertains to minority groups. Thus, it is the only legally binding provision on minority rights in an international treaty. This article says that in those ‘States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities *shall not be denied* the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or

to use their own language' (Article 27 of the ICCPR, emphasis added). Hence it is apparent that there is no comprehensive treaty for minority protection; what is available is a splintering of provisions across various treaties and declarations.

The Member States are generally reluctant to accord distinctive group status to minorities because they fear that this would encourage them to acquire a distinct juridical personality and stoke their aspiration for self-determination. Many Member States argue that a collective notion of minorities as a group and its recognition has the potential of leading to *disintegration of the states* and hinders the *process of nation-building*. Hence, the States have preferred to protect minority rights on an individual basis, as seen in Article 27 of the ICCPR. In order to allay the fears of the states, the Human Rights Committee, in its General Comment on Article 27, has sought to separate the 'rights of persons belonging to minorities on the one hand and the right to self-determination and the right to equality and non-discrimination on the other' (Vijapur, 2006, p.377). Regarding the nature of rights to be granted to minorities, Kymlicka opines that in addition to general right to equality and non-discrimination that are available to everyone, minorities must be granted protective measures such as group-specific rights and participatory rights to accommodate enduring cultural differences. Since this has mostly been an exercise in the academic realm, there is no uniform application of these suggestions in the world. Different levels and types of minority protection abound and the debate continues to engage us.

8.5 RIGHTS OF THE INDIGENOUS GROUPS

There are many similarities between the debates and delays surrounding the minority rights and the rights of the indigenous groups. The member states shared anxieties on such issues as the definition of the concept of 'indigenous peoples', their right to self-determination, and lastly, the provision regarding the control over natural resources. Definition, the nature of collective cultural rights and right to self-determination were contentious issues witnessed in the debate on minority rights as well. It took inordinately long time for a declaration on the rights of the indigenous groups to come to fruition owing to disagreements mentioned above.

The earliest effort at recognising the rights of the indigenous peoples by way of a declaration came in 1982 when following the study conducted by Jose Martinez Cobo, the Economic and Social Council established a Working Group on Indigenous Populations (WGIP) in order to: (a) review developments pertaining to human rights of indigenous populations and (b) elaborate international standards to protect those rights. WGIP took its second mandate seriously and formulated a draft declaration in 1993 for possible adoption by the United Nations. However, as a result of a deadlock on some issues, little headway was made on this front. The Declaration on the Rights of Indigenous Peoples was finally adopted by the General Assembly on 13 September 2007.

Similar to the Declaration on Minorities, this Declaration too nowhere defines the term indigenous peoples. There are difficulties in arriving at a common, strict definition that can subsume the diversity and difference prevailing among the indigenous communities and be applicable on a universal basis (Errico, 2007, p.746). Hence, the Declaration leaves the matter open-ended; the indigenous groups can determine their identity based on their customs and traditions. It can be deduced from the Preamble and other provisions that indigenous groups are understood as those with a historical continuity relating to land and societies evolved on that territory. In addition to it, they display distinct features with regard to their organisation, political and economic institutions, culture, customs and

language, in addition to sharing a common experience of marginalisation and discrimination deeply rooted in their historical experiences. Although they may or may not be a numerical minority, they most often form a non-dominant section of society which makes their issues akin to those of the minorities and equally exposes them to vulnerability and discrimination.

In order to address the anxieties of the member states regarding the right to self-determination, the Preamble paragraph says that it should be 'exercised in accordance with international law, the UN Charter and that this right should not be seen as encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States' (provision in the Declaration, cited in Errico, 2007, pp.757-758). The indigenous groups have identified rights similar to the minority groups such as cultural distinctiveness, the religious, linguistic, collective rights and the possession or control over natural resources. The cultural rights that are collective in nature, and relevant to both indigenous groups and minorities, are considered to be important to stem the tide of ethnic violence. The declaration aims to provide those 'minimum standards' necessary for the survival, dignity and well-being of the indigenous populations.

8.6 DISABLED OR DIFFERENTLY-ABLED?

This group has been the most neglected group in the human rights discourse. Owing to a lack of definition and differing levels of protection and empowerment accorded to them in various countries across the globe, this was one area where agreement or even a common level of understanding was difficult to achieve. A binding treaty devoted to the rights of the disabled persons was long overdue since it was felt that disability was *the missing link* in the human rights framework with no mention of it in any of the core treaties, except the CRC.

The debate surrounding the rights of the disabled persons has been multi-layered in that it concerned firstly, the approach towards understanding disability (medical model or social model), secondly, the terminology to be used for persons with such needs (impaired, handicapped, challenged, disabled, or differently-abled) and, lastly, the kind of rights and level of protection to be accorded to them. In the last instance, the debate over rights of the disabled persons got enmeshed in the development discourse. The international community had to initiate a process of reconciling these divergent aspects of disability rights before drafting a binding treaty on the subject. There are two models of understanding of disability. Traditionally, persons with disability are seen as 'objects of pity', charity, 'as a burden on their societies and families', and as persons requiring treatment to cure and restore 'normalcy'. Disability is perceived as a 'personal tragedy' and disabled persons 'either passively come to terms with a condition' or bravely overcome their 'limitations by great mental or physical effort' (Kayess and French, 2008, p.5). This model of understanding disability is known as the **medical model** that was the prevailing notion until a different approach was proposed in the late-twentieth century. The medical model believes that the problems of, and solutions to, disability are largely situated within the body of individuals – as *internal conditions* – without any external causes or contribution by the society.

As opposed to the medical model, the **social model** of disability situated the experience of disability in the *external social conditions* – as a systemic disadvantage and social oppression. Disabled persons are often excluded and segregated by the society since their

impairment is seen as a deviation from the norm rather than as a diversity of human existence. This model makes a distinction between impairment and disability. While impairment is internal and physical in nature, disability is socially induced due to environmental barriers and social structures of discrimination. Discrimination based on impairment creates physical and social barriers, structures, and practices that impede full participation of disabled persons in society. The need for rights of the persons with disability stems from the fact that formal equality, available in human rights treaties, is *difference-blind* in that it requires that everyone be treated same and thus strengthens the existing patterns of social disadvantage.

The Convention on the Rights of Persons with Disabilities (CRPD) was finally adopted by the General Assembly on 13 December 2006 after a long deliberation and it entered into force in 2008. The Convention avoided any definition of disability owing to opposition from member states and the other actors in negotiations. In fact, the Preamble to the Convention states that disability is an evolving concept and results from attitudinal and environmental barriers. However, Article 1 includes long-term impairment, as against short-term or episodic impairment, as the criteria to determine persons with disability. This convention is firmly based on the *social model* and eschews any reference to prevention or treatment of impairment. It represents a 'paradigm shift' away from a social welfare approach to a rights-based approach to disability. The latter approach views persons with disability as direct bearers of rights, 'able to claim those rights as active members of society' (Kayess and French, 2008, p.3), rather than as passive recipients of welfare. Hence the first source of debate has been conclusively resolved. Regarding the second source of contention on terminology, the Convention is open-ended. Although the term disability appears in the title of the treaty, the member states are allowed to adopt and use phrases that they prefer.

Insofar as the kind of rights and their protection in the Convention is concerned, the demand for the rights of the disabled was couched in terms of social development and linked to the Millennium Development Goals (2000). It was argued that since disabled persons constituted a disproportionately large part of the world's poorest of the poor, any effort at the eradication of poverty and global development had to address their concerns and needs. It does not create any new rights or entitlements; rather it phrases the existing human rights provisions in a manner that addresses the needs of the disabled persons.

8.7 EUTHANASIA: THE RIGHT TO DIE WITH DIGNITY

This has been one of the most debated issues across the world in recent times, particularly in the last one decade. The debate extends to both ends of the spectrum as to whether euthanasia can be legalised. Those who argue in favour or against this right have deployed strong arguments on the subject centred on medical and ethical questions, legal positions and religious considerations. The adoption of legislation permitting euthanasia in the Netherlands and Belgium in the early years of the new millennium (2002) raised renewed interest in the subject. While some have attempted to analyse the implications of legalising euthanasia in the light of individual choices, others have indicated towards the inherent dangers of slippery slope.

Laws prohibiting active euthanasia are usually justified in terms of right to life because it amounts to taking of life by a private person and the state is obligated to protect its citizens from such intentional killing. However, euthanasia occasioned by an act of omission usually escapes criminal liability. The problem has been compounded by the fact

that there is no single way of effecting euthanasia. It can be achieved by various measures each of which has a subtle difference in the extent to which the patient is assisted by others in mercy killing. In medical terminology subtle differences are recognised on two bases: the ways in which euthanasia is carried out and the circumstances in which it is effected taking into consideration the nature of the consent of the patient or lack of it. Since there can be myriad forms of effecting death and the circumstances that occasion such decisions, uncertainties of definitions abound. However, it is widely agreed that euthanasia involves at the very minimum, two things: a quiet, painless death and an intentional act to occasion that death by artificial means. It is the means and circumstances that are open to debate and disagreement. Any useful “discussion of euthanasia must accept the... fact that it involves some form of killing” or hastening death (Mason and Smith, 1999, p.414).

Medical and ethical support for euthanasia usually emanates from such arguments as ‘individual autonomy’, ‘death with dignity’ and, more emphatically, ‘best interest of the patient’. It is argued that sometimes one has to act against strictly moral or ethical injunctions, which may be justified in medical terms and in the ‘best interest of the patient’. They are based on the belief that a patient has a right to autonomy and self-determination. This right can be extended to matters of choice of time, circumstances and the way in which death must occur. Ronald Dworkin, while advocating relaxation in law says, “[m]aking someone die in a way that others approve, but [patient] believes a horrifying contradiction of his life, is a devastating, odious form of tyranny” (Cited in Keown, 2002 pp.52-53). However, opponents of autonomy argument contend that it is difficult to ascertain if a given decision is truly autonomous. Several extraneous conditions determine the exercise of autonomy like loneliness and depression. Moreover, autonomy must be exercised in accordance with sound moral principles. Just as freedom comes with responsibility, autonomy must entail moral restraint. The law provides “scant support for an absolutist understanding of autonomy” (Keown, 2002, p.61).

Peter Singer says the opposition to euthanasia comes from two sources: traditional Christians in view of their religious beliefs, and secular opposition which argues that clinical depression and intense pain can be alleviated with psychiatric help and palliative care. According to Singer, treatment of clinical depression and the use of palliative care can be part of the procedural safeguards to be included in any law on euthanasia but they cannot form a basis of banning it. For him, a middle path would be to allow euthanasia with stricter guidelines so as to restore dignity in death (Singer, 2002, p.16).

It is essential to highlight here the dangers of legalising euthanasia. A law permitting voluntary and physician assisted euthanasia is opposed basically on three grounds. Firstly, it may at times lead to paternalistic decision that amplifies risks of abuse. Secondly, that such a law cannot be checked from misuse to increasingly include possible circumstances to initiate death. Assuming that the moral basis of law can be sustained, it will still present serious practical difficulties in controlling its slide. Finally, it is argued that if one legal exception is made, it may embolden the other aspirants of assisted suicide to seek legal option and open the ‘floodgates’ of litigation.

One may add here that most advocates of euthanasia, on their part, are cautious while supporting its legalisation. The Supreme Court of India, in Aruna Shanbaug judgment, has allowed High Courts to henceforth pass orders on plea filed by near relatives for passive euthanasia of terminally-ill patients after seeking expert opinion of medical panel. It has also recommended decriminalisation of attempt to suicide (section 309 of IPC). However,

most importantly, Aruna Shanbaug continues to live (passive euthanasia was not allowed in her case) because of the strident stand taken by the KEM Hospital staff who have been caring for her since 1973. Each case will have to be brought before the High Court. Most countries are reluctant to make euthanasia legal and it remains a widely debated issue.

8.8 SUMMARY

In the preceding pages we have looked at some of the important debates that have had a bearing on the human rights discourse. The debates highlighted here are neither exhaustive nor conclusive. They merely represent some of the current tidings. It is pertinent to note that the efforts of the international community to resolve contending positions and tread a common ground have been successful in some cases and attempts to seek solutions have proved to be evasive in others. In all, there are three levels of recognition of rights and resolution of contending issues that are evident in this discussion. Firstly, the international community has been successful in smoothening out the differences and codifying the norms and standards; this is clearly reflected in the established principle that rights are interconnected and that no set of rights can claim primacy over others. Secondly, some rights have been standardised and codified without clearly resolving the contentious issues. In a sense, the international community has attempted to circumvent the disagreements focussing instead on standardisation of norms and rights in treaties or declarations. Issues related to minorities, indigenous groups and disabled groups fall under this category where there is no definition to be found in the documents pertaining to these groups nor is there any final consensus on the nature of rights or their implementation. These two questions have been left open-ended. Thirdly, debate and disagreements have proved to be inconclusive as in the case of universalist versus relativist approach to human rights and the right to die with dignity. No common ground exists on these two issues yet.

8.9 TERMINAL QUESTIONS

1. Discuss the debate on the primacy of a set of rights and how it has been resolved at the international level.
2. What are the difficulties experienced in reconciling the claims of universalism and cultural relativism in human rights discourse?
3. In what way do you think the problems and debates of the minorities and indigenous groups are similar? Elucidate.
4. Highlight the paradigm shift that has occurred in understanding disability.
5. After considering the various arguments in favour or against euthanasia, do you think that it can be recognised as a human right? Give reasons.

SUGGESTED READINGS

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