

The background of the cover is a photograph of a sunset or sunrise. The sun is low on the horizon, creating a bright yellow and orange glow that fills the sky and reflects on the water below. The foreground shows dark, silhouetted mountains and hills. The overall mood is serene and contemplative.

STUDIES IN HUMAN RIGHTS

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RELATIONSHIP BETWEEN HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: MECHANISMS FOR IMPLEMENTATION

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Customarily, it has been argued that both 'Human Rights' and 'Humanitarian Law' essentially aim to protect the rights of the individuals more than that of States. Hence it was advocated that these two branches have a limited role in international law. There is no doubt that in the initial stages both the systems have been developed in the national sphere by the greatest amount of suffering and sacrifice of human freedoms to protect the life and liberty of the individual at all times. But, the concerted effort of mankind for the fuller realization of human rights and to eliminate the respective differences between them universally drew the attention of the international community in recognising them in the international plane.

By the advent of science and technology the world has shrunk. It has become a unipolar union with a high degree of interdependence. No state can live by itself without the cooperation of the other. More than ever before, economic and social cooperation, and, the promotion of peace and security became the paramount objectives of the 'comity of nations' in the governing relations. Today the definition of international community covers not only the nation-States, but also the subjects of theirs. In the contemporary scenario 'law of nations' or the 'common law of mankind' regulates the relations of the international community, where in its rules have been grown up on the basis of the common consent of the member States based on customary and treaty norms, such as declaration of Paris (1856), the Hague Rules concerning Land War Fare of 1899 and 1907, the Pact of Paris (1928), the charter of the United Nations (1945), the Geneva Conventions (1949), the International

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Covenants of Human Rights (1966) and the additional protocols to the Geneva Conventions (1977). Today as an embodiment of human rights and humanitarian norms, currently the aim of International Law is to establish the concept of 'one world' and to foster respect for the promotion of life and liberty of the mankind at all times without any discrimination towards race, colour, sex, language, religion or social origin.

In the changing face of international community, human rights and humanitarian norms have a decisive role in influencing all the branches of international law than in yester years. In the visage of increasingly acute suffering, continuous violations against the fundamental freedoms of the individuals and the exploitation of the mankind (especially in the implementation of the economic and social rights), certainly the future world is highly dependent on the fuller of realization human rights in times of peace and war. Taking into consideration of the growing concern of the world community, a modest attempt is made to study the inter-relationship between human rights and humanitarian norms with a particular emphasis for their implementation at the international, regional and national spheres.

In principle the basic aim of 'Human Rights' and 'International Humanitarian Law' is to protect the rights of the individual guaranteed by natural law or positive law at all times. However, in extending protection to human rights of humanitarian character, IHL departs from some of the basic principles, which are valid or needed in peacetime situations. The main aim of IHL is to protect the basic human rights that are recognised by international law during conflicting situations such as internal or external. Though there are differences exist between human rights and IHL, there is also much in common between them. In view of the intricate relationship that exist between them, it is necessary to recapitulate the developments between human rights and IHL before analysing the relationship between them.

Human Rights

Although the term 'Right' has a variety of meanings, human rights can be defined as the rights held by the human beings for the simple reason of being human. Whatever may be the philosophical, social, political, economic and legal foundations of human rights, they exist on the basis of 'human dignity'. Human rights are the minimal rights necessary for the development of human personality and are universal irrespective of varying degrees of social, economic, religious, cultural, political and legal background of the

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individuals. Hence human rights are the inalienable and immutable rights of man vested in him, needs a guarantee for their protection at all times, including conflicting situations and at all levels (i.e. regional, national and international).

In the saga of struggle between liberty of man and the authority of the state, it has taken a longtime for the due recognition of natural or human rights of the individual. The ancestry for the recognition of these rights in the national systems can be traced from the Magna Carta of English (1215), the Petition of Rights (1628), the Bill of Rights and Act of settlement (1689), Virginia Declaration of Rights (1776), and the Declaration of Man and Citizen (1789) by the French National Assembly and the Great October Revolution of Russia in 1917. However, these national efforts for the recognition of the basic freedom of the individual are inadequate and unsatisfactory, unless they are incorporated in and safeguarded by the international society in extending their support for due recognition and adequate protection against the authority of the State.

With the development of the idea for a single international community, a new movement for the recognition of human rights and humanitarian norms has been born at the international level. The events of the First and Second World Wars led the international community in expressing their concern for the promotion of human rights universally. This has influenced the development of the rules of international law for the protection of the natural rights of the individual. Strictly speaking, the modern international law of human rights is a post Second World War II phenomenon.

The conviction for the protection of human rights is clearly expressed repeatedly in a number of declarations. Since the establishment of the United Nations, the Charter of the United Nations contains a number of provisions for the promotion and protection of human rights. The first is the preamble, which specifies that the United Nations will strive hard in upholding the dignity of the individual at all times. The basic obligations of the organizations and its member States in achieving the purposes set out in the preamble are more clearly expressed in Articles 55 of the Charter. In order to fulfil the commitment undertaken by the organization and its member States, the Economic and Social Council constituted a Commission on Human Rights in 1946 in exercise of its powers specified under Article 68 of the Charter. Basing on the recommendation of the Commission on December 10, 1948 the General Assembly had adopted a Resolution (217 III) which is otherwise popularly

called "the Universal Declaration of Human Rights or the Bill of Rights of the Mankind."

Although the Universal Declaration is the first comprehensive instrument on human rights to be proclaimed by an international organ, the rights enumerated in it are not enforceable in courts of law. Because the Declaration is only a moral code of conduct for the States to promote human rights, since the General Assembly adopted it as a resolution having no force in law. Furthermore, the declaration is a mixture of justiciable and non-justiciable (i.e., Civil and Political and Socio, Economic and Cultural) rights, it is difficult for the enforcement of the latter rights in courts of law and which are addressed to the States alone as directives. In view of the difficulties that exist in the implementation of the declaration, the United Nations took steps to bifurcate them and adopted two independent Covenants in 1966. They are (a) the Covenant on Civil and Political Rights and (b) the Covenant on Economic, Social and Cultural Rights. These Covenants came into force in 1976 after receiving the revised number of ratification's (i.e. 38) for their entry into force.

Further, for the effective implementation of the Civil and Political Rights Covenant two additional Protocols have been adopted by the member States as separate instruments. The first one entered into force in 1976. The second one was opened for signature in 1989 and entered into force on July 11, 1991.

Apart from the Universal Declaration and the two Covenants, over the years the United Nations has promulgated a number of Covenants concerning with particular human rights abuses. They are the Convention on the Prevention and Punishment of the Crime of Genocide (1948); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Convention on the Suppression and the Punishment of the Crime of Apartheid (1973); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and other Cruel in- human or Degrading Treatment (1984), and the Convention on the Rights of the Child (1989). In addition to the adoption of various Covenants the United Nations constituted various Committees and Commissions to monitor the effective implementation of the Conventions adopted by it.

Humanitarian Law

The main aim of humanitarian law is to restrain the conduct of belligerents during a military conflict and to protect the persons of wounded,

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shipwrecked, prisoners of war and civilians suffered during hostilities. Accordingly, international humanitarian law can be defined as that body of international law binding on the States on the basis of customary and treaty rules having norms, which limit the use of violence in times of armed conflict upon the consent of the States.

Principally, international humanitarian law owes its birth to the young Swiss Philanthropist Henry Dunant. Moved by the debris of the battle of Solferino (Austrian and French battle in Italy) in 1859, he organized a Conference in 1863 wherein sixteen States had participated. He then set up the International Committee for Aid to the Wounded (later renamed as the International Committee of the Red Cross). These efforts of Dunant had finally accorded by majority of the European States through the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field. This Convention formed as the basis of humanitarian norms for the successive wars. In the light of human sufferings during the Franco-Prussian War (1870), the Spanish - American War (1898), Russian-Japanese War (1904) and of the First World War (1914-1918), and the crucial role played by ICRC¹⁰ in saving lives and preventing needless suffering had moved the States to strengthen the Geneva Convention of 1864. With that spirit in 1929 a Conference in Geneva adopted a Convention with better provisions for the Treatment of Sick and Wounded, and a second Convention on the Treatment of Prisoners of War.

However, the core of modern IHL owes its birth to the Hague Peace Conference of 1899, 1907, the Geneva Conventions of 1944 and the Protocols of 1977.¹¹ Today a great majority of States are parties to these conventions compared to the human rights covenants and protocols. In this long and eventful history, the contemporary norms of IHL applies not only to wars of International character but to the civilian wars of national liberation.¹²

Relationship between Human Rights and International Humatnitarian Law

The brief survey of the evolution and the development of human rights and IHL amply specify that the philosophical, political, legal foundations of both the components of international law are different. Whatever may be the sources of human rights and IHL, the fundamental aspect between them is to extend protection to human beings at all times.¹³ In view of this destined

approach, the norms of human rights and IHL are protective prohibitive and preventive.¹⁴

There is no doubt that IHL antedates human rights law. It has been developed over a century. On the other hand, human rights is only little over half a century old. But due to the progressive development and the volume of codification, human rights law has become the apposite aspect of all the branches of international law including humanitarian law. Hence it is appropriate to describe that human rights law is the heart of which humanitarian law is the body.

The growing convergence between the two aspects has been amply demonstrated at the international level through various conferences and texts. The International Conference of Human Rights held at Teheran in 1968 recognised the need to protect human rights in situations of armed conflict. Basing on the recommendations of the Conference, the United Nations has started viewing international humanitarian law from the angle of human rights law.¹⁵ When viewed in this angle, it is clear that the basic approach of the majority of the texts of human rights, notably the Universal Declaration and Covenants on Civil and Political Rights Specify the standards of application to all human beings at all times including at the time of war. According to Article 4 para (2) of the Civil and Political Rights Covenant the following are recognised as fundamental human rights of the individual to which no derogation may be made even during an armed conflict. These are (1) Right to life (Article 6); (2) The Prohibition of torture of inhuman treatment (Article 7); (3) The Prohibition of slavery and servitude (Article 8 Para 2); (4) The Prohibition of imprisonment for debt (Article 11); (5) The Prohibition of retroactivity of the criminal law (Article 15); (6) The right to recognition as a person before the law (Article 16); and (7) The right to freedom of thought, conscience and religion (Article 18).

This is the same approach that is found in the Regional Conventions such as European Convention on Human Rights (Article 15) and the American Convention on Human Rights (Article 27 para 2).

International humanitarian law is also developed on the basic premise of these core fundamental or human rights. But in view of the particular requirements required during an armed conflict IHL has developed certain supplementary rights, which are not necessary during peacetime. Hence, it departs from the human rights approach of non-warring situations.¹⁶ In fact

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the post World War Humanitarian Law also covers the rights of individual that are affected during an 'Internal Conflict' or 'Civil Strife'. Viewed from this angle, IHL is more advanced in its humanistic approach of protecting the human rights and fundamental freedoms of individuals rather than peace time human rights.

However, a close examination of the common Article 3 of the Geneva Conventions on humanitarian law makes it clear that some of the non-derogable rights of the Civil and Political Covenant have had no place. These are prohibition of slavery, slave trade and servitude, (Article 8) prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (Article 11) the principle of non-retroactivity of criminal law declared in Article 15, the right to recognition as a person everywhere before law (Article 16) are not mentioned. At the same time Article 3 guarantees certain rights which are not there in the Covenant. These are, the prohibition of taking hostages and the critically important due process protection; the prohibition of passing sentences without previous judgement pronounced by a regularly constituted court affording all the indispensable judicial guarantees. However, non-discrimination, the right to life, prohibition of torture recognised under the Covenant of Civil and Political Rights are non-derogable even in accordance with the principles of humanitarian law.

Further under Article 4 of the second Protocol II of the humanitarian law recognises certain fundamental guarantees to persons who don't take part in hostilities or ceased to be part of hostilities. Article 5 guarantees protection to persons whose liberty has been restricted. Article 6 governs with respect to penal provisions. Most of these rights are derogable under the Civil and Political Rights Covenant.

Humanitarian instruments, having been enacted to specific narrow situations of grave emergencies (even as armed conflict, internal strife) the possibility of derogation is very less. Where as human rights texts are generally subject to derogations in various exceptional circumstances. For example Article 4 permits the States to take measures derogating their obligations from the provisions of the Covenant during emergent situations. However, this does not mean that a State has absolute power to derogate the non-derogatable rights, which are accorded by the general principles of international law.

The compact analysis on the relationship between human rights law and humanitarian law amply specifies that they have common concern in their approach for the protection of human beings either at the time of peace or during warring situations. Though some of the areas of them overlap, their inter-relationship is not established crystal clearly. They are implemented separately and at times argued that reciprocity between them is not possible at all times.¹⁷ In view of the uncertainty that is prevailing, it is better to apply them together as a single component of international law than viewing them as two distinct branches of the common law of mankind. Any branch of international law commands respect more than anything else on the basis of its adherence and enforcement. It is the stricter adherence of these norms that brings credence to the aim of protecting the human beings from the violations of the human rights than the discussing the differences that exists between them.

Enforcement of Human Rights and Humanitarian Norms

It is a general problem of all the branches of international law with regard to their enforcement. The same is applicable to human rights and humanitarian law also as the customary branches of international law. There is a radical change in the outlook of the States with respect to the implementation of these two branches in the last half a century.

Today human rights and humanitarian norms have occupied a high pedestal in the international, regional and national planes as binding legal norms on the States and individuals. However, in majority of the regional national societies the justiciability of human rights and humanitarian norms is very narrow, since the State alone decides what rights are to be protected and how these rights are to be protected. Because the States often plead that the protection and enforcement of human rights and or fundamental freedoms mainly depends on the national and social policy. In fact, in majority of the States the policies of the Government depends mainly on the consideration of political parties than that of international concerns and international legal norms. In such a situation, the implementation of human rights and humanitarian norms will always take a back seat whatever may be the progressive steps that are taken by the international community. Hence it is necessary to adopt the following measures for the stricter implementation of these branches at all levels.

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Measures for Implementation at the International Level.

In the last half a century the United Nations has constituted various Commissions and Committees for the promotion and implementation of human rights at the international level. But in view of the recommendatory nature of all the Commissions and Committees, they could not achieve much progress for the effective implementation of human rights. As stated already if politics is the prime concern when rights are being formulated and procedures for implementation being devised, it might be expected to be relevant at the level of practice. The UN and its organs are filled in with representatives of States scarcely bother about the violations whenever they are reported. States having political influence or having powerful friends in these organs can use their cards openly to avoid investigation or can bring it to an halt if investigation has already started before anything has been achieved. In such a situation nothing could be implemented strictly until the nation States reorient themselves with a complementary approach for the protection and promotion of humanitarian norms with a positive outlook. Hence the following suggestions can be considered as an urgent measure to be adopted at the international level:

- 1) The most important aspect is the dissemination of human rights and humanitarian norms which includes teaching and training of the personnel of the States involved in the implementation of these texts. Apart from disseminating the personnel, the United Nations and other Governmental and non-Governmental organisations should give much emphasis in educating the people all over the world.
- 2) On the lives of the proposed international criminal court, which will have jurisdiction to try the violations of humanitarian norms, the establishment of an International Court of Human Rights is the need of the hour.
- 3) The International Court of Human Rights should be given jurisdiction over the States and the individuals. It should be considered as an appellate court where in an appeal may lie from the National courts of a State, if they are unable to protect the rights of the individuals that are guaranteed by the constitution of the country in view of legislative impediments. For example in India in *Harbhajan Singh Bhalla V. Union of India*,¹⁸ the Supreme Court of India had expressed its inability in protecting the fundamental rights of a citizen in view of the non-refusal of the Union of India to accord permission to sue the Algerian Embassy in accordance

with powers conferred on it under Section 86 of the Civil Procedure Court. In this type of circumstances upon the certificate of a National Court the International Human Rights Court should be accorded jurisdiction. At the same time the United Nations should be endowed with power to oversee that the judgements delivered by the Court have to be implemented properly. If any state fails to implement the judgement within a stipulated period of time specified by the Court (at least a minimum of three month time should be given to a state) the General Assembly or the Security Council be empowered to take appropriate action in the form of fine or temporary suspension of the State from the UN or if it is not a member State should impose sanctions on economic and trade related aspects in accordance with the humanitarian character as the UN possesses as specified in Article 2 (7) of the Charter. If the individual is also allowed to appeal to the Court, it will certainly clarify the controversy with respect to the status of individual in international law. The individual should also be allowed to appeal to the proposed International Criminal Court for the criminal breaches of law by the States.

- 4) All the Covenants, Conventions, Protocol of human rights and humanitarian norms have to be codified and should be adopted as a code of mankind through a single instrument for the stricter enforcement of human rights and humanitarian norms. By adopting such a Code, the existing gaps in the norms of international humanitarian law with respect to international and national conflicts could be easily removed. At the same time norms relating to natural calamities arising out of cyclones, earthquakes, flood situations etc., also need to be incorporated as a part of the humanitarian norms.
- 5) Apart from these a High Commissioner of Human Rights and Humanitarian norms be created at the UN level having Regional Commissioners. The High Commissioner and Regional Commissioner be empowered to oversee and to initiate steps for the implementation of the code of humanitarian norms by the States and to submit reports to the United Nations with respect to the efforts of the Commissioners and steps taken by the States in implementing the code of human rights and humanitarian norms.¹⁸

Basing on the reports, if any state fails to implement the human rights and humanitarian norms, the United Nations should initiate steps to take appropriate action as recommended above. In initiating steps against a

violating State, the Security Council should not be allowed to use the veto power. This means there is every need to amend the Charter at least with respect to the implementation of human rights and humanitarian norms.

Enforcement at the Regional Level

The Conventions and Protocols of human rights and humanitarian norms can be implemented effectively only through adoption of Regional Conventions. The success of the European convention and the Court of Human Rights should be taken as a basis atleast by the Asian States. If the Asian States may not be able to come to an understanding in the near future to adopt a Convention, at least the South Asian States should come forward to adopt a Regional Convention on human rights and humanitarian norms. It is possible for them to adopt such a Convention and even to constitute a Court of Human Rights on the lines of the European Court of Human Rights. The adoption of such a Convention and the establishment of a Court will certainly strengthen the hands of the SAARC in eliminating most of the problems that are plaguing the region at present.

Measures to be implemented at the National Level

As an ardent advocator of human rights and humanitarian norms from the ancient periods, India became a party to the majority of the Conventions and Protocols. Of late the Indian judiciary has taken the lead role in protecting the human rights guaranteed by the Constitution of India and by the universal declarations. In fact, among the South Asian States India is the only State, which has constituted a National Human Rights Commission for the effective protection and promotion of human rights, guaranteed by the constitution and by international Conventions. However, in view of massive population illiteracy, socio, economic imbalances and the intricate complexities of the Indian society, majority of the populace are not in a position to enjoy their basic fundamental or human rights as guaranteed by the constitution and by the international texts. Hence the following measures need to be considered at the national level:

- 1) As stated already the government and the non-governmental organizations and media should take an active role in educating the people about human rights and humanitarian norms.
- 2) Teaching of human rights should be made compulsory at all levels of education. Research programmes at the Higher Education level should be made action oriented.²⁰

- 3) The Union Government should take steps for the constitution of human rights Courts in every State as envisaged by the Human Rights Act, 1993.
- 4) The Human Rights Act has to be amended in extending the powers of the National Human Rights Commission, especially an amendment of Section 2-clause (d), which will enable the Commission to inquire the violations against the socio, economic rights. An amendment of Section 36 is also necessary to remove the impediment of time frame or empowering it to deal with matters which have already been dealt with by other Commissions or if they are terminated in midway for reasons better know to the Government.²¹
- 5) Whenever there is an armed conflict or internal strife or a natural calamity, several of the Ministries at the Union and State level have to involve themselves directly. In such situations the Administrators play a vital role in implementing the provisions of the human rights and humanitarian norms of the Geneva Conventions. Hence the Administrative, Foreign Affairs and Police Personnel need to be trained in the fields of human rights and international humanitarian law. Knowledge of these branches will certainly help the officers to eliminate the present day maladies of the polity to a great extent.
- 6) In training the officials and researchers the Indian Society of International Law has to take a lead role with the aid of Universities, teachers, and research organizations in framing programmes to disseminate the knowledge of human rights and IHL. Although the society is presently training the people of various sectors of the society by offering Diplomas through evening courses, they are confined only to the people of Delhi. Hence it has to take steps to start correspondence courses on the similar lines of the Universities that are at present offering through distance education centers. Such efforts of the Society should be strengthened by the Union Government and the University Grants Commission to make them subsidised.
- 7) The law universities started by various States also should focus their attention in the promotion and dissemination of human rights and IHL than confining themselves in teaching traditional areas of law.
- 8) Newspapers and the electronic media should also take a lead role in the promotion of the norms of human rights and IHL.

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- 9) The Regional branch of International Committee of the Red Cross can play a vital role in educating the masses of India, especially in the villages by conducting seminars, symposia, depicting video films in the local language of the people specifying the objectives and principles of human rights and humanitarian law norms.
- 10) Last but not the least, the armed forces should have the basic knowledge of human rights and humanitarian norms. The Government of India should direct all the training institutes of armed forces that aspects of human rights and humanitarian norms need to be taught compulsorily.

Conclusion

The above brief survey clearly specifies that human rights and IHL have been developed tremendously since the end of Second World War. Both the subjects have many common principles in their interaction with each other. Though both of them are considered as independent branches of International law, reciprocity between them plays a vital role in bringing compliance with norms. However, at the same time any attempt to strip these systems of any element of reciprocity is risky. Because the implementation and promotion of these systems at the international, regional and national levels mainly depends on the participation and cooperation of the International organisations and States.

In the promotion of International Humanitarian Law, the United Nations has to play a vital role more than ever before. The United Nations should encourage all the other organisations and States to intensify their work in the promotion of IHL and the application of human rights law. In this United Nations Decade of Human Rights, the United Nations has a huge task on its shoulders in the promotion and dissemination of human rights and IHL. It has the duty to ensure that the future generations of the next century will be able to exercise their fundamental human rights without any fear or favour as guaranteed by its Charter.

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10. B.P. Singh Seghal : "The Role of International Committee of the Red Cross in the Development of International Humanitarian Law", *Ind. J Int. L*, Vol. 29, 1989 pp 52-53 also see Buergental Supra n 8 pp. 267-270 and the literature cited therein.

11. The law fare a) b) c) d) The a) b)
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11. The Hague Conventions of 1899 extended the principles of humanitarian law to persons of wounded and ship wrecked in maritime and land warfare. The Geneva Conventions relate to
 - a) The Amelioration on the Condition of Sick and Wounded in the Field.
 - b) The Amelioration of the Condition of the Wounded Sick and Shipwrecked members of Armed Forces at Sea.
 - c) The Treatment of prisoners of War.
 - d) The Protection of civilian population in time of War.The 1977 Protocols deals with
 - a) Protection of Victims of Armed Conflicts.
 - b) Protection of Victims to Non-International Armed Conflicts.
12. B.C.Nirmal: "Wars of National Liberation and International Humanitarian Law", *Ind. J. Int. L.*, Vol. 28, 1988 pp 201-215
13. for a details study see *Human Rights and Humanitarian Law: UN Bulletin of Human Rights* (91 / 1) 1992 pp 1-60.
14. J. Patronogic, *ibid.*, p.5
15. UNGA Resolution 2444 (XXIII), "On Respect for Human Rights in Armed Conflicts" 1968; also see the Proclamation of Teheran, 1968.
16. The supplementary rights are such as the treatment of War victims, medical care, rights of prisoners to correspond with their families, the right to repatriation etc.
17. Rene Provost, *supra* n 1, pp. 389-454
18. AIR 1987 SC 9; also see for a critical view on the case T.S.N. Sastry "The Changing Concept of State Immunity and Indian Perspective" ALR, Vol. XVI, at p. 2338.
19. For a similar approach see G.V. Ajjappa, "Enforcement of Human Rights" in H.P. Dubey (e.d), *International Law* 1969, pp. 103-105.
20. See K. P. Saksena: "Role of Institutions of Higher Education in Human Rights" *Fifty years of India's Independence*, K.P. Saksena (ed.,) 1999, pp.155-168.
21. For a detailed discussion on the Powers of the Commission, See T.S.N.Sastry, *supra* n.7, pp. 102-104.