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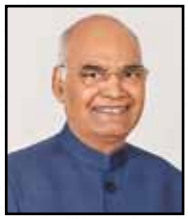

MESSAGE

I am happy to know that the National Human Rights Commission (NHRC) is celebrating its silver jubilee on 12th October, 2018.

Since its inception, NHRC has played a pivotal role in protecting and promoting human rights in the country. The Commission has taken several initiatives to promote awareness about human rights and has been an able watchdog for securing human rights of all Indians.

Human rights are basic rights of every individual and their protection holds the key for a nation and a society that cherishes equality, justice and liberty for all. These values are intrinsic to our civilisational heritage as well as are cornerstones of our Constitution.

I extend my warm greetings and felicitations to all those associated with the National Human Rights Commission and wish the silver jubilee celebration all success. I wish the Commission continued success in its good work.

Ramnath Kovind

(Ram Nath Kovind)

सत्यमेव जयते

भारत के उपराष्ट्रपति

VICE-PRESIDENT OF INDIA

MESSAGE

I am happy to know that National Human Rights Commission (NHRC) is celebrating its silver jubilee on October 12, 2018.

Human rights are inherent to all human beings without discrimination on the basis of caste, creed, religion or any other status. The Constitution of India guarantees every individual to live a life of dignity, equality and respect and acts as a custodian of fundamental rights of every citizen.

Established in India under the Protection of Human Rights Act, 1993, NHRC has always played an important role in strengthening the human right regime in our vast country. The annual journals published by NHRC on the crucial issues of life, liberty, equality and dignity are proving important documents in highlighting and enlightening the general public about their rights on the subjects relating to education, health, gender equality, rights of children, rights of persons with disabilities and human rights, etc.

On the occasion of Silver Jubilee Celebrations, I convey my best wishes to NHRC and wish the event a grand success.

MVaidu.

(M. Venkaiah Naidu)

सत्यमेव जयते

प्रधान मंत्री
Prime Minister

MESSAGE

I am happy to know that the National Human Rights Commission is celebrating its silver jubilee on 12 October 2018.

The National Human Rights Commission is working continuously for the promotion and protection of human rights of all the segments of the society especially the marginalized sections. Through its Journal, the Commission has sought to create an important platform for sharing the ideas and opinions of eminent persons on various issues relating to human rights.

Through this platform, I wish to convey that the Government is firmly determined and committed to uphold human rights, of every individual in the country. It is with this objective our focus is on providing basic amenities like housing, power, water and sanitation for all – important not just for welfare, but also human dignity; with the philosophy of "**Sabka Sath Sabka Vikas**".

Our development is intrinsically linked to the empowerment of women and it begins with the girl child. India is now moving forward from women development to women-led development.

On the occasion of silver jubilee of the Commission, I extend my warm greetings and wish them a grand success.

(Narendra Modi)

राष्ट्रीय मानव अधिकार आयोग
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Justice H.L. Dattu
Chairperson
(Former Chief Justice of India)

Preface

It is with great pleasure that the Special Edition of the NHRC English Journal is being released on the occasion of the Silver Jubilee of the Commission on 12 October 2018.

The NHRC, in its 25 years of journey, has relentlessly endeavoured to fulfil its mandate of the protection and promotion of human rights as enunciated in the Protection of Human Rights Act, 1993. Though 25 years is not a very long time in the life of an institution, but good enough to introspect and chronicle the journey taken by it so far. I would like to acknowledge, appreciate and express gratitude to everyone associated with the Commission for their contribution during this journey of 25 years.

The Commission, in discharge of its statutory obligation under Section 12 (h) of the Protection of Human Rights Act, 1993, has been spreading human rights literacy and awareness through a variety of formats, such as; training programmes, seminars, workshops, short-films, newsletter, journal, books, etc.

The Commission published the first Annual English Journal in 2002 to facilitate sharing of ideas, experiences and information on human rights issues, both national and international. It seeks to promote debate and free exchange of ideas on a range of serious Human Rights issues. In the last sixteen editions of NHRC Journal, various facets of human rights were focused upon such as rights of women and children, workers, right to education, issues of corruption and governance, right to health, right to food, human rights education, gender equality, right against torture, criminal justice system, etc. Through this Journal, the Commission sought to create an important platform for building a body of high quality

scholarship on human rights and a community of human rights scholars. Over the years, eminent jurists, academicians, scholars and experts have enriched this Journal by expressing their views through their articles on the human rights issues.

In this Special Edition of the journal, the eminent personalities from various fields have shared their thoughts as to how they perceive human rights, i.e., their idea of human rights. The resonance emanating from these articles make a point that human rights, even if guaranteed in the law, require ongoing work to ensure that they are realized. Realization of human rights acts as a catalyst and a driving force for the Commission to work relentlessly.

I express my deep gratitude to all those who have contributed to the cause of human rights by contributing their articles and also to the Members of the Editorial Board whose deep knowledge and experience have enriched this Journal. I hope that this Journal of the National Human Rights Commission will prove to be a successful endeavour to create greater awareness and knowledge in the area of human rights.

(H.L. Dattu)

राष्ट्रीय मानव अधिकार आयोग
NATIONAL HUMAN RIGHTS COMMISSION
मानव अधिकार भवन, सी–ब्लॉक, जीपीओ कम्पलेक्स, आईएनए, नई दिल्ली–110 023
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Ambuj Sharma, IAS
Secretary General

From the Editor's Desk

The Annual English Journal of the National Human Rights Commission (NHRC) is being published since 2002 and this Journal has maintained a legacy of providing a platform for erudite work on human rights. Over the years, this Journal has been recognized across India for promoting quality scholarship on Human Rights and bringing together the fraternity of Human Rights scholars to deliberate on note-worthy topical issues.

The confluence of articles, in this Special-edition of the Journal commemorates the silver jubilee of NHRC. We appreciate this long journey of the Commission and its mandate as detailed under the Protection of Human Rights Act (PHRA), 1993. In discharge of its statutory obligation under Section 12 (h) of the Act, the Commission has been spreading human rights literacy and awareness through a variety of formats, including the NHRC English Journal. To celebrate the NHRC's existence, as an apex statutory body for 25 years, this Journal presents a set of readings by some of the pioneers of the Indian society, as well as contemporary stalwarts, that present their views on a broad spectrum of human rights.

This special edition of the Journal has been enriched by several eminent persons, such as former President of India Shri Pranab Mukherjee and His Holiness the Dalai Lama along with others. They have expressed their views on varied facets of human rights issues including patriotism, human

dignity, restorative justice, creative role of Indian Judiciary, poverty as a violation of human rights, child-yardstick to measure human rights and legal aid at police stations, among others.

Hon'ble President, Vice-President and Prime Minister of India have been truly considerate to convey their message to the Commission for completing 25 years of its existence. I express my deep gratitude to them.

I would like to compliment and express my gratitude to all the authors who have contributed to this Journal.

I am grateful to all the Editorial Board members for providing their full cooperation, enabling the Commission to produce this English Journal of the National Human Rights Commission, 2018.

(Ambuj Sharma)

Pranab Mukherjee
Former President of India

Nation, Nationalism and Patriotism

I wish to share with you my understanding of the concepts of Nation, Nationalism and Patriotism in the context of India, that is Bharat. These three concepts are so closely intertwined that it is difficult to discuss any one of them in isolation.

Let us make a beginning by understanding the dictionary meaning of these three words. **Nation** is defined as 'a large group of people sharing the same culture, language or history and inhabiting a particular state or area'. **Nationalism** is defined as 'identification with one's own nation and support for its interests especially to the exclusion of interests of other nations'. **Patriotism** is defined as 'devotion to and vigorous support for one's country'.

Let us look at our roots,

India was an open society, globally connected along the Silk and Spice Routes. These busy highways of commerce and conquest witnessed a free exchange of culture, faith and invention as merchants, scholars and sages traversed mountain and desert and sailed the oceans. Buddhism reached Central Asia, China and Southeast Asia together with Hindu influences[1]. Ancient travelers

[1] B. G. Verghese

like **Megasthenes** in the 4th century B.C., **Fa Hien** in the 5th century A.D. and **Hiuen Tsang** in the 7th century AD; when they came to India, wrote about the efficient administrative systems with planned settlements and good infrastructure. **Takshashila, Nalanda, Vikramashila, Valabhi, Somapura** and **Odantapuri** comprised the ancient university system that dominated the world for 1,800 years beginning the sixth century BCE. They were magnets for the finest minds and scholars in the world. In the liberal environment of these institutions creativity found full form and art, literature, and scholarship flourished. **Chanakya's Arthashastra**, an authoritative text on state-craft was also written during this period.

India was a state long before the concept of the European Nation State gained ground after the **Treaty of Westphalia** in 1648. This model- of a defined territory, a single language, shared religion and a common enemy- is the model which led to the formation of various nation states in Europe. On the other hand Indian Nationalism emanated from **"Universalism"** the philosophy of ***Vasudhaiva Kutumbakam*** *(olsdkso dqVqEcde)* ***and Sarve Bhavantu Sukhinah, Sarve Santu Niramayah.*** We see the whole world as one family and pray for the happiness and good health of all. Our national identity has emerged through a long drawn process of confluence, assimilation, and co-existence. The multiplicity in culture, faith and language is what makes India special. We derive our strength from tolerance. We accept and respect our pluralism. We celebrate our diversity. These have been a part of our collective consciousness for centuries. Any attempt at defining our nationhood in terms of dogmas and identities of religion, region, hatred and intolerance will only lead to dilution of our national identity. Any differences that may appear are only on the surface but we remain a distinct cultural unit with a common history, a common literature and a common civilization[2]. In the words of the eminent historian **Vincent Smith**, "***India beyond all doubt possesses a deep underlying fundamental unity, far more profound than that produced either by geographical isolation or by political superiority. That unity transcends the innumerable diversities of blood, colour, language, dress, manners, and sect***"[3].

[2] S. Radhakrishnan, The Hindu Way of Life.

[3] Oxford History of India (1919), p.x.

If we take a quick look at history the emergence of the Indian State can be traced back to the sixteen **Mahajanapadas** mostly spread across Northern India in the 6th century BC. In the 4th century BC, **Chandragupta Maurya** defeated the Greeks to build a powerful empire comprising of North-Western and Northern India. **Emperor Ashoka** was the most illustrious ruler of this dynasty. After the collapse of the Mauryan Dynasty, the empire broke into small kingdoms around 185 BC. **Gupta Dynasty** again created a vast empire which collapsed around 550 AD. Many dynasties ruled till 12th century, when Muslim invaders captured Delhi and successive dynasties ruled for the next 300 years. Babur defeated the last **Lodhi King** in 1526 at the **First Battle of Panipat** and firmly established Mughal rule which continued for 300 years. The **East India Company** after winning the **Battle of Plassey** in 1757, and the **Three Battles of Arcot** (1746-63) brought a vast territory in East and South of India under its control. A large part of western region was also annexed to the company's territory and to administer these territories, a modern form of government was established in 1774. To administer these territories, the office of Governor General at fort William, Calcutta and two sub-ordinate governors at Madras and Bombay were created. For nearly 140 years, Calcutta was the centre of British Authority in India. However, the responsibility of administration was taken away from the East India Company in 1858 and the Secretary of State for India was appointed in the British Cabinet to superintend the Indian Administration.

Throughout this period of 2500 years of changing political fortunes and conquests, the 5000 year old civilizational continuity remained unbroken. In fact, each conqueror and each foreign element had been absorbed to form a new synthesis and unity[4]. **Tagore** in his poem '**Bharat Teertha'** says and I quote "……***No one knows at whose beckoning call how many streams, of humanity came in indomitable waves from all over the world, over the millennia and mingled like rivers, into this vast ocean and created an individual soul, that is called Bharat"***.

[4] Rudrangshu Mukherjee

The concept of Modern Indian State found frequent articulation by various Indian organizations including the Indian National Congress towards the end of nineteenth century. Starting with **Shri Surendranath Banerjee** in 1895 at Pune, all Congress Presidents gave a call for an Indian Nation comprising the territorial areas of British India and the territories of 565 princely states. When **Bal Gangadhar Tilak** gave voice to the phrase coined by **Barrister Joseph Baptista** "***Swaraj is my Birthright and I shall have it***", he referred to Swaraj for the Indian People – encompassing various castes, creeds, and religions, spread across British India, and Princely States. This Nation and Nationalism was not bound by language, religion, or race. As Gandhiji explained Indian nationalism was not exclusive, nor aggressive, nor destructive. It was this Nationalism **that Pandit Jawaharlal Nehru** so vividly expressed in the 'Discovery of India', and I quote, "***I am convinced that Nationalism can only come out of the ideological fusion of Hindu, Muslim, Sikh and other groups in India. That does not mean that extinction of any real culture of any group, but it does mean a common national outlook, to which other matters are subordinated***". In the process of our movement against British Rule, the various anti-colonial, anti-British and mostly progressive movements across the length and breadth of the country were unified into a cohesive national struggle for freedom, keeping the feeling of patriotism above their individual, ideological and political leanings.

We won independence in 1947. Thanks to the efforts of **Sardar Vallabhbhai Patel**, the Princely States merged leading to the consolidation of India. The complete integration of Provincial and Princely States took place after the formation of states on the recommendation of States Re-organisation Commission.

On 26 January 1950, the Constitution of India came into effect. In a remarkable display of idealism and courage, we the people of India gave to ourselves a sovereign democratic republic to secure for all its citizens justice, liberty, and equality. We undertook to promote among all citizens fraternity, the dignity of the individual and the unity of the nation. These ideals became the lodestar of the modern Indian State. Democracy became our most precious guide towards peace and regeneration from the swamp of poverty created by centuries of colonial rule. For us, Democracy is not

a gift, but a sacred trust. The Indian Constitution, consisting of 395 articles and 12 schedules, is not merely a legal document but a Magna Carta of socio-economic transformation of the country. It represents the hopes and aspirations of the billion plus Indians. From our constitution flows our nationalism. The construct of Indian nationalism is **'Constitutional Patriotism'**, which consists of an appreciation of our inherited and shared diversity; a readiness to enact one's citizenship at different levels; the ability to self correct and learn from others[5].

I want to share with you some truths that I have internalized during my fifty year long public life, as a Parliamentarian and Administrator.

The soul of India resides in pluralism and tolerance. This plurality of our society has come through assimilation of ideas over centuries. Secularism and inclusion are a matter of faith for us. It is our composite culture which makes us into one nation. India's Nationhood is not one language, one religion, one enemy. It is the '***Perennial Universalism'*** of 1.3 billion people who use more than 122 languages and 1600 dialects in their everyday lives, practice 7 major religions, belong to 3 major ethnic groups – Caucasians, Mongoloids, and Dravidians live under one system, one flag and one identity of being '**Bhartiya**' and have **'No Enemies'**. That is what makes Bharat a diverse and united nation.

In a democracy, informed and reasoned public engagement on all issues of national importance is essential. A dialogue is necessary not only to balance the competing interests but also to reconcile them. Divergent strands in public discourse have to be recognized. We may argue, we may agree, or we may not agree. But we cannot deny the essential prevalence of multiplicity of opinion. Only through a dialogue can we develop the understanding to solve complex problems without an unhealthy strife within our polity.

Peaceful co-existence, compassion, respect for life, and harmony with nature form the foundation of our civilization. Every time a child or woman is brutalized, the soul of India is wounded. Manifestations of rage are tearing our social fabric. Every day, we see increased violence

[5]Guha, Ramchandra. 'Patriotism Vs Jingoism', *Outlook* (2018).

around us. At the heart of this violence is darkness, fear, and mistrust. We must free our public discourse from all forms of violence, physical as well as verbal. Only a non-violent society can ensure the participation of all sections of people in the democratic process, especially the marginalized and the dispossessed. We must move from anger, violence, and conflict to peace, harmony, and happiness.

We have lived with pain and strife for long enough. You are young, disciplined, well trained and highly educated. Please wish for peace, harmony and happiness. Our Motherland is asking for that. Our Motherland deserves that. The message I bring to you is to join hands to build an inclusive India.

Happiness is fundamental to the human experience of life. To lead healthy, happy, and productive lives is the basic right of our citizens. While we have done well on our economic growth indicators, we have fared poorly on the World Happiness Index. We rank **133 out of the 156 countries** mapped in the World Happiness Report 2018. **Kautilya's** *Shloka* from ***Arthashastra***, inscribed near lift No. 6 in the Parliament House says:

प्रजासुखे सुखं राज्ञः प्रजानां च हिते हितम् ।
नात्मप्रियं हितं राज्ञः प्रजानां तु प्रियं हितम् ।।

In the happiness of the **people** lies the happiness of the king, their welfare is his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever causes happiness to all **people. Kautilya** points out in this *shloka* very succinctly that the State is for the people. People are at the centre of all activities of the state and nothing should be done to divide the people and create animosity amongst them. The aim of the state should be to galvanise them to fight a concerted war against poverty, disease and deprivation and to convert economic growth into real development. Let the objective of spreading Peace, Harmony and Happiness inform the formulation of our public policy and guide all the actions of our state and citizens in their everyday life. This and only this will be able to create a happy nation, where Nationalism flows automatically.

Thank You
Jai Hind.

His Holiness
the Dalai Lama*

Human Rights and Universal Responsibility

I have lived most of my adult life as a refugee in India. It has been my second home for nearly 60 years. In fact, I'm India's longest-staying guest and I remain ever grateful to the government and the people of India for the kindness shown towards my fellow Tibetans and me .

India is home to all of the world's major religious traditions; there is respect even for non-believers. I have great admiration for the secular nature of India's tradition over thousands of years. And for Tibetans, India is the source of our Buddhist religious tradition and knowledge. Buddha attained enlightenment in Bodh Gaya and all the renowned masters of the legendary Nalanda Monastic University were Indian. In the past, Tibetan scholars were sent to study in India and Indian masters visited Tibet to teach. India and Tibet have a strong historical and spiritual bond; hence we Tibetans refer to India as our Aryabhoomi.

In the course of my years in India, I have travelled freely to all part of the country and noted the tremendous development that has taken place. In addition to economic advancement, there is great appreciation of the rights of all citizens of India. The establishment of the National Human Rights Commission is but one example of this.

* His Holiness the Dalai Lama is the spiritual leader of Tibet and was awarded a Noble Peace Prize in 1989 for his non-violent struggle for the liberation of Tibet.

Your Commission is charged with protecting the human rights of all citizens and with holding the government accountable when these are violated.

However, despite tremendous advances in so many fields, a large number of Indians continue to face difficulties. While in the more affluent parts of India people lead luxurious lives, countless others struggle to meet their basic needs. They work hard to survive in the face of inequality, mismanagement and injustice. Despite legal protection, social class and caste divisions lead to unequal enjoyment of human rights and democratic freedom.

I once visited Orissa where poverty, especially among tribal people, has led to conflict and insurgency. I met with a Member of Parliament from the region and discussed these issues. He told me about a number of legal mechanisms and government projects aimed at assisting and protecting the tribal people. The problem, he told me, was that sometimes the funds provided by the government were not reaching, in toto, those they were intended to help. When poor management, inefficiency and irresponsibility subvert such projects, they become the cause of problems in society.

Even when a system may be sound, its effectiveness depends on the way it is implemented. If, owing to failures of personal integrity, a good system is misused, it can easily become a source of harm rather than benefit. I know that our leaders are aware of this and are working sincerely to redress the issues. However, we will never solve problems simply by instituting new laws and regulations. Ultimately, the source of the problems lies at the level of the individual. If people lack moral values and integrity, no system of laws and regulations will be adequate. So long as people give priority to material values, all the outward manifestations of neglected inner values such as injustice, inequity, intolerance and greed, will persist.

What can be done about this? The modern education system in India, as in other countries, is oriented towards material goals rather than inner values. We seem to be giving too much attention to the

external aspect of life while neglecting inner moral values. By contrast, ancient Indian traditions had a rich understanding of the workings of the mind and emotions. I believe that this ancient Indian knowledge can be of great value in tackling the social problems we face today. By learning to tackle the emotions, it is possible to maintain peace of mind and inner strength.

Our own peace of mind has an impact on others and can lead to a wider sense of global or universal responsibility. Fundamentally, we all desire happiness and do not want to suffer. We all prefer others' generosity to meanness. And, who among us would not favour tolerance, respect and forgiveness of our failings over bigotry, disrespect and resentment? Regrettably, we see too much emphasis on secondary differences between individuals and groups of people, leading to divisions between 'them' and 'us'. We need to learn that we are all dependent on each other. My own happiness and success depends on the wellbeing of my fellow seven billion human beings.

We need to promote inner values, qualities that we all appreciate in others and toward which we all have a natural instinct, bequeathed by our biological nature, enabling us to survive and thrive only in an environment of concern, affection and warm-heartedness, the ingredients of compassion. The essence of compassion is a desire to alleviate the suffering of others and to promote their well-being. A compassionate attitude opens our inner door, making it much easier to communicate with others. When we are too self-centred, fear, doubt and suspicion arise and our inner door closes.

When we possess a sense of universal responsibility, all human beings, including non-believers, and even those critical of religion, will be seen as brothers and sisters. Once we develop this attitude towards all, we won't have any difficulty in accepting people of different religious faiths. All major religious traditions convey the same message of love, compassion and forgiveness. With a true attitude of universal responsibility we will be able to distinguish between our faith, which we have for our own religion, and respect, which we extend to all religions.

We can thereby bring about genuine harmony among religious traditions.

I strongly believe that it is worthwhile and possible to implement this different approach to human development. This is an aspect of my own personal commitment that I hope the National Human Rights Commission will work at incorporating in your work. My confidence comes from my conviction that all of us, all human beings, are basically inclined toward what we perceive to be good. Whatever we engage in is because we think it will be of some benefit. We also all appreciate the kindness of others. We are all, by nature, oriented toward the basic human values of love and compassion; we all prefer their love and kindness.

Kailash Satyarthi*

Child: The Yardstick of Human Rights and Development

It has cost the world centuries of war and conflict to recognize the universal human rights of all people. The greatest minds, through contest and collaboration, established their enforceability with potent doctrines, laws and institutions. And yet, what we face today is the largest deprivation of human rights in the history of our world.

It is thus only logical to conclude that the realisation of human rights will not be achieved merely through the enforcement of law, but through the actualisation of the values of liberty, justice and equality in the lives of people. In this article, I argue that the yardstick to measure the realisation of human rights in our society is the life of the 6-year old girl child from a scheduled caste or tribe, living in a village working as slave labour in a brick kiln and vulnerable to all forms of abuse and exploitation. She is the true evaluator of the development of India.

Human rights and development cannot be viewed as disjointed from one another. The idea of development in the absence of human rights is a hollow one that can never sustain. On the other hand, the true realisation of human rights will have sustainable development as intrinsic to it. Unfortunately, what we are witnessing today is narrow and vertical development that is unjustifiably bent in favour of those having control

* Shri Kailash Satyarthi is a Nobel Peace Laureate (2014).

over wealth, information and power. We have to look horizontal in our development strategy, where it places all beings at a position of equal dignity, opportunity and voice. For this I believe that quality education is the great equalizer; of gender, caste, economic or other disparity. Let the right to education extend to rights through education, which begins with children.

Rights that may be guaranteed and even accessible will never be realized without human freedom and liberty; most importantly, the freedom from fear. Why do citizens fear the institutions that are built to serve and protect them? This is because the very system that perpetuates violence creates institutions for protection from this violence. The independence of democratic institutions is compromised at the expense of the faith placed in them by its citizens. When people believe that their freedoms are in conflict with the institutions that are meant to protect these freedoms, this gives birth to fear. It is therefore imperative that a democracy is able to create a culture of rights that is dynamic and empowering.

When citizens adopt a way of life that preserves and promotes the rights of themselves and one another, it leads to a culture of rights. This can be accomplished only through inclusive development in a free and thriving democracy. A nation that embraces the principles of liberty, justice, and equality at the core of development will undeniably achieve a secure future through the protection of its children.

I congratulate the National Human Rights Commission (NHRC) on the completion of 25 years of standing tall as the protector of the rights of the vulnerable and downtrodden. Time and again, I have placed my faith in NHRC in my struggle for the protection of children. I believe it is an opportune time for the Commission to redefine the scope of human rights as the foundation of social justice. And as we progress as a nation, we must ensure that the 6-year old girl child is not left behind, but is at the forefront of development.

Zeid Ra'ad Al Hussein*

Human Rights are not a Luxury

Four years as the U.N. High Commissioner for human rights have brought me many luminous encounters and desperate struggles, much painful and shocking information, and some profound lessons that may take many years to fully assimilate.

I have constantly circled back to the drafting of the Universal Declaration of Human Rights in 1948, where this story truly began. It was a time of slaughter and terrible suffering, with broken economies and nations emerging from the ashes of two global wars, an immense genocide, atomic destruction and the Great Depression. Finding solutions that could ensure global — and national — peace was a matter of the starkest kind of survival. Committing to the U.N. Charter and the Universal Declaration of Human Rights was crucial. They were not philosophical goals: This was life or death.

There could be no peace without justice. There could be no durable development without promotion of broad social progress and better standards of life, for all, in larger freedom. The men and women who survived the two world wars understood this utterly. It was in their bones.

* Mr. Zeid Ra'ad Al Hussein is the Former U.N. High Commissioner for Human Rights.

Treaty by treaty, world leaders built a great body of laws and covenants and committed to upholding them. Today there is a great cynicism about the global order they constructed — never fully global, never very orderly — but although it may have been partial, the progress they ensured was immense.

But that generation is departing quickly, and with them the living memory of the lessons that were so painfully clear to them. Now, rather than advancing toward greater freedom, justice and peace, the world is going backward — to a landscape of increasingly strident, zero-sum nationalism, where the jealously guarded, short-term interests of individual leaders supplant and destroy efforts to find common solutions.

We are moving backward to an era of contempt for the rights of people who have been forced to flee their homes, because the threats they face there are more dangerous even than the perils of their voyage. Backward to a time when military operations could deliberately target civilians and civilian sites such as hospitals, and chemical gases were openly used for military purposes and against innocent families.

We are moving backward to an era when racists and xenophobes deliberately inflamed hatred and discrimination among the public, while carefully cloaking themselves in the guise of democracy and the rule of law. Backward to an era when women were not permitted to control their own choices and their own bodies — when criticism was criminalized and human rights activism brought jail, or worse.

This is the way that wars are made: with the snarl of belligerence and the smirk of dehumanization; the lash of injustice and the incremental erosion of old and seemingly wearisome checks. The path of violence is made up of the un-reckoned with consequences of banal, incidental brutality seeping into the political landscape.

Here is one lesson: Intolerance is an insatiable machine. Its wheels, once they begin to function at a certain amplitude, become uncontrollable — grinding deeper, more cruelly and widely. First one group of people is singled out for hatred; next it will be more, and then more, as the machine for exclusion accelerates into violence, and into civil or international

warfare — feeding always on its own rage, a growing frenzy of grievance and blaming. As that tension begins to peak, no obvious mechanism exists that is capable of decompressing and controlling its intensity, because the machine functions on an emotional level that has very little contact with reason. Release may come only after tremendous violence. This is something those of us who work for human rights have witnessed time and again.

We are at a pivotal moment in history, now, as contempt for human rights spreads. Xenophobes and racists have emerged from the shadows. A backlash is growing against advances made in women's rights and many others. The space for civic activism is shrinking. The legitimacy of human rights principles is attacked, and the practice of human rights norms is in retreat. What we are destroying is, quite simply, the structures that ensure our safety.

The destruction of Syria is a murderous parable, written in blood, that brings home yet again that horrific spiraling of incremental human rights violations into absolute destruction.

The organized campaigns of violence against the Rohingya in Myanmar – Southeast Asia's fastest-growing economy in 2016 — yet again reminds us that economic growth will never maintain peace and security in the face of biting discrimination. In 2017 we once again saw the specter of genocide, and once again, we did very, very little to stop it from happening.

So, in a sentence, what is the one core lesson that has been brought home to me by this extraordinary, privileged, crushing mandate as high commissioner?

It is that in every circumstance, the safety of humanity will be secured only through vision, energy and generosity of spirit; through activism; through the struggle for greater freedom, in equality; and through justice.

Message of the UN Secretary-General on Human Rights Day 2017

This year's commemoration of Human Rights Day marks the beginning of a year-long celebration of seven decades since the adoption of one of the world's most profound and far-reaching international agreements. The Universal Declaration of Human Rights establishes the equality and dignity of every human being and stipulates that every government has a core duty to enable all people to enjoy all their inalienable rights and freedoms.

All of us have a right to speak freely and participate in decisions that affect our lives. We all have a right to live free from all forms of discrimination. We have a right to education, health care, economic opportunities and a decent standard of living. We have rights to privacy and justice. These rights are relevant to all of us, every day. They are the foundation of peaceful societies and sustainable development.

Since the proclamation of the Universal Declaration in 1948, human rights have been one of the three pillars of the United Nations, along with peace and development. While human rights abuses did not end when the Universal Declaration was adopted, the Declaration has helped countless people to gain greater freedom and security. It has helped to prevent violations, obtain justice for wrongs, and strengthen national and international human rights laws and safeguards.

Despite these advances, the fundamental principles of the Universal Declaration are being tested in all regions. We see rising hostility towards human rights and those who defend them by people who want to profit from exploitation and division. We see hatred, intolerance, atrocities and other crimes. These actions imperil us all.

On this Human Rights Day, I want to acknowledge the brave human rights defenders and advocates, including UN staff, who work every day, sometimes in grave peril, to uphold human rights around the world. I urge people and leaders everywhere to stand up for all human rights – civil, political, economic, social and cultural -- and for the values that underpin our hopes for a fairer, safer and better world for all.

António Guterres

Fali S. Nariman*

As to Why Human Rights Day is Celebrated Every Year

In 1982 when Canada enacted for the first time a "Charter of Rights", the caustic comment of a Canadian Senator was, "From now on, we will have: a field day for crackpots, a gold mine for lawyers, and a pain in the neck for judges and legislators".

In India, (depending on one's occupation) its citizens have experienced the "field day", the "gold-mine", as well as the "pain in the neck" – for nearly 70 years! India's constitution, which included a Fundamental Rights Chapter, came just two years after the Universal Declaration of Human Rights (UDHR) had been adopted by members of the United Nations on December 10, 1948: the UDHR having served as the foundation of two binding U.N. human rights covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The UDHR was drafted by the UN Human Rights Committee;[1] its task could not be completed in days or in weeks. It took many months;

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[1]The following members of the Human Rights Commission were appointed members of the Human Rights Committee: Mrs. Eleanor Roosevelt, USA (Chairman of the Committee also Chairman of the Human Rights Commission); William Hodgson (Australia); Charles Habib Malik (Lebanon); Hernan Santa Cruz (Chile); Rene Cassin (France); Alexander E. Bogomolov (Soviet Union); Charles Dukes (United Kingdom); John Peters Humphrey (Canada), Director U.N. Division of Human Rights.

not because the delegates were short on ideas and ideals, but because the approaches of individual members of the Human Rights Committee, which produced the ultimate draft, were different – they were drawn from different cultural regions of the world.

Determined to complete the Draft Declaration in record time, the Committee's Chairman, Mrs. Eleanor Roosevelt –as famous as her husband US President Franklin Roosevelt, pressed her colleagues tirelessly, almost mercilessly! The Committee worked at times for sixteen hours a day, and some delegates secretly whispered to themselves the prayer ascribed to Franklin Roosevelt: "Lord, make Eleanor tired!"[2]

The First Director in the UN Division of Human Rights, Mr John Humphrey, records in his memoir how when the draft of the Universal Declaration was ultimately completed, Mrs. Roosevelt produced a bottle of wine, which (she said) had been presented to her by her uncle, former US President Theodore Roosevelt. It was considered appropriate that the French Member of the Committee, M. Rene Cassin, should open the bottle, which he promptly proceeded to do – with great ceremony. The wine was poured into glasses and a toast was proposed. Each Member of the Committee raised his glass and took a sip. Alas, the wine that had been preserved for so long had turned to vinegar! John Humphrey records that none of those present flicked an eyelid and Mrs. Roosevelt (a teetotaller) could not tell wine from vinegar and so never sensed what was wrong. This is when the rest of the members pledged to one another to preserve the memory of this great document (the UDHR) – to keep it from turning sour! And *that* (it is said) is the reason why the tenth of December each year is not merely *observed*, but always *celebrated,* as Human Rights Day.

The story has a moral, and the moral is that just as a bottle of wine is meant to be opened and critically appreciated, so it is with words: however learned, precise and legalistic, when they are bottled up in a document they

[2] Once the Committee finished its work in May 1948, the draft was further discussed by the Commission on Human Rights, the Economic and Social Council, the Third Committee of the General Assembly before being put to vote in December 1948. During these discussions many amendments and propositions were made by UN Members States.

tend to turn stale and sour. They have to be read, understood and applied. They have to be widely disseminated and must penetrate into the ethos of the people, which is a challenging task, entrusted by India's Parliament to the present ever-vigilant and vibrant Human Rights Commission, established under the Protection of Human Rights Act, 1993[3].

[3] Protection of Human Rights Act, 1993 contains the following definitions (Section 2(d) and Section 2 (f))
(d) "Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.
(f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.

Soli J. Sorabjee*

Creative Role of Indian Judiciary in Enlarging and Protecting Human Rights

When a person proclaims that his country is a democracy I request him to send me the leading newspapers in his country. If there is fulsome praise of the government and hardly any criticism I realise that democracy is absent in the country. Another request I make is to supply me a few law reports containing judgments in connection with freedom of expression and freedom of the press. If the judgments extol the virtues of judicial restraint and are full of praise for the government and hardly give relief to persons who complain of violation of their fundamental rights, it is apparent that the claim of democracy is myth, not reality.

Our country suffers from many ills and there are constant violations of Fundamental Rights of citizens by the executives. Fortunately the judiciary in our country has adopted a creative role in protecting and also enlarging fundamental rights.

Fundamental rights occupy pride of place in Part III of our Constitution. Fundamental rights are enforceable against the State and its manifold instrumentalities, and also against bodies and institutions in which there is significant government control and involvement.

One manifestation of the creative role of the Indian judiciary, is that Fundamental rights, which are not specifically mentioned in Part III of the

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Constitution, have been spelt out and deduced on the theory that certain un-enumerated rights are implicit in the enumerated guarantees.

Let me give some illustrations. Our Constitution does not specifically guarantee freedom of the press as a fundamental right. In several decisions of the Supreme Court freedom of the press has been held to be implicit in the guarantee of freedom of speech and expression and has thus acquired the status of a fundamental right by judicial interpretation. The Supreme Court, by interpretation of the free speech guarantee, has also deduced the right to know and the right of access to information, by reasoning that the concept of an open government directly emanates from the right to know, which is implicit in the guarantee of free speech and expression.

The right to travel abroad and return to one's country has been spelt out from the expression "personal liberty" in Article 21 of the Constitution. Although there is no specific provision in the Constitution prohibiting cruel, inhuman and degrading punishment or treatment, the Court has evolved this guarantee from other provisions of the Constitution. The right to privacy has also been spelled out and based on the inherent human right to be left alone.

The expression "life" in Article 21 has received expansive interpretation. The Court ruled that "life" does not connote merely physical or animal existence but embraces something more, namely "the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head". Based on this interpretation the Supreme Court has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water. Health and sanitation have been held to be integral facets of the right to life.

Guaranteed fundamental rights are not absolute. They can be reasonably restricted in the public interest. The question of whether the restriction imposed is reasonable or unreasonable, excessive or disproportionate has to be determined by an independent judiciary exercising the power of judicial review. This delicate judicial task of

striking the balance requires understanding not merely of the legal and constitutional provisions but of the prevalent economic and sociological forces and the contemporary mores of society. The endeavour of the judiciary in India has been to achieve an acceptable accommodation of the conflicting interests of the individual, society and the State. There is no royal road to achieve such accommodation. Courts have on occasions not struck the balance right.

The first wave of human rights came around the late eighteenth century, which witnessed the drafting of the US Bill of Rights and the French Declaration of the Rights of Man. Both were primarily concerned with guaranteeing liberty against state tyranny and against religious persecution. The second wave was generated because of the atrocities committed by the Nazis before and during the Second World War. The present new wave of rights focuses upon the values of dignity and equality. It has been aptly described as a search for certain basic values to guide human behaviour. Dignity is the moral and intellectual source of human rights.

The Vienna Declaration on Human Rights in June 1993 explicitly recognised that "all human rights are universal, indivisible and interdependent and interrelated". This has put to rest the controversy regarding the superiority of one set of rights over the other. However, at the operational level in developing countries, socio-economic rights would have priority in matter of enforcement. For example, if the choice were between a new television tower, which would enhance freedom of expression, and the building of roads and hospitals, limited financial resources would tilt the choice in favour of the latter.

The most remarkable craftsmanship displayed by the Supreme Court in promoting human rights has been to incorporate into fundamental rights some of the Directive Principles, such as those imposing an obligation on the state to provide a decent standard of living, a minimum wage, just and humane conditions of work, and to raise the level of nutrition and public health. This has been achieved by placing a generous interpretation on the expression ‘life’ in Article 21 of the Constitution.

Access to justice is recognised as a basic human right. In order to achieve this, it is necessary that the doctrine of *locus standi* should not be rigid. Our Supreme Court has liberalised this rule of standing in public law and ruled that where judicial redress is sought for legal injury done to indigent and disadvantaged persons, who, on account of economic disabilities are unable to approach the courts themselves, any member of the public acting bona fide and not for oblique considerations, can maintain an action on their behalf.

Rights without remedies are useless. A mere declaration of invalidity of an executive order or an administrative decision that has resulted in the violation of a person's fundamental rights would not provide a meaningful remedy. The International Covenant of Civil and Political Rights (ICCPR) provide that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation" [see Article 9(6)]. The Indian Constitution contains no such explicit provision. Nonetheless the Supreme Court has, in some cases, ordered payment of compensation by the State as a remedy in public law. The National Commission to Review the Working of the Constitution (NCRWC) has recommended that right to compensation for violation of a person's life or liberty be made an enforceable fundamental right by an express provision in the Constitution. This salutary recommendation has not yet been fully implemented.

Based on the expansive interpretation of life the Supreme Court has appreciably contributed to environmental protection. It has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water, and sanitation, without which life cannot be enjoyed, and that a hygienic environment is an integral facet of the right to healthy life. In its efforts to prevent environmental degradation the Court has ordered certain tanneries and chemical industries, which were discharging effluents into lakes, rivers and soil, to stop functioning unless the effluents were subjected to a pre-treatment process, to be achieved by setting up approved primary treatment plants. The Court was conscious that the closure of tanneries may bring about unemployment and loss of revenue but it firmly ruled that "life, health and ecology have greater importance to the people".

Another field in which the Supreme Court has made a remarkable contribution is in cases of custodial violence. It is a notorious fact that in India torture is rampant in police cells and police stations. The Court has ruled that in case of death or injuries suffered whilst a person was in police custody, the burden will lie with the authorities to establish that the death or injuries occurred owing to natural causes. The Court has awarded monetary compensation as a remedy in public law in cases of torture and death of persons at the hands of the police. At times it has imposed fines on persons found guilty of causing death, and made the amount payable to the heirs of the deceased. The underlying rationale is that there must be meaningful remedies for violations of fundamental rights. And one of the effective and telling ways by which violations of fundamental rights can be prevented is to mulct its violators with the payment of monetary compensation.

Another important judicial contribution has been in the field of prisoners' rights. Massive violation of human rights takes place in prisons and detention centres. In most cases it is hardly visible. The Court has ruled that a prisoner is not denuded of his or her basic human rights upon incarceration although the exercise of these rights may be circumscribed by the very nature of imprisonment. The Court frowned upon solitary confinement and ruled that putting iron bars or fetters on prisoners is unconstitutional unless it is imperative in the interest of security. Recently the Court ruled that no prisoner can be asked to do labour free of wages. It is not only the legal right of the workman to have wages for work done; it is a social imperative with ethical compulsion.

Freedom of expression and freedom of the press have received generous protection from the Courts. The underlying rationale of this judicial approach is that freedom of the Press embraces a variety of rights. The right guaranteed is not merely the individual right of the proprietor of the newspaper, or that of the editor or the journalist. It includes within its compass the collective right of the community, the right of citizens to read and to be informed, to impart and receive information. In essence it is the right of the people of India to know about the functioning of the government and the working of public institutions, which would enable them to make

informed choices in discharge of their civic and political duties.

The Court's solicitude for freedom of the press reached its zenith when in 1985, in its decision in a matter concerning *Express Newspapers* a steep levy of customs duty on newsprint imposed by an executive notification was held to be subject to judicial review. The Court observed that, whilst newspapers did not enjoy any immunity from payment of taxes and other fiscal burdens, the imposition of a tax such as customs duty on newsprint is an imposition on knowledge. The court ruled that a huge fiscal levy on newsprint has a direct impact on the freedom of the press and the impugned notification was struck down.

In the beginning the Supreme Court had adopted an illiberal attitude towards censorship on the ground of obscenity. Its decision in *Ranjit Udeshi* that D.H. Lawrence's novel *Lady Chatterly's Lover* was obscene was an aberration. The Supreme Court has recently been less illiberal and ruled that neither nudity nor vulgarity can necessarily be equated with obscenity. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, the result will be that adolescents will be unable to read any novel and will have to read only books that are purely religious. The Court has deprecated censorship imposed in order to protect the pervert or to assuage the susceptibilities of the over-sensitive. According to the Court's rulings "the standards we set for our censors must make a substantial allowance in favour of freedom. They must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read".

One of the greatest achievements, and one which has enabled the Court to make its invaluable contribution to the protection of human rights, has been the liberalization of the rule of *locus standi*. The traditional doctrine in civil law that only a person directly affected by an act or omission of the legislature or the executive can be regarded as a person aggrieved and can approach the court for relief, has not been accepted by the Court. The reason is that such a restrictive rule of *locus standi* would effectively deny access to a large number of people who, owing to poverty and severe social and economic handicaps, are totally unable to approach courts for

enforcement of their fundamental rights which continue to be violated with impunity. Such a state of affairs is subversive of the Rule of Law. In view of these realities, the Supreme Court has laid down that where judicial redress is sought for legal injury to the disadvantaged and downtrodden segments of society, any member of the public or any organisation acting bona fide and not for oblique considerations, can maintain an action on their behalf.

The liberalization of the rule of *locus standi* in the field of public law has fostered the development of Public Interest Litigation (PIL). What is PIL? It is a form of legal proceeding in which redress is sought in respect of injury to the public in general, for example the discharge of effluents into a lake or a river which may harm all who are deprived of clean water, or emission of noxious gas which may cause injury to large numbers who inhale it. In PIL the collective rights of the public are affected and there may be no direct specific injury to any individual member of the public.

Recourse can be had to PIL also for the enforcement of the rights of a determinate class or group of people who are directly injured by the act or omission complained of but who are unable to approach the court on account of indigence, illiteracy or social or economic disabilities. For example, young children working in factories under conditions detrimental to their health or inmates of asylums living in sub-human conditions.

The Court's role in PIL has drawn severe criticism. Indignant critics charge that some orders passed by the courts in PIL are tantamount to government by the judiciary and that the Courts are running and, in effect, ruining the country. What is forgotten is that it is the notorious tardiness of legislatures and the inertia, almost bordering on callousness, of the executive branch that provide a proper occasion for judicial intervention. When continued derelictions of statutory and constitutional obligations and gross violations of human rights by public authorities are brought to the notice of the Court, it cannot fold its hands and refuse to act. Unlike the executive or the legislature, the judiciary can neither prevaricate nor procrastinate. It must respond promptly.

Violations of human rights often take place owing to non-

implementation of laws; for example, failure to enforce laws enacted to protect young children in workshops, and laws and regulations to prevent pollution. One of the main reasons for judicial intervention is the failure of the executive to implement laws made by Parliament and the State legislatures, and its failure to discharge its legal and constitutional obligations. In most cases the Court is ordering the executive to implement the laws made by the legislature.

It is true that PIL has been abused in some cases and has degenerated into publicity interest litigation, private interest litigation and political interest litigation. At times it has become an instrument of blackmail and oppression, for example, when the sole purpose of filing a PIL is to prevent the construction of the factory of a rival industrialist for alleged violations of municipal laws and regulations. Courts have severely deprecated the misuse of PIL and imposed heavy costs in some such cases. However, abuse of PIL is no ground for its abolition or for placing unreasonable fetters on it. Abuse of process is as ancient as legal ingenuity. A good judicial jockey in the saddle can effectively curb the misuse of PIL.

It must not be forgotten that thanks to PIL, numerous under-trial prisoners languishing in jails for inordinately long periods have been released; persons treated like serfs and held in bondage have secured freedom and have been rehabilitated; inmates of care homes and mental asylums have been restored their humanity; and the conditions for workers in stone quarries and brick kilns, and young children working in hazardous occupations have undergone a humanizing change. Fundamental rights have become living realities, to some extent, for at least some illiterate, indigent and exploited segments of Indian humanity. Juristic activism in the arena of environmental and ecological issues and accountability in the use of hazardous technology has been made possible and has yielded salutary results. PIL has empowered citizens and groups fighting for justice to approach the courts and has provided opportunities for vindicating the Rule of Law. All things considered judicial activism in PIL has greatly contributed to the protection and promotion of human rights.

However there is one area in which the judiciary has lagged behind. It is well settled that access to courts is a basic human right. However,

unless there is effective and expeditious access there is denial of justice and denial of this basic human right. Hamlet's lament about the laws delays still haunts us in India and the horrendous arrears of cases in courts is a shameful blot on India's legal system, especially the criminal justice delivery system. If justice is not dispensed speedily people will come to believe that there is no such thing as justice in Courts. This perception has caused many a potential litigant who has been wronged to settle out of court on terms that are unfair to him, or to secure justice by taking the law into his own hands or by recourse to a parallel mafia dominated system of 'justice' that has sprung up. The gravity of this development cannot be underestimated. Justice delayed will not only be justice denied, it will be Rule of Law denied.

After briefly surveying the scene what honest appraisal can be made of the overall role of our judicial sentinels in India about the performance of their solemn duty of protecting and promoting human rights?

A fair assessment would be that despite occasional aberrations of the judicial process our judiciary has been a good sentinel on the *qui vive* in the protection of the fundamental rights of our people. Despite frustration with the legal and judicial system because of costs and inordinate delays there is yet public confidence in the judiciary. And justice is rooted in confidence. It is significant that whenever a Commission of Inquiry is to be appointed in a matter of national importance the public demand is for a judge to head the Commission. The most heartening feature is that Courts have started taking human suffering seriously and are responding to it with sensitivity. On the whole our judiciary has upheld the Rule of Law, sustained constitutional values and made human rights meaningful. And that is no mean achievement in a country with such a vast population.

K. K. Venugopal*

Poverty be Recognized as A Violation of Human Rights

I believe that it was Pope Francis who had said, ***"Human rights are not only violated by terrorism, repression or assassination, but also by unfair economic structures that creates huge inequalities."***

We were given, in 1950 a very powerful Constitution and its outstanding characteristics are its egalitarian concepts woven into its Preamble and the chapter on Fundamental Rights. Among its vibrant provisions are Article 21 of the Constitution which protects life and personal liberty and above all the equality provision contained in Article 14 followed by Articles 15 and 16. These together sum up the profound philosophy of the Constitution. We find Articles which provide for the abolition of untouchability and prohibiting enforcement of any disability arising out of untouchability, which shall be an offence punishable in accordance with the law. Begar or any kind of slavery is abolished. All these raise the question as to how far have we as a people been able to secure these lofty ideals of our founding fathers. We find that almost 30% (as per Rangarajan Report on Poverty, 2014) of the population of this country is still living in utter-penury. The State has been unable to provide for universal education in the period of 70 years. The health services of the poor appears to be in shambles. Employment is still to achieve its goals.

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The popular belief is that it is only torture, physical abuse and illegal detentions that would be comprehended within the concept of Human Rights. However, a mere perusal of the United Nations Universal Declaration of Human Rights (UDHR) passed in 1948 would show the multifaceted aspects that are acknowledged to be a part of Human Rights. Article 25 of the UDHR reads as follows:

> *25.1 "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*

But what really is the reality behind the implementation of the declaration contained in Article 25? The statistics today make grim reading. According to the World Bank Development Indicators 2016, about 750 million poor people around the world are living in extreme poverty i.e. below the $1.90 per day poverty line (before 2015, the poverty line was defined by the World Bank at $1.25 per day, which has been readjusted to $1.90 accounting for price inflation). According to a UNICEF report titled 'State of the World's Children 2016', 46% of the world's population living in extreme poverty are children, with the United Nations 'Report on Sustainable Development Goals 2016' placing the number of children with stunted growth to be about 156.4 million as of 2014. According to the UN Report on Sustainable Development Goals, cited above, between 2000 and 2015, the proportion of the global population using improved sanitation increased from 59 to 68 percent, yet the plight of 2.4 billion people did not improve at all, and a staggering 946 million people are left without any sanitation facility and continue to practice open defecation.

It is not as if the poor are hungry because of lack of food. The world produces enough food to feed everyone. World agriculture produces 17 percent more calories per person today than it did 30 years ago, despite a 70 percent population increase. This is enough to provide everyone in the world with at least 2,770 kilocalories (kcal) per person per day according to

a 2012 Food and Agricultural Organisation estimate. However, the principal problem is that many people in the world do not have sufficient land to grow, or income to purchase, enough food. Poverty, conflict, disregard by the State and the lack of development result in the poor not being able to gain access to this food that is produced in excess each year.

However, it was 45 long years after the UDHR, in the year 1993, that extreme poverty and social exclusion were stated to constitute a violation of human dignity. The UN proclaimed the decade between 1997 to 2006 as the International Decade for the Eradication of Poverty. It was for the first time in 2000 that all the then member states of the United Nations subscribed to the Millennium Development Goals. In 2015, the Sustainable Development Goals were adopted which aim to completely eradicate “extreme poverty” by the year 2030.

Today every State extends to its people a catena of basic rights, fundamental rights and human rights. This includes the right to freedom of speech, right to property, right to move freely, the right to form associations and, among others, the right to carry on one’s profession, trade or business. But to me, it seems that all these basic rights are meaningless to a whole population suffering from utter deprivation and poverty. Of what use is the freedom of speech if you do not have a job to fetch you two meals or you have no shelter, or no access to medical facilities or to basic education. Poverty engenders all these deprivations or conversely, the deprivation of all these basic rights is a sure and undeniable proof of the existence of dire poverty in that section of the population.

But it is the misfortune of these poor, disadvantaged sections of society, that States have miserably failed in carrying out these obligations cast on them. In approaching this problem, one must remember that the Universal Declaration of Human Rights makes it clear that rights are not conferred by Government, but that they are the birth right of all people, which Governments are bound to protect. Poverty, anywhere in the world constitutes, at the most fundamental level, a denial of the rule of law. The reality is that the promise of equality, guaranteed by the United Nations Declaration of Human Rights and also the Constitutions of all our countries would ring hollow for an unconscionably large section of society even today.

Very many thinkers and writers have had no hesitation in linking "dire poverty", "absolute poverty" or "extreme poverty", call it what you may, to an unequivocal violation of human rights. For instance, Pierre Sane, the Assistant Director-General Social and Human Sciences Sector of UNESCO had said in a paper:

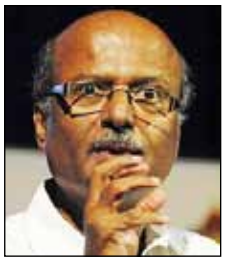
> *"If, however, poverty were declared to be abolished, as it should with regard to its status as a massive, systematic and continuous violation of human rights, its persistence would no longer be a regrettable feature of the nature of things. It would become a denial of justice. The burden of proof would shift. The poor, once recognized as the injured party, would acquire a right to reparation for which governments, the international community and, ultimately, each citizen would be jointly liable."*

Treating poverty as a violation of human rights, would enable the Courts at the international, and more importantly, at the national level, to enforce such rights. The Indian Supreme Court, for instance, has treated the various facets of poverty, such as the right to food, right to shelter etc. as a part of the fundamental right to life under Article 21 of the Constitution of India, which declares that no person shall be deprived of his life or liberty other than through procedure established by law. This has enabled the Indian Courts to attempt to enforce these rights as they now create a positive obligation on the State.

No Government has the right to exist as a signatory to the United Nations Declaration on Human Rights and the various Conventions on Civil and Political as well as Economic, Social and Cultural Rights while allowing vast sections of its population to remain destitute, powerless and on the verge of starvation

We cannot, therefore, escape the conclusion that it is primarily the Governments concerned that have to ensure that their wealth is evenly distributed so that they achieve the pious hope in Article-1 of the UDHR, **"*all human beings are born free and equal in dignity and rights*".**

We must remember the words of the great humanist Nelson Mandela, who said:***"Massive poverty and obscene inequality are such terrible scourges of our times – times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation – that they have to rank alongside slavery and apartheid as social evils."***



Valerian Rodrigues*

Human Dignity: Interfacing Ambedkar and Gandhi

Human dignity, irrespective of the circumstances in which people find themselves, or their social location, is the basis of human rights. Most human rights documents, including the Universal Declaration on Human Rights concur on this. While different cultures might have deferred to human dignity for ages past, at least in an incipient way, much of the reflection on this value, as a cherished goal that every human being ought to acknowledge, is a recent development. Most states today acknowledge dignity as the foundational to their polity, or admit that it enjoys consensus across the differences that inform them. The reasons for acknowledging human dignity as a basic value, or consensual criterion, however, hugely vary. Sometimes the chords that weave the overlap of this value can snap, tearing open many bleeding sores.

What do we generally understand by human dignity? It is a valued end that calls for extending certain consideration to all human beings, qua human, which will not be traded off on grounds of utility. Even where infringement and qualification of this value are made for the attainment of other values, reasonable justifications would be offered. Societal institutions and processes will not endorse denigration of this value. Further if a human being acts in a way detrimental to this value he/she

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will be subjected to reprimand. Such a consideration in turn gives rise to values such as equality of respect, equality of treatment, equality before law and personal freedoms. Human dignity forms the foundation of human rights. Respect for beliefs and cultural differences is deeply implicated in deference to human dignity. It may assume not merely umpteen cultural expressions, but often they are the modes through which it takes a concrete form.

Several provisions of the Indian constitution, and the judgements of the courts in India directly invoke the value of dignity.[1] Many social movements in India, particularly those of Dalits, Adivasis and women, often invoke it as the basis of their right-claims. Different societies in a variety of ways have institutionalised this value, although its violation is still widespread today in the treatment meted out to ethnic and religious minorities, refugees and women in several societies labour under duress.

Human dignity has been central to India's freedom struggle and its long echoes can be heard in the writings of Raja Rammohan Roy and Jotirao Phule from the early and mid 19th century. Many political thinkers in India saw colonial rule and the treatment that this regime meted out to Indians, as an affront to human dignity. At the same time many Indian thinkers, such as Jotirao Phule, Ramaswamy Naicker Periyar, and Babasaheb Ambedkar, pointed out that the prevalent social institutions and cultural practices in India were demeaning to vast social groups, and called for setting up new benchmark values for social relations through such concepts as *manuski*, *suyimaryadai* or *izzat*. In this paper I wish to argue that while Mahatma Gandhi and Babasaheb Ambedkar differed on many issues, they still made this value central to their thinking and political practice, although from very different perspectives.

While an overlap of this value with nationalist thought encompasses many other thinkers, this paper limits itself only to two of them. This is not merely on account of their eminence, but also the deeply contested legacy of the engagement between them on a number of issues. In contemporary

[1]India's constitutional provisions, particularly the *Preamble* and *Directive Principles of State Policy*, have their anchor in the value of human dignity. From *Maneka Gandhi vs. Union of India* (1978) onwards the Supreme Court of India has constantly invoked the value of human dignity while upholding human rights.

Dalit-lore Ambedkar is generally pitted against Gandhi. Gandhi is seen as the votary of Hinduism and upper castes. He is also seen as the defender of the varna system, which in turn is interpreted as the matrix of the caste system.

In many narratives Gandhi is projected as a wily opponent who trapped Ambedkar to sign the Poona Pact (1932) through his fast unto death by which Dalits became beholden to caste Hindus for political representation for good.[2] One of the recent works that celebrates this antagonism is Arundhati Roy's introduction to Ambedkar's *The Annihilation of Caste* (A. Roy 2013: 15-180). While Roy tends to project Gandhi as the villain of the piece and Ambedkar as hero, there are others who while depicting Gandhi as the authentic other of colonial modernity have either seen Ambedkar as an apologist of colonialism or as an imposter (Shourie 1997). Dalits have generally tended to reject Gandhi's appellation of 'Harijan' to them, as a mode of restoration of their human dignity. Instead of instilling dignity, they feel that such an address is exclusionary and marginalizes them further. On the other hand, there are many who believe that Gandhi's approach to delegitimize the social practice of untouchability created a favourable space, without which the claim of Dalits to their humanity would have been brutally resisted by the social majority. Gandhi did not merely build a bridge between anti-colonial struggles and social claim to human equality, but also saw moral reordering of social relations as the key to the restoration of human dignity.

The Ambedkar-Gandhi Divide

Ambedkar and Gandhi found themselves at crossroads while evaluating the modern turn and it's bearing on human condition. Ambedkar saw in it immense prospects for striving for human perfection. Modern reason can instil confidence in human beings, and undermine supernaturalism and ritualistic practices. Modern industry and professions can be conducive to human enablement if they are appropriately employed. Gandhi thought otherwise: The modern turn invariably throws up roles, structures and instrumentalities that bind men and women in new chains. Under it, human needs and wants inevitably tend to be expansive, reinforcing structures

[2] This argument is finely documented in a recent study by Raja Sekhar Vundru (2017).

of violence all round. For Gandhi colonialism was one of its expressions. However, the end of colonial rule will not bring swaraj, although it is an essential precondition for the latter. The ideal of swaraj would continue to be the norm even under national independence.

While they agreed on how to read texts and traditions (Rodrigues 2011) in certain respects they had strong disagreements in others. For both Gandhi and Ambedkar hallowed texts were very important for norm-setting, justification of actions and expanded reproduction of communities. They agreed that while a tradition might acknowledge several texts there were some among them, which were the most important, although such valuations were susceptible to change and re-evaluation. They felt that all authoritative interpretations were ultimately caught in contestation. They agreed with each other that texts do not speak by themselves. We read them through the perspectives that we carry overboard, and without such perspectives it would be nearly impossible to read them. Both of them admitted that there were many concerns of contemporary life that have no explanation or parallel in the hallowed texts. We not merely interpret but also act on the interpretations of hallowed texts, and in the process change and transform their meaning and orientation, and their significance to us. They differed, however, on the mode and process of interpretation, the relation between critical rendering of texts and community sensibilities, the extent of authority that we can ascribe to a text, and the relative significances of faith and reason while reading and interpreting texts and traditions.

For Ambedkar, democracy becomes the large theatre where human potentialities are unfolded. It accords presence and access to social agents enabling them to self-critically look into their own shortcomings, and reach out to spheres of life to which they had little access hitherto. It invests people with new competences and modes of accountability to life in common. Gandhi did not think that it is essential to develop wider and thicker levels of social cooperation and interaction for human perfection. In fact, wider levels of social cooperation would enhance a person's ability to satisfy material needs and wants, which otherwise would be a hurdle to self-rule. Limiting one's needs and regulating social division of labour for

the purpose, was essential to subserve swaraj. For Gandhi the process of discovery of one's own self also attunes one to the rest of the world. The reconstitution of social life should involve as little dependence as possible on wider social networks. Only tending the familiar and nourishing the requisite resources can accord priority to spiritual pursuits. He found in the village panchayats ideal institutions to limit needs and wants and for the realization of self-rule. For Gandhi the varna system was not an affront to human equality, but an ideal that mandated pursuit of callings that one is embedded in, without they being superior or inferior. It enables optimum use of resources while keeping needs to the minimum.

Ambedkar argued that caste institutions in general and Untouchability in particular are clearly an affront to human dignity. He also thought that these institutions have complicity with the practices of gender-based indignities and exclusions in India (Rege 2013). Arguing that eventually these institutions and practices find a sanction in the Hindu scriptures, he felt pursuit of social equality would become impossible unless the *shastras* themselves are rejected.[3] Gandhi, on the other hand, argued, that while Untouchability and several caste practices, as they existed, are an affront to human dignity, the scriptures cannot be blamed for it. There is no sanction for these practices in the scriptures. They are an immoral outgrowth, and caste Hindus, to the extent they practice them should desist from such practices and make compensation for the unfortunate victims of these practices. He felt that Hinduism is the only source that Hindus have to retrieve their dignity. They will be left with precious little if they were to abandon the *shastras*.

Ambedkar identified human telos as *self-perfection*, pursuit of which, according to him, was feasible only through social cooperation and recognition accorded in the process, while Gandhi saw such a telos in *self-knowledge* and *self-realisation* that demanded minimising our material wants and needs. Naturally they had serious disagreements with regard to intents and purposes of education as the nurseries of these pursuits, and duties and responsibilities of citizens inculcated through them.

[3] Ambedkar's key text where he develops this argument is *Annihilation of Caste*

How do these two contested perspectives engage with the idea of human dignity and what are its implications?

The Ambedkar-Gandhi overlap on Human Dignity

After a period of prevarication in South Africa, Gandhi came to subscribe to the view, central to mainstream Hindu tradition, that man was essentially spiritual and the cosmic spirit informed and pervaded the whole universe. In spite of the autonomy of domains and even of discrete entities, the whole universe was an organically interdependent system and a coherent whole. It was a partnership and no one can make an exclusive claim over it. While everyone can access all that he needs he cannot do violence to the integrity and harmony of the order of things. By respecting the rhythm and harmony of the cosmos man enabled the conditions of his own reproduction. Man is also the deputy of the cosmic spirit, a partner in his design. In fact, "Absolute Truth has no power unless incarnated in human beings" (CW 22: 108).

Gandhi distinguished between the *Atman* and the self, while avoiding to the extent possible, the intricacies in which this relation was spelt out by the different philosophical schools in India. Everyman is a unique self, made of distinct dispositions, propensities and temperament inherited from birth. This self is the seat of desires and wants, projected itself in time and sustained itself through desires and wants. It has a history encompassing several life spans. Every man is solely responsible for what he is. At the same time man is also an *Atman*, or soul, which is nothing but the cosmic spirit manifest in him. While the self is the basis of individuality and personal identity, the *Atman* was the same for all. Men are also bodies and as such are constituted of elements common across them. While human fulfilment lies in overcoming the sense of discreteness and getting united with the cosmic spirit, the diverse aims and purposes of human existence have a bearing on him and have to be necessarily attended to (Parel 2006:12-13). The final human realisation is moksha, liberation from samsara or the cycles of births and rebirths. Moksha consisted in dissolving the identity of self, as well as that of the other, by attaining total identification "with the limitless ocean of life" (CW 32: 150). It is important to note that he regarded the two principles central to his striving, i.e., satyagraha, i.e.,

pursuit of truth in spite of all odds, and ahimsa, i.e., non-violence, as not merely the key for self-realisation but political action as well.

Being a unique self, every individual perceived the world and lived his life in his own way. He has to work out his moksha following the path best suited to him. While the goal is the same, paths varied. Man is the architect of his own self and responsible for his own actions. While men can be persuaded out of their beliefs, their integrity and choices have to be respected unless their choices threatened the social order or undermined the context of choice itself. Every action was both self and other-regarding. No man can brutalise or degrade another without inflicting it on himself. In harming others men harmed themselves. Gandhi revisited the traditional Hindu doctrines of *varnashrama* and *karmasiddhanta* to make them the bearers of the principles of interdependence, responsibility and freedom (Parekh 1989: 85-109). He made swaraj a sine-qua non for self-realisation and saw equality grounded in the very ontic existence of the human; but self-realisation can only be attained by being true to one's station in life by birth.

In his attempt to make sense of the human, two questions became quite central to Ambedkar: What is distinctive about human beings? How such a distinctive self comes to be formed? Quoting from Jacques Maritain[4] approvingly, he says,

> *"Man is an individual who holds himself in hand by his intelligence and his will; he exists not merely in a physical fashion. He has a spiritual super-existence through knowledge and love, so that he is, in a way, a universe himself, a microcosmos, in which the great universe in its entirety can be encompassed through knowledge. By love, he can give himself completely to beings who are to him, as it were, other selves. For this relation no equivalent can*

[4] It is interesting that Ambedkar did not draw his central arguments on human dignity from the philosopher Immanuel Kant, but those philosophical traditions that saw an organic link between the mind and the body, nature and nurture, including Buddhism. Several writings of Ambedkar display the influence of the French philosopher Henri Bergson. It is important to note that Bergson played a major role in influencing the ideas of Jacques Maritain. Ambedkar, however, did not seem to fancy Maritain's metaphysical positions strongly anchored in Thomas Acquinas.

> *be found in the physical world……The notion of personality thus involves that of totality and independence, no matter how crushed a person may be, he is a whole, and as a person subsistent in an independent manner. To say that a man is a person is to say that in the depth of his being he is more a whole than a part and more independent than servile."(Ambedkar 1987: 95-96)*

It is interesting to note the attributes of human beings in this quotation: their wholesomeness; self-subsistence governed by intelligence and will, or knowledge and love; micro-cosmos, being the miniature presence of the whole universe; and capacity of alterity, i.e. to be in union with others and feel others in oneself. While these attributes, that demarcate humans from the rest of beings, definitely call forth respect, one can always argue that they are the attributes of a few against the many. Ambedkar disagrees. He thinks that across all the differences, that might be found in human beings, they all share the above qualities, setting up a moral equality across them: He employs the work of Prof. Beard to argue,

> *"When humanity is stripped of extrinsic goods and conventions incidental to time and place it reveals essential characteristics so widely distributed as to partake of universality. Whether these characteristics be called primordial qualities, biological necessities, residues or any other name matters little……...It is easy to point out inequalities in physical strength, in artistic skill, in material wealth, or in mental capacity, but this too is a matter of emphasis. At the end it remains a fact that fundamental characteristics appear in all human beings. Their nature and manifestations are summed up in the phrase 'moral equality'. In essence the phrase 'moral equality' asserts an ethical value, a belief to be sustained, and recognition of rights to be respected. Its validity cannot be demonstrated as a problem in mathematics can be demonstrated. It is asserted against inequalities in physical strength, talents, industry, and wealth. It denies that superior physical*

strength has a moral right to kill, eat or oppress human beings merely because it is superior. To talents and wealth, the ideal of moral equality makes a similar denial or right" (Ambedkar 1987:1996-97).[5]

Ambedkar feels that moral equality among human persons is nurtured through and finds expression in freedom, equality and fraternity. Freedom was not merely an absence of restraint but a positive capacity of doing things worth doing, and refraining from those worth avoiding.[6] Equality of consideration begets a disposition to others, and he says that it is "the disposition of an individual to treat men as an object of reverence and love and desire to be in unity with his fellow beings". He says, "Fraternity strengthens socialities and gives to each individual a stronger personal interest in practically consulting the welfare of others. It leads him to identify his feelings more and more with their good, or at least with an ever greater degree of practical consideration for it."(Ambedkar 1987: 97-98)

What makes a human self-constituted as such? Ambedkar was least concerned to source human existence to a divine being or subscribe to the idea of an immanent and permanent principle such as the Atman. In fact, in his magnum opus, *The Buddha and His Dhamma*, he rejected both and saw them as the habitat of essentialism and denial of human freedom (Ambedkar 2011: 136-141). According to him, human beings, to be as such, need to be socially recognized. Only in and through such recognition a person comes to realize who one is and what one's strengths and weaknesses are. In the absence of such recognition and belonging a person's growth remains stunted or distorted as is the case. Human perfection becomes possible only by being related to wider and denser levels of human interaction, which he termed, using Dewey's term, social endosmosis. The caste system, and particularly untouchability, by treating people not merely as inferior but also as defiling, confines and limits such interactions. The kind of labour they are associated with, their habitations, the denial of the sacral, social prohibitions and prescriptions, and the ascription of pollution to their presence, instil among untouchables

[5] A similar kind of argument is made by Bernard Williams (1979)

[6] Ambedkar's definition of freedom rhymes with that of T.H. Green, liberal idealist philosopher, with whose work he was very familiar.

a negative sociality. There is no light for them at the end of the tunnel except the promise of a better next life if they submit themselves to the injunctions of the social order. Ambedkar would have extended this argument to regard all social structures and relations that come in the way of the expansive reach of a person as hurdles in his or her striving towards his/her perfection.

Implications

In spite of their other disagreements both Gandhi and Ambedkar agreed that human beings are endowed with a unique dignity, which demands appropriate nurturing and deference. Social institutions and processes need to measure themselves against this benchmark. Both of them sought an affirmation of human agency rather than merely see it as subservience to forces beyond their control. Their ideas of opposition to human servility, non-domination, swaraj and gender equality were shaped by this shared vision.

Ambedkar and Gandhi applied their understanding of human dignity to several considerations. Gandhi definitely saw Untouchability as an offence,[7] although he insisted that as the labour that an untouchable performed is a social need, he is duty-bound to carry it out. His resolution of the conundrum that he was caught in, of upholding human dignity while defending traditional division of labour, was to inform all labour with equal dignity. The *Bhangi*will continue to be *Bhangi* but the valuation that we ascribe to her labour should undergo a change. Clearly, Ambedkar had the better of on Gandhi in this regard when he sought to know from him what should *Bhangis* do if such valuation does not come forth or for that matter, the *Bhangi*wasto assert himself as equally human as the rest, being true to one's dignity. He also turned Gandhi upside down by arguing that if a *Bhangi* is endowed with talents and competences, it is appropriate for him to pursue them as he would not remain fair to his self and others if he

[7] Gandhi adduced little evidence to prove that untouchability is not integral to Hinduism, but built up the argument as was his wont, that Hinduism, given the spiritual and moral heights that it conquered, could not have engendered an evil of the kind that untouchability was. Predictably, Ambedkar and many others perceived such a stance of Gandhi as an attempt to protect Hinduism rather than develop self-help among untouchables themselves. He also argued that one's own humanity cannot be left to the mercy of others who have a vested interest in denying it.

refused to do so.

Unlike Gandhi, Ambedkar thought that caste Hindus do not regard untouchability as a distortion or aberration, but as integral to their religious beliefs and practices. The caste system and the varna system avow the same principle. Both of them are founded on the principle of graded inequality that find their sanction in key texts of the tradition which caste Hindus regard as sacrosanct. These systems have not let lower castes and particularly untouchables to access wider horizons. Contra Gandhi, he felt that caste Hindus were unlikely to commune with the untouchables. Given this social disposition, should the untouchables wait for the change of heart of the upper castes to claim their humanity? Gandhi countered such a stance, saying, that rights are claims that are upheld by the conscience of society. Without a change in the perspective of the upper castes, a unilateral pursuit of their claims by the untouchables would precipitate massive violence from the former.

Both Gandhi and Ambedkar thought that their primary interest lies in shaping 'right' understanding and disposition to the world. According to them religion had tended to monopolise this domain, and under conditions of modernity, 'a scientific approach' was proposed in its place. They subjected both these domains to critique and called for revamping them. Their contention against the religious ideologies of their time, or what went in the name of religion is well known. They also felt the need to distinguish between 'scientific approach' and 'scientific knowledge'. While they defended a scientific approach to reality, they felt that mere emphasis on scientific rationality and 'scientific' knowledge can reinforce domination and prove hugely detrimental to fostering the human. At the same time both of them recognized the great significance of religion in social life. They asserted that religion is not personal but social, and our life will be bereft of the human if religion is shorn off it. Naturally such an understanding of religion does not see it as a creedal and ritual formation, but a set of dispositions and orientations to our world, both natural and social. It would be very unfair to them to collapse their understanding of religion to anyone of those currently vying for our souls and our final loyalties. There is little evidence to suggest that Ambedkar associated religion only with a Semitic version of the same.

Given their approach to human understanding, both Gandhi and Ambedkar laid much stress on education, but considered the existing models of education inappropriate to nurture 'right' disposition and orientation. Ambedkar's call to 'educate, agitate and organise', placed education as a priority[8] and Gandhi, apart from his wider and more encompassing perspective on education, proposed his idea of *'Nai Talim'*, to cultivate a citizenship tuned to gainful earning while learning (Iyer 1987 Vol. III: 77-89).[9]

On the Hindu-Muslim tension Gandhi thought that many religions could co-habit the same political space, mutually learning from each other. Deference to human dignity demands that one cannot claim one's own religion as superior to that of others, but live his religion as bequeathed to him. While Ambedkar agreed with Gandhi that religious belonging does not necessarily beget national bond, he thought that it is important to take pre-emptive measures against such a development, if many religious communities wish to live in a common fold.

Politically, Gandhi and Ambedkar were much in agreement with regard to three issues: the significance of non-violence, the role of the masses and the idea of swaraj. Ambedkar decried use of force and coercion as political means since they are not appropriate for human dignity and could do more harm than good, be short-sighted and reinforce authoritarianism. Unlike Gandhi who considered non-violence as an end in itself Ambedkar argued that it was a means to ends independently stipulated. Whether means or end, the arguments that they advanced in justification of non-violence has much in common. Ambedkar's critique of Indian nationalism was on grounds of its being exclusive, and he thought that it should be made inclusive by uprooting social institutions founded on gradations and ranking, and by enabling people to decide their own futures. Swaraj is

[8] For Ambedkar education implied much more than what is generally implied by the term: It was the principal means of assigning dignity to oneself, inventing and defining oneself, and developing resources to overhaul social relations: 'For ours is a battle, not for wealth or for power. It is a battle for freedom. It is a battle for the reclamation of human personality….My final words of advice to you is educate, agitate and organize, have faith in yourselves and never lose hope.' (Ambedkar 2003:276)

[9] On Gandhi's wider approach to education see, Raghavan Iyer, *The Moral and Political Writings of Mahatma Gandhi*, Vol. III, Oxford, Clarendon, 1987, pp. 377-389. He gave a definitive form to his idea of 'earning while learning' in his experiments of 1937.

a term that occurs in Ambedkar far too often, largely as a critique of the narrow idea of nationalism upheld by the Congress. He saw swaraj as a public virtue, and not a personal state of being, and it cannot be promoted by keeping those it encompasses outside the fold.

Gandhi sought an economy that could be under the collective control of its users, and he felt that it should have its base at the lowest level of a political and administrative unit. In other words, Gandhi's politics sought to be at the driver's seat as far as his economics was concerned. Swaraj was a state where a person or a collective was in control of its own resources, its needs, its skills and competences. Gandhi therefore believed that a decentralized economy made of rural produce, and village, cottage and Khadi industries would be much more conducive to swaraj. He also thought that by giving a moral turn to enterprise through the ideal of trusteeship, age-old social capital and entrepreneurship would remain intact while curbing the instinct of profit and aggrandizement of resources, for its own sake. While Ambedkar is often celebrated as an economist, and he did some excellent research on public finance and currency, he saw economic initiatives and public policy as political choices rather than the other way about. His approach to the agrarian question, big industry, planning, labour policy, resettlement, and ecological questions were largely premised on his politics outlined above. Unlike Gandhi, Ambedkar was not opposed to large scale production or to modern technology, but wanted to wet them with the distinct concerns and politics that he avowed.

Both Gandhi and Ambedkar believed that political action could be profoundly transformative. They invested much in engendering a collective human agency that is politically viable and effective, and bestowed much attention in forging politically viable organizations. In fact, Gandhi called politics the religion of our times. The transformative nature of political action is not merely confined to overhauling social relations, but also values, beliefs and dispositions, and the inner self too. Both of them called for mass action for the purpose and did meticulous planning to ensure that it achieves the desired goals. While they differed with regard to the understanding of satyagraha, both of them took recourse to it when the existing channels of redress of grievances proved inadequate. Both of

them were ever ready to call into question emerging modes of dominance, even though they might have arisen as the consequences of their very action.

Above all, Ambedkar and Gandhi inaugurated a reflection in modern India on the idea of what it means to be human, setting up a grounded legacy on human rights. This reflection linked itself to India's long past making critical powerful traditions such as those of the renouncers and the Bhakti movement that pitted themselves against dominant social structures, which reduced the human to their effects. India's context, where vast numbers were condemned to demeaning and sub-human existence too called for a focus on this concern afresh. The idea of human dignity still pleads for attention in India today.

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Rajni Kant Mishra*

My Idea of Human Rights

Human Rights are rights relating to life, liberty, equality and dignity of individuals, as guaranteed by the Constitution or embodied in International Covenants and enforced by Courts of Law. These are basic rights assigned to all human beings without any discrimination with regard to nationality, place of residence, sex, ethnicity, religion, language, colour or any other status. Human rights are interrelated, interdependent and indivisible. Human rights also include the right to freedom from slavery and torture, freedom of opinion and expression, the rights to work and education, and many more. Human rights are important due to the relationship that exists between the individual and the Government that governs them. States have to look after the basic needs of the people and protect their freedoms.

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights, which was adopted by the United Nations General Assembly in Paris on 10th December 1948 as common standard of achievements for all people and all Nations. Since its declaration, the scope of human rights has been constantly widening, making the world a better place to live with dignity. “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of

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brotherhood" says Article 1 of Universal Declaration of Human Rights.

By virtue of beings born human, every individual inherits certain essential freedoms, including freedom from discrimination, freedom to enjoy a decent standard of living, freedom to develop and realize one's human potential, freedom from fear of threats to personal security, from torture, arbitrary arrest and other violent acts, freedom from injustice and violations of the rule of law, freedom of thought and speech, freedom to participate in decision making and form associations and freedom to engage in decent work without exploitation.

The formation of the National Human Rights Commission in 1993, and subsequently the State Human Rights Commissions and Human Rights Courts, undoubtedly mark the hope for possible avenues to address human rights concerns domestically. The work of the Human Rights Commissions, State and Central Governments, the judiciary, non-profit organisations and civil society in general is a continuously evolving activity.

The Sashastra Seema Bal (SSB), in English the Armed Border Force, being a Border Guarding Force of the Union of India has been continuously involved in promoting and protecting the human rights of common citizens in general and the border population in particular. There has been a change in the role and duties being performed by the SSB, since its inception in 1963. The SSB has been assigned duties of guarding the Indo-Nepal border since 2001 and subsequently the Indo-Bhutan border also since 2004. While performing these duties, SSB personnel are required to follow the law of land, deal with the local population and the population across the border while in transit to India, in conformity with the ethical practices and giving due regard to the basic human rights of these individuals.

In view of the prevailing security scenario in the country and the possibilities of criminal elements misusing the Indo-Nepal and Indo-Bhutan Borders, the force is striving hard to secure these open and porous borders while maintaining the historical friendly ties with these nations. In doing so, it ensures that, even personnel working at the lowest

level, protect the human rights of all individuals. A zero tolerance policy is adopted by the Force while dealing with violations of human rights by the Force personnel. There has been continuous practice to sensitise and create more awareness in every SSB man so that he can be a protector of human rights of the common man, while discharging his duties. In the last 2 years, SSB has apprehended 464 human traffickers and has rescued 1573 victims on its borders keeping up the spirit of human rights.

Sankar Sen*

My Idea of Human Rights

I consider human rights quintessentially as respect for human dignity. Human rights are those minimal rights that an individual must have by virtue of his being a member of the human family, irrespective of any other consideration. They are based on the concept that innate dignity of an individual must receive respect and protection from society. Human rights, to quote the words of President Jefferson are "inherent and inalienable rights of man".

My idea of human rights is that they are not some outlandish ideas unrelated and out of tune with thoughts and conditions prevailing in the developing countries of Asia and Africa. Many Asian countries, which are parties to the UN charter and signatories to the Universal Declaration of Human Rights, have expressed the view that western countries are using human rights as instruments for their political and ideological hegemony. The nub of the criticism is that the concept of human rights is a western imposition – an act of moral and cultural imperialism by the West. In my opinion, this is an erroneous view. Respect for human dignity is an inherent part of our culture. Great Indian saints like Swami Vivekanada, spoke of divinity in man and proclaimed that service to man is the highest form of service to God. It is also necessary to constantly bear in mind that most

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of the human rights adumbrated in the Universal Declaration find place in the Indian Constitution as Fundamental Rights and Directive Principles that we are committed to upholding. Thus, defence of human rights means championing the constitutional rights guaranteed to the people of the country.

However, in the midst of controversies and the clash of western and eastern perceptions, there is acknowledgement of the fact that there are some fundamental human rights, whose violations will be condemned unequivocally by all the major cultures of the world. Abuses like torture, rape, custodial death, racism, ethnic cleansing, et cetera are not tolerated by any face or culture that respects humanity.

I strongly uphold the view that human rights are interdependent, interrelated and universal. Protection of social and economic rights is as important as the defence of civil and political rights. There is fallacious thinking that negative rights, which gather round our liberties are more important than positive rights that evolve from our basic needs. The approach to human rights must be holistic and integrated. Thus, the different initiatives of the NHRC to bring into focus the need for implementation of basic socio economic rights are laudable steps in the correct direction.

My idea of human rights is that they provide a valuable tool for governance and help in the building of a just and humane society. They have transformative potential in a developing country like India. They constitute challenges to entrenched interest and oppressive systems that deny basic rights to common people.

During my innings in NHRC, I have experience the exultation of fighting against gross injustice and violations of the basic human rights of downtrodden and disadvantaged groups, and setting right some inhuman wrongs, despite stubborn resistance from vested interests as well as from the authorities. Therefore, I sincerely believe that for the success of the human rights movement, it is vital to develop the human rights conscience, which will on the belief that human rights are indivisible and their protection is the abiding responsibility of the civilised international community.

Nishtha Satyam*

Women's Rights are Human Rights

"Human rights are women's rights," declared the then U.S. first lady Hillary Clinton at the 1995 Beijing Platform for Action, which set an agenda for women's empowerment and identified 12 critical areas of concern, where urgent action was needed to ensure greater equality and opportunities for women and men, girls and boys. It also laid out concrete ways for countries to bring about sustainable and irreversible change. She added that "*Women must enjoy the right to participate fully in the social and political lives of their countries if we want freedom and democracy to thrive and endure."*

The Beijing Declaration and Platform for Action, which included participation from India, confirms that the protection of human rights, and the elimination of all forms of discrimination against women is the first responsibility of governments and core to the values and ethos of the United Nations. This focus was also endorsed through the adoption of CEDAW (1979), the U.N. Security Council resolution on "Women, Peace & Security" passed in 2000, and most recently with the adoption of the Sustainable Development Goals in 2015, which includes a standalone goal on gender equality and empowerment of women and girls. While women's equality and empowerment, or Goal 5, is one of the 17 Sustainable Development Goals, it is also a pre-requisite to all other Goals and dimensions of

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inclusive and sustainable development.

Apart from being a signatory to these instrumental Conventions and Frameworks, India's Constitution guarantees the Right to Equality to its citizens. It is, however, noted that most often the Constitutional guarantee has been confounded by discriminatory personal laws that institutionalized gender inequality. The Directive Principles of State Policy, embodied in Part IV of the Constitution, direct the state to guide the establishment of an economic and social democracy, as proposed by the Preamble, which guarantees equality of status and of opportunity to all – men and women. To enforce the provisions of the Constitution, India has also enacted important legislations such as the Protection of Women from Domestic Violence Act, 2005, the Prohibition of Sexual Harassment of Women at the Workplace Act, 2010 as well as implementing important policies and programme interventions, like the Beti Padhao Beti Bachao initiative, the One-Stop Centre Scheme, Pradhan Mantri Ujjwala Yojana, the Mahila E-Haat Scheme, Sukanya Samridhi Yojana (SSY) and the Rajiv Gandhi National Creche Scheme For The Children Of Working Mothers, among others. Likewise, the 73rd and the 74th Constitutional Amendment in 1993 brought about the greatest number of women in local governance - bringing more than 1 million women into leadership positions - that is greater than the number of all women in local governance put together globally.

While we have come a long way, women around the world continue to suffer human rights violations throughout their lifecycle. Across the world, in all societies, women and girls consistently face a range of barriers to equality - such as wage gaps, gender-based violence, child marriage and female genital mutilation.

In the 'Global Gender Gap Report' (2017) released by the World Economic Forum (WEF), India has been ranked a low 108 out of 144 countries on the gender equality scale, slipping from 87 last year. India ranks 148 out of 193 countries in number of women parliamentarians according to the Women in Politics map released by the Inter-Parliamentary Union (IPU) and UN Women in 2017. The rankings indicate that women made up 11.8% of the Lok Sabha where 64 female candidates were elected to the 542-member house and 11% of the Rajya Sabha with 27 female

candidates of the 245 members.

Crimes against women have recorded a whopping 83% increase from 2007 to 2016, according to the National Crimes Record Bureau[1] and that 2016 saw the lowest conviction rate (18.9 per cent) for crimes against women in a decade. Likewise, India's NCPCR report states that around 39.4 per cent of adolescent girls in the 15-18 age group are not attending any educational institution, and a vast majority — around 65 per cent — of them are "either engaged in household activities, are dependents, or are engaged in begging, etc". The 2012 Gender Statistics Report published by the World Bank indicates that only 14% of girls in India get a chance to receive secondary school education and only 26% women have a financial account in a formal institution.

The 2017 World Bank reports that at 27% India has one among the lowest female labour force participation rates (LFPRs) in the world. Despite a high growth rate during the economic reform period, the World Bank have found that women's ability to access job opportunities in the new economy has been "precarious". Low female LFPR is a drag on gross domestic product (GDP) growth and an obstacle towards reaching a higher growth path. India could add $700 billion of additional GDP in 2025, upping the country's annual GDP growth by 1.4 percentage points by raising women's participation in the labour force by ten percentage points (analysis period between 2015 to 2025). This would result in bringing 68 million more women into the labour force as per the McKinsey Global Institute report. This points to certain harsh truths - that realizing women's human rights has not always been a priority.

Gender equality by 2030 requires urgent action to eliminate the many root causes of discrimination that still curtail women's rights in private and public spheres. Fundamentally, it is imperative for policy makers to understand that changes in gender relations are not linear and therefore cannot be addressed through straight forward, homogenized measures. Eliminating discrimination against women and girls will need policy makers to understand how intersectionality of age, ethnicity, nationality,

[1] https://www.firstpost.com/india/crimes-against-women-up-83-but-conviction-rate-hits-10-year-low-delhi-reports-highest-crime-rate-in-india-4254313.html

caste, religion, education, marital status, disability, socio-economic status manifests into marginalization, therefore requiring a comprehensive, integrated and rights-based approach to development.

Secondly, efforts towards achieving equality should be based on addressing structural barriers to equality. Women's realities and their lived experiences are constantly changing and inter-linked, and new manifestations of discrimination and bias surface regularly. Depending on other grounds, some groups of women face the burden of running into additional forms of discrimination. These intersecting and structural forms of discrimination must be comprehensively introspected when developing tools, measures and responses to address discrimination against women. It is also important for policy makers to focus on frontier issues, such as growing cyber security concerns, that has now exposed women to a whole range of issues with newer dimensions on safety and security.

A key challenge that is stalling progress on women's rights and overall sustainable development is chronic underinvestment. Overall, while the total magnitude of the Gender Budget Statement i.e. gender budget in proportion to the total union budget went up from 4.7 per cent in 2016-17 to 5.2 per cent in 2017-18, the allocation for the nodal ministry, the Ministry of Women and Child Development (MWCD) only saw a marginal increase from Rs. 17,640 crore (2016-17 Revised Estimate) to Rs. 22,095 crore (2017-18 Budget Estimate) which is merely 1 per cent of the total Union Budget. With the Fourteenth Finance Commission recommendations now being implemented to strengthen a federal structure, it then becomes equally critical for the states to invest adequately on gender issues.

We also need investment to ensure that women's voices, choices, participation, and leadership at all levels of decision making – at home, in business boardrooms and in governance - are made a reality. Discriminatory laws need to change, and legislations adopted to proactively advance gender equality and women's rights. We need investment to advance our efforts on interventions for prevention, protection, and provision of multi-sectoral services for survivors of gender-based violence and to address harmful practices such as child marriages, gender-biased sex selection,

and female-genital mutilation.

There is a need to ensure that women are able to gain equal and unhindered access and ownership of productive resources including land, energy, technology and finance. Places of work will need to ensure gender responsive HR, procurement as well as marketing policies - by providing flexible working arrangements, child care, equal wages, setting quantitative targets for recruiting women at all levels of the firm, setting quotas for women on boards, including gender diversity target, addressing gender discrimination and structural constraints. We need urgently to accelerate progress on women's economic empowerment by putting in place policies that provide services, social protection and basic infrastructure, promote sharing of domestic and care work between men and women, and recognize, reduce and redistribute women's unpaid work. There is a need to invest in policies that put forth special measures that will enable women and girls to make up for the historic inequality, level the playing field and go forward.

We are at a decisive point in history and it is up to us to create positive impact to shape the future of women's rights in the face of both unprecedented achievements and persistent challenges. This will lay the base for *sab ka saath, sab ka vikas*, a journey that leaves no one behind.

India's Contribution to the Universal Declaration on Human Rights[1]

Miloon Kothari*

"I do not want my house to be walled in on all sides and my windows to be stuffed. I want the culture of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any"

Mahatma Gandhi

"Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"

Preamble of the Universal Declaration of Human Rights

Abstract

India gained independence in 1947, after decades of our freedom struggle bought to a head a flurry of resistance at home and advocacy for freedom abroad. The United Nations was also born in 1947 after a remarkable series of global initiatives that began with the birth of the League of Nations in 1920. The culmination of these developments was the adoption (in 1948) of one of the world's greatest living documents – the Universal Declaration of Human Rights (UDHR).

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[1] This article is a result of research using, to a large extent, primary sources. I would like to thank the very knowledgeable librarians at the United Nations library in Geneva for their assistance in tracking down the relevant documents. In particular, I would like to thank Rachel Foreman.

It is not only the dates of the struggle for Indian independence and the institutional build-up towards a world organisation, the UN, that coincide. As this article argues, there is between the birth of India and the UN, a remarkable degree of affinity and purpose of ideas, concepts and fundamental principles used to buttress the global search of peace, self-determination and human rights, which, it was hoped, would govern the role, and behaviour of states.

This coalescing of ideas and visions between India, as a nation, and the UN, as a global entity, was not a coincidence but a well-planned strategy employed by Jawaharlal Nehru under the guidance of Mahatma Gandhi. The intention was clear – that the pulpit offered by the world organisation would be used to counter British rule and as a forum where the freedom of all oppressed people around the world could be articulated and actions determined.

This article seeks to contribute to, what is at this stage, a nascent scholarship that seeks to define the contours of this convergence. A great deal of scholarship exists about the content of the Universal Declaration of Human Rights (UDHR) but a biased[2] view prevails in literature on the UDHR as to who were the women and men whose ideas defined the content – and from where they came.

The article will highlight the role of key Indians in this quest and the role of key global conferences; and the seminal documents that contributed to the drafting of the UDHR and set the stage for the formation of an organisation that would represent nations across the world and attempt to give them a voice in the range of intergovernmental and independent bodies that continue to contribute towards a world in 'Larger Freedom'.[3]

[2] Western scholars, legal scholars and historians alike, overemphasise the contribution of John Humphrey and Rene Cassin. The vast majority of books available on the UDHR overlook the significant contributions made by the representatives of countries like India, Lebanon (Charles Malik), China (P.C. Chang), Philippines (Carlos Romulo), Chile (Hernan Santa Cruz) and Mexico (Alphonso de Alba) among others. There are, of course, Western scholars who are exceptions to this rule. See References.

[3] Phrase used in the UN Charter. This is also the title used by Kofi Annan in the seminal report that led to the creation of the highest human rights policy making body in the UN, the UN Human Rights Council.

The Aftermath of the First World War and the Wilsonian Moment

In the aftermath of the First World War several attempts were made by world leaders to ensure, through the establishment of standards and institutions, that the 'sleepwalking'[4] that led to a world war would not be repeated.

The United States led these efforts through the statements of President Woodrow Wilson, in particular his 'Fourteen Points' address that called for the self-determination of peoples and nations and suggested that "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[5]

President Wilson put forward his 'fourteen points' in the autumn of 1918. The time between the announcement of the 'fourteen points; until the spring of 1919, is termed the 'Wilsonian Moment'.[6] These months began what that Hedley Bull called 'the expansion of international society'[7]. The moment, in the words of Manela "launched the transformation of the norms and standards of international relations that established the self-determining nation-state as the only legitimate political form throughout the globe, as colonized and marginalized peoples demanded and eventually attained recognition as sovereign, independent actors in international society".[8]

This was followed by the Paris Peace Conference, which in 1920, led to the formation of the League of Nations through the adoption of the 'Covenant of the League of Nations'.

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[4] For an insightful account of the blunders that led to World War 1 see: Christopher Clark (2013) '*The Sleepwalkers: How Europe Went to War in 1914'*, Harper (2013)

[5] Point 14. For the text of the full speech see: http://www.ourdocuments.gov/doc

[6] This is a term coined by Erez Manela in his excellent book '*The Wilsonian Moment: Self-Determination and the International origins of Nationalism*'. See list of references

[7] Quoted in Ibid. Manela.

[8] Ibid. Manela, pp. 22

The League of Nations[9] was formed, as a result of the initiative of President Wilson and other world leaders. Politics and self-interest of nations, and the emergence of leaders like Adolf Hitler led to the demise of the League of Nations.[10] It is however, without doubt, that the United Nations was the fruition of the platform for global dialogue that the League established. The United Nations is a legacy of the ideas and methods of work that was established by the League of Nations.

In India, both Mahatma Gandhi and Jawaharlal Nehru regretted that the 'Western powers' had not seized on the 'Wilsonian Moment' and that they had squandered the opportunity afforded by the League of Nations to create a global body that could work for the benefit of all, whether independent or oppressed, peoples across the world. At the time of these developments India was under British rule, which severely limited Mahatma Gandhi and Jawaharlal Nehru's roles as leaders able to play a global role. Hence, the opportunity offered by the San Francisco Conference and then the drafting of the UDHR was, for Mahatma Gandhi and Nehru, not to be missed. They sought, in these global meetings, to link India's struggle for freedom from the yolk of colonialism to the freedom of all oppressed people.

The San Francisco Meeting and the UN Charter

In the years preceding the adoption of the UN Charter two important events contributed to the formulation of principles that could contribute to the creation of a new 'international order'.

President Roosevelt in his state of the union address (1941) proposed 'Four Freedoms' (1941): freedom of speech and expression; freedom of every person to worship God in his own way; freedom from want and freedom from fear.[11] These principles were to play an important role in the

[9] Space constraints prevent me from elaborating on the work of the League of Nations, including the contributions made by Indians who participated in the deliberations of the League. See 'The Indian contribution to the League of Nations. Forthcoming from the Author.

[10] For a remarkable overview of the beginning and end of the 'League of Nations' see: Susan Pedersen (2017) '*The Guardians: The League of Nations and the Crisis of Empire*'. See references.

[11] Excerpt from the 'Four Freedoms' speech. Full text available at: http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/

conceptual development of the UDHR. [12]

On January 1, 1942, forty-seven countries (including India) signed the Declaration by the United Nations.[13] This Declaration formed the basis of the discussions at the San Francisco meeting that resulted in the UN Charter.

In October 1945, fifty nations of the world adopted the UN Charter. India was a founding member of the United Nations. At the San Francisco conference on 26 June, 1945 the UN Charter was adopted. The Indian delegation[14] led by Sir Arcot Ramasamy Mudaliar signed the United Nations Charter on behalf of India.

India was not yet independent but delegations from India (appointed by the British) were part of the deliberations that led to the UN Charter. Mahatma Gandhi and Vijaya Lakshmi Pandit dismissed these delegations as being stooges of the British.

Mahatma Gandhi issued a press statement on April 17, 1945 directed at the participants of the San Francisco Conference. In his press statement he quoted at length from the All India Congress Committee (AICC) resolution of August 8, 1942:

'While the A.I.C.C.[15] must primarily be concerned with the independence and defence of India in this hour of danger, the Committee is of opinion that the future peace, security and ordered progress of the world demand a world federation of free nations, and on no other basis can the problems of the modern world be solved. Such a world federation would ensure the freedom of its constituent nations, the prevention of aggression and exploitation by one nation over another, the protection of national minorities, the advancement of all backward areas and peoples, and the pooling of the world's resources for the common good

[12] Did the articulation of these 'freedoms' emanate from Roosevelt? See the discussion, in the section below on the UNESCO survey,on the contribution of S.V. Puntambaker.

[13] For the content and the list of countries see: http://www.un-documents.net/dec-un.htm

[14] The British Government nominated A. Ramswamy Mudaliar, Firoz Khan Noon and V.T. Krishnamachari to represent India at the Conference. See Collected Works of Mahatma Gandhi. Mr. Mudaliar had also been on the Indian delegation to the League of Nations in 1938.

[15] The All India Congress Committee 'Quit India' Resolution. August 8, 1942.

of all….. An independent India would gladly join such a world federation and co-operate on an equal basis with other countries in the solution of international problems. **Thus the demand for Indian independence is in no way selfish. Its nationalism spells internationalism'**.[16]

The biggest impact at the San Francisco Conference which adopted the UN Charter, however, was not made by an 'official' Indian delegate but by Vijaya Lakshmi Pandit who was in the middle of a one-year tour of the United States.

In the months leading up to the San Francisco Conference, Pandit embarked on an extensive lecture tour of the United States. The views Pandit expressed at these events summarised the world views of Mahatma Gandhi and Jawaharlal Nehru: that the freedom of India was a precondition to the freedom of all of the world's oppressed and colonised people; that equality for all and a life free from all forms of discrimination was a prerequisite to a life to be lived with dignity and 'larger freedom'; that any global body that sought to represent the people of the world must treat all countries, large and small, at the same level.

Pandit's lectures[17] drew large crowds and included civic leaders from across US society. Pandit's views resonated powerfully with the African-American leadership that was, some years later, to inspire Martin Luther King and his crusade for the emancipation of black people in the US. Pandit found powerful voices among groups that represented the struggle such as the NAACP, and their leaders, including W. Debois and Walter White, for India's demands of the withdrawal of the British from India.[18]

In a memorandum submitted to the Conference, Pandit outlined the positions of Mahatma Gandhi and Jawaharlal Nehru, who both saw in the

[16] From the Bombay Chronicle 18-4-1945 in the Collected Works of Mahatma Gandhi, Volume 86. pp. 188-190. Emphasis added by the author. Also see the reflection about Mahatma Gandhi's inspiring balance between 'intense nationalism' and his 'world outlook' in Jawaharlal Nehru 'The Discovery of India', pp. 463-464.

[17] For full transcripts of Pandit's lectures during her tour of the US See: Bimal Prasad (Ed) (2008) '*Towards Freedom: Documents on the Movement for Independence of India, 1945*,' Indian Council for Historical Research, Oxford University Press.

[18] These organisations and their leaders, in their statements to the San Francisco Conference, supported India's freedom struggle. See Kenton J. Clymer (1995), '*The Quest for Freedom: The United States and India's Freedom'*, Columbia University Press, New York.

global conferences opportunities to not only expose the gross injustice of the British occupation of India but an opportunity to turn the nascent global organisation, the UN, into a force for the emancipation of all oppressed people across the world. Pandit submitted a statement to the San Francisco Conference.

> *'As a member of the Indian National Congress Party in India and one who has been selected to be the spokesman for India on the occasion of the United Nations Conference for International Organisation in San Francisco by the India League of America (which is an organisation predominantly of American citizens devoted to the cause of Indian Freedom) and by the National Committee for India's Freedom (which represents a vast majority of Indian national residents in the United States) I desire respectfully to submit the following observations and representations with a request that you place them before the members of the delegations of the United Nations now assembled in the Conference.'*

Pandit expressed hope for a successful outcome to the Conference and drew attention 'of the United Nations Conference to the problem of India which is at once the acid test of the principles on which the hopes of the Conference are postulated and a cancerous menace to the prospects of lasting concord and harmony among nations after the labours of this Conference, as we all hope, are fruitfully concluded.'

Pandit concludes her statement, 'The voice of some 600 million enslaved people of Asia may not be officially heard at this conference and those who have usurped their birth right, freedom, may cynically claim to speak for them but there will be no real peace on this earth so long as they are denied justice. Recognition of India's independence now will be a proclamation and assurance to the whole world that the statesmen of the United Nations assembled at this solemn conclave at San Francisco have in truth and honour heralded the dawn of a new era and better day for an all but crucified humanity.'

Towards the end of Pandit's visit to the US she gave a press conference[19] in San Francisco where she expressed grave reservations about the conclusions that were at that time being reached in the negotiations during the final stages of the drafting of the UN Charter.

> *'The sum total of the San Francisco Conference will doubtless mark a historic step forward in international relations,' she said. 'Such improvements as have been effected in the original Dumbarton Oaks proposals go a considerable way towards strengthening the world organisation. Certain fundamental principles of international justice and human decency have been incorporated in the general purpose of the Charter. The compromise that seems likely to be forced on the conference on the issue of independence is so disingenuous and the camouflage it embodies so patent that I fear the cause of future peace and concord among nations will not be advanced by it.'*

Pandit's remarkable performance during her one year stay in the US encapsulated the essence of the lessons learnt from India's on-going freedom struggle. The alliances Pandit built during that trip with Eleanor Roosevelt, with the Black leaders, and with the public and media in the US created solid ground based on human rights and social justice, which India's representatives to the deliberations that led to the UDHR, would build upon. Pandit did not succeed in her goal to have the UN Charter become the bold instrument that would completely break with the colonial, imperialist view of the world. She did, however, achieve solidarity and earned respect and admiration for India's freedom struggle and the messages that the on-going struggle represented. All this hard work was to pay remarkable dividends, as we will see in the next sections, not only for India, but for the foundations on which the nascent United Nations was built.

The UN Charter has its weaknesses but, largely as a result of pressure from the 'new' countries that participated in the discussions in

[19] Quoted in the Hindustan Times, 20 June, 1945. op.cit. 17 at pp. 254-55.

San Francisco, contains several clauses on human rights.[20]

The challenge for the Indian leadership in the period between the adoption of the UN Charter (1945) and the beginning of deliberations towards the UDHR (1947) was to ensure that the United Nations would, in fact, move away from the direction that a strict adherence to the UN Charter, and the continued suspect motives of the allied powers, would have directed – a compromised organisation where the 'big' powers continued to control the world with a lighter but firm version of colonialism – what the British termed, the role of 'non-self-governing territories' for its colonies.

India, on the other hand, wanted a global body where all countries of the world, including the ones that would gain independence in the decades following the adoption of the UDHR, were equal; an organisation that would strive for an end to discrimination worldwide; for women's equality; for an 'indivisibility' perspective to human rights where economic, social and cultural rights would be treated with the same level of importance as civil and political rights; where the instrument of decolonisation would be self-determination practised by the then colonised countries.

In fact, the same human rights as those that characterised the Indian freedom struggle, as brilliantly articulated in the Quit India resolutions and in the drafting process during the Constitutional Assemblies. So the messages that were carried by India's representatives Hansa Mehta, M.R. Masani and Lakshmi Menon, to the UDHR framing process, for the freedom of human kind from oppression of all kinds, was the same as the independence movement message.

The collective voice of the Indian delegates, therefore, called for an independent India and an independent global body – free from the interference of a colonised power for India and free of the duplicitous games that the Allied powers (the UK being common to both) for the United Nations.

[20] These clauses require the UN to promote human rights and request particular bodies of the UN to undertake action on human rights. For a detailed overview see: Zenon Stavrinides (1999) Human rights obligations under the United Nations Charter, The International Journal of Human Rights, 3:2. Also see: Sherwood, Marika (1996): 'India at the Founding of the United Nations, International Studies, JNU.

The worldview of Mahatma Gandhi and Jawaharlal Nehru honed through decades of the freedom struggle and the experience, and indeed the resonance that Pandit gained on her visit to the US, would all converge into the powerful messages the Indian delegates contributed to the various articles of the UDHR.

Contributions towards the drafting process for the UDHR

A number of contributions from professional associations and international agencies were made to assist the drafting process of the UDHR prior to the formal process. Of all of these, two contributions stand out both for their insightfulness and for the contributions made by Indians.

(a) UNESCO and the 1947-1948 Global Survey on the Theoretical Bases for the Rights of Man

As a possible contribution towards the drafting of the UDHR, the Director-General of the newly created United Nations Education, Science and Cultural Organisation (UNESCO), Dr. Julian Huxley, circulated a memorandum and questionnaire[21] to 150 eminent thinkers across the world. The attempt was to solicit opinions on the utility of a universal instrument of human rights and whether different conceptions of human rights could be reconciled into a single 'universal' document.

In a letter addressed to Jawaharlal Nehru, Dr. Huxley stated: '… It is most important that we should obtain contributions from men like yourself, who have thought about these problems both theoretically and in relation to practical politics, and who are representative of another culture than that of Europe' and 'Might I also ask you very kindly to forward the enclosed letter to Mahatma Gandhi asking him for a contribution…'.[22] Pandit Nehru replied to Dr. Huxley expressing regret that he could not respond to the request for contributions to the UNESCO symposium since 'we have to face very difficult and intricate problems in India and I have

[21] Appendix 1 in UNESCO (Ed.) (1949) '*Human Rights: Comments and Interpretations*, UNESCO, Wingate, London

[22] Letter dated 2 April, 1947. Made available to the author through personal communication by Mark Goodale. For an excellent treatment of the UNESCO exercise to contribute to the UDHR see: *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (Mark Goodale, editor, Stanford University Press, 2018).

the misfortune to be tied up with these problems. I cannot find the time for any quiet consideration or writing….'. In this letter Pandit Nehru promised, however, that he would bring the symposium to the notice of Mahatma Gandhi: 'Certainly I shall urge him to write something, for his approach to these problems is always novel and interesting'.[23] Given the fact that India was three months away from becoming independent it is remarkable that Pandit Nehru took the trouble to reply to Julian Huxley. This is surely an indication that the success of the United Nations and the framing of global standards was of great importance to Pandit Nehru.

In a related letter, Sarveppali Radhakrishnan thanked Julian Huxley for his letter stating that; 'I shall be very glad to assist you in furthering his most important and interesting project…'.[24] Dr. Radhakrishnan suggested the names of five Indians: 'who are likely to offer useful suggestions': Professor K.T. Shah, Mrs. Hansa Mehta, Prof. Humayun Kabir, Prof. M. Habib and Prof. S.V. Puntambekar.

The UNESCO publication[25] on the results of the symposium contains the contributions of three Indians: Mahatma Gandhi, Humayun Kabir and S.V. Puntambekar.

The response from Mahatma Gandhi, written while travelling by train to Delhi, was in the form of a letter addressed to Dr. Julian Huxley. The letter includes one substantive paragraph that encapsulates his thinking about human rights and its corresponding obligations:

> *'I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right*

[23] Ibid. Letter from Pandit Nehru to Julian Huxley dated 14 May, 1947

[24] Letter from S. Radhakrishnan to J. Huxley dated 12 April, 1947. UNESCO Archives, AG 8 Secretariat Records, Central Registry Collection, file Human Rights – Enquiry, Public Opinion 342.7 (100): 301.153 A 151.

[25] See op.cit. 21. UNESCO.

can be shown to be a usurpation hardly worth fighting for.'[26]

The need to strike a balance between rights and responsibilities we also one of the issues raised by Prof. S.V. Puntambekar.[27] In his contribution he stated that: 'Human freedoms require as counterparts human virtues or controls. To think in terms of freedoms without corresponding virtues would lead to a lopsided view of life and a stagnation or even a deterioration of personality, and also to chaos and conflicts in society.' Puntambekar summarises in his response, the early thinking of Hinduism and of Buddha:

> *'They have propounded a code, as it were, of ten essential human freedoms and controls or virtues necessary for good life. They are not only basic but more comprehensive in their scope than those mentioned by any other modern thinker. They emphasise five freedoms or social assurances and five individual possessions or virtues. The five social freedoms are (1) freedom from violence (Ahimsa), (2) Freedom from want (Asteya), (3) freedom from exploitation (Aprigraha), (4) freedom from violation or dishonour (Avyabhichara) and (5) freedom from early death and disease (Armitatva and Aregya). The five individual possessions or virtues are (1) absence of intolerance (Akrodha), (2) Compassion or fellow feeling (Bhutadaya, Adreha) (3) Knowledge (Jnana, Vidya), (4) freedom of thought and conscience (Satya, Sunrta) and (5) freedom from fear and frustration or despair (Pravrtti, Abhaya, Dhrti)'.*

A different, but not incompatible perspective, was contributed by Humayun Kabir.[28] For H. Kabir, the'Western conception of human rights' was flawed since it only applied to 'Europeans and sometimes to only some

[26] Letter from Mahatma Gandhi to Julian Huxley dated May 25th, 1947. op.cit. 21. UNESCO

[27] Contribution from S.V. Puntambekar; 'The Hindu Concept of Human Rights'. Prof. Puntambekar, political scientist, was Head of the Department of Political History and Science, Hindu University, Benaras. Op.cit. 21. UNESCO

[28] Contribution from Humayun Kabir: 'Human Rights: The Islamic Tradition and the Problems of the World Today'. Humayun Kabir, poet and philosopher, was with the Department of Education, Government of India. Op.cit. 21. UNESCO

among the Europeans'. He argued that such a conception of human rights had 'to a large extent receded from the theory and practice of democracy set up by early Islam, which succeeded in overcoming the distinction of race and colour to an extent experienced neither before nor since'.

Kabir fully supports the effort to create a world charter for human rights overseen by 'a world authority - democratically based on the will of all groups and individuals of the world, to ensure the achievement of the fundamental human rights.' For Kabir the 'problem of the 20th century is to reconcile the conflicting claims of liberty and security. A new charter of human rights must secure to each individual irrespective of race, creed, colour or sex, the minimum requirements for a bare human existence, viz:

(a) food and clothing necessary for maintaining the individual in complete health and effectiveness;

(b) housing necessary, not only from the perspective of protection against the weather, but also from that of allowing space for relaxation and enjoyment or leisure;

(c) education necessary for developing latent faculties and enabling the individual to function as an effective member of society;

(d) medical and sanitary services necessary for checking and curing disease and for ensuring the health of the individual and the community.'

Kabir stressed that 'These are four basic rights on the enjoyment of which all other rights depend.' A world charter 'should, therefore, confine itself to the definition of the content of the four fundamental human rights and the degree of control and interference permitted to the State for securing them.'

Literature on the origins of the UDHR is divided as to the extent that the remarkable exercise undertaken by UNESCO contributed to the content of the UDHR. What is not in doubt, however, is that the responses from diverse religious, cultural and philosophical traditions confirmed that, in spite of their differences, there exist universally accepted principles and

values that could be expressed in a global document.[29]

(b) The American Law Institute and the 'Essential elements of human rights'

In 1942 The American Law Institute appointed a Committee to discover 'how far the people of the world would agree as to what rights were essential to make the freedom of the individual effective'.[30] Since this effort was to contribute to a global instrument, the composition of the Committee had to include eminent experts from different fields, representing 'cultures around the world'. The intention of the Committee was to draft a document that would serve two purposes: (1) to feed into discussions on a peaceful resolution to the war that was raging at that time and (2) to contribute to the process that could lead to a 'future declaration of rights – one that would be incorporated by the UN in its constitution'.

K.C. Mahindra[31]from India was invited to be part of the Committee. Mr. Mahindra was at that time leading the 'India Supplies Mission'[32] and was based in Washington D.C. Mr. Mahindra attended the final conference and submitted a few written statements.[33]

The work of the Committee was significant not only as an advance on how human rights should be crafted, for a world beyond the second world war, but also the influence they had on the text of the first draft of the UDHR. One of the departure points for the work of the Committee was the decision to include economic, social and cultural rights, as enforceable

[29] For a compelling rendering of this argument see introduction to the UNESCO volume by Jacques Maritain. Op. cit 12. UNESCO

[30] Appendix IV and V of the Lowenstein Papers cited in Van Dyke, Mary Samuel, "The United Nations Commission on Human Rights and the Relationship of the United States to It: 1945-1953" (1957). Dissertations. Paper 495, Loyola University Chicago

[31] I would like to thank Prof. Asbjorn Eide, Emeritus Professor at the University of Oslo and Former member of the UN Sub-Commission on Human Rights (1981-2003) for bringing to my attention that an Indian was part of the Committee established by the American Law Institute.

[32] The India Supplies Mission was an official body that issues tenders for steel imports against aid from the United States.

[33] I have not been able to find the summary records of these sessions. It is, therefore, not clear precisely what K.C. Mahindra added to the deliberations of the Committee.

rights in the instrument that was being drafted. The document that was published[34] by this Committee was called the 'Statement of Essential Human Rights'.

Mr. K.C. Mahindra was an industrialist and did not have an activist background in the freedom struggle as had the other Indian's, Hansa Mehta and Vijaya Lakshmi Pandit, who contributed to the UN instruments. It is also worth noting that even during his time as Head of the India Supplies Mission Mr Mahindra exhibited a 'political' mind set and attempted to use his visit to the US to influence the President of the US to put pressure on the British in favour of Indian independence.[35]

His instincts and life's work were, nevertheless imbued with a strong sense of social justice. When he returned to India in 1946, Mr. Mahindra established Mahindra and Mohammed, an industrial house dealing in several sectors. His partnership with Mr. Mohammed was an attempt to demonstrate Hindu-Muslim unity at a time when there was growing conflict between the two groups.[36]

The UDHR

In May 1946 the Economic and Social Council of the United Nations created a Commission on Human Rights composed of members from 18 countries. India was a member of the first Commission on Human Rights, which was charged with the task of drafting an 'International Bill of Rights'.

The UDHR was drafted in seven drafting stages[37] over a period stretching from January 1947 to 10 December 1948, the day it was adopted by the UN General Assembly.

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[34] Americans United for World Organisation, 'Statement of Essential Human Rights: American Law Institute's Committee of Advisers on Essential Human Rights', 1945, New York. Available at UN Internet Archive: https://archive.org/details/statementofessen00amer

[35] See op.cit. 18. Kenton J. Clymer, '*The Quest for Freedom'*

[36] The company later changed its name to Mahindra and Mahindra after Mr. Mohammed chose to move to Pakistan. Mr. K.C. Mahindra was also the founder of the Mahindra Trust, one of the few philanthropic trusts that supports work on social justice in India.

[37] For a comprehensive overview of the different drafting stages see: Johannes Morsink (1999), *'The Universal Declaration of Human Rights: origins, drafting and intent'*, University of Pennsylvania Press, pp. 4-35.

Hansa Mehta represented India on the Commission and made a remarkable substantive contribution to many of the articles that made up the UDHR. Hansa Mehta was well placed to play an important role in this process. Mehta had already represented India at the Nuclear Sub-Committee on the Status of Women in 1946. Mehta was also a member of India's Constituent Assembly.[38] When the first draft of the UDHR, 'the Geneva draft', was ready in December 1947, the Assembly had already deliberated on the contents of the Indian Constitution, including the content of fundamental rights.

At the eighth meeting of the Commission, Mehta asked for consideration of the draft resolution[39] that had been submitted by India to the Commission. India's resolution contained the following human rights for incorporation into the UDHR:

> *"I. (a) Every human being is entitled to the right of liberty, including the right to personal freedom; freedom of worship; freedom of opinion; freedom of assembly and association; and the right to access to the United Nations, without risk of reprisal, whenever there is an actual or threatened infringement of human rights.*
>
> *(b) Every human being has the right of equality, without distinction of race, sex, language, religion, nationality or political belief.*
>
> *(c) Every human being has the right of security, including the right to work, the right to education, the right to health, the right to participate in government and the right to property, subject only to the over-riding consideration of public weal when the State or its appropriate organs acquire it after paying equitable compensation."*

[38] Mehta, to add to her formidable credentials, was a social activist, a Gandhian and had also been to prison for her strong views on a range of British policies that violated the human rights of Indians.

[39] E/CN.4/11 in Schabas. William A., 'THE UNIVERSAL DECLARATION ON HUMAN RIGHTS: The Travaux preparatoires'. Volumes I to III. Cambridge University Press, 2013. All UN document numbers in this article, unless otherwise mentioned, are from these volumes.

At the tenth meeting of the Commission it was decided by vote (with no objections) that the Indian resolution would form one of the documents on the basis of which drafting of the UDHR could begin.[40]

Subsequent meetings of the Commission began to debate the contents of the UDHR. During the course of the two years that the Commission and its various Committees attempted this seemingly impossible task, a number of Indian's were members and made contributions towards the perspective, scope and content of what was to become the UDHR. Hansa Mehta was the longest standing member and made critical inputs. A number of other Indians also represented India including: M.R. Masani and Laxshmi Menon.

The Indian contribution[41]can be organised in the following themes:

(a) The importance of the 'secular' approach to human rights

The debates on the source of human rights are some of the most fascinating parts of the 'Travaux Preparatiores' of the UDHR.

The lineage of language from the American Declaration of Independence and the French Declaration is clear in the wording of Article 1 of the UDHR. What sets the UDHR apart, however, and this reformulation has been critical to the evolution of human rights since the UDHR, is the omission of God as the source from which human rights derive. The struggle in the deliberations was, therefore, of how to resolve the 'bargain about God and Nature'.[42]

The Indian position had been made clear in the resolution (paraphrased above) it submitted, at the initial meeting of the CHR prior to the beginning of the drafting process. The preamble of India's resolution states that: 'Recognizing the fact that the United Nations has been established for the specific purpose of enthroning the natural rights of man

[40] E/CN.4/SR.10. op. cit. Volume 1, pp. 180-182

[41] It is, of course, not only India that contributed to the development of these themes. India opened up the discussions on some of the themes and was supported by the representatives of other countries, or the discussion on other themes was initiated by other countries and India supported these positions.

[42] This is one of the sub-titles of Morsink op. cit. 36. chapter 8 on Article 1.

to freedom and equality before the law, and for upholding the worth and dignity of human personality.'

The debate on human rights being derived from God or to be seen as natural rights as inherent in human beings continued for many days at various stages of the drafting process.[43]The Indian delegates made it clear that the UDHR must be applicable to everyone in the world and that there were millions of people who did not believe in God.

In the process of the debate the word 'God' was removed from earlier drafts. CHR members instead agreed on the use of the phrase 'by nature and conscience'. The CHR, when it presented the draft of Article 1 to the Third Committee the text read:

> *'All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another in a spirit of brotherhood.'*

In written comments to the CHR draft a number of countries presented amendments. Brazil insisted on the inclusion of the word 'God'. Their amendment suggested the inclusion of the phrase 'created in the image and likeness of God' in the second sentence.

When the debate was taken up at the Third Committee[44] on the amendments Lakshmi Menon from India stated that:

> *'Although different countries had different beliefs and political systems, they shared the same ideals of social justice and freedom. The purpose of the declaration was to set forth those ideals and to find a basis of agreement acceptable to all. As far as article 1 was concerned, there was general agreement that all men should live together in freedom and brotherhood. In that connexion lessons could be learnt from the democracies of both the East and*

[43] For an excellent overview of these debates see: op.cit. 36. Morsink. Also see, for a discussion on the tension between the 'epistemic' and 'natural rights' see: Johannes Morsink (2009), '*Inherent human rights: philosophical roots of the universal declaration',* University of Pennsylvania Press.

[44] A/C.3/SR.99

the West. As the amendment submitted by the Brazilian representative (A/C.3/215) contained a statement of belief which was not shared by all the representatives, she appealed to him to withdraw it for the sake of unanimity.'

Mrs. Menon's appeal was echoed by the delegate from France, Mr. Grumbach who in his reasoning cited the French Catholic philosopher Jacques Maritain who had stated that: 'stated in relation to that very question that the nations should try to reach agreement on a declaration of human rights, but that it was useless to try to reach agreement on the origin of those rights. It had been that agreement on practical fundamental rights which had kept the leaders of his country strong and united during the terrible years of the occupation'.[45]

Although the Brazilian delegate had the support of a number of other Latin American countries, including Argentina and Venezuela, the strong appeal from Mrs. Menon and Mr. Grumbach to withdraw his amendment. The word 'nature' was also withdrawn during the debate.

The final text of Article 2:

'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

(b) Women's Rights

The CHR met on 12 December 1947[46] to begin consideration of the articles of the UDHR prepared by its working group.[47] The text of Article 1 before the CHR read as follows:

'All men are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another like brothers.'

Mehta began the discussion by stating that 'she did not like the wording 'all men' or 'and should act towards one another like brothers',

[45] Ibid.

[46] E/CN.4/SR.34

[47] E/CN.4/57

she felt they might be interpreted to exclude women and were out of date.'

The CHR initially adopted the article without acknowledging the point made by Mehta. A debate on this point ensued. Eleanor Roosevelt 'replied that the word 'men' used in this sense was generally accepted to include all human beings'. Lord Dukeson from the United Kingdom offered a compromise by proposing a note to be added to beginning of the Declaration to the effect that the word 'men' as used herein, referred to all human beings. Mehta responded by stating that: 'she had no objection to the United Kingdom suggestion, but Article 1 was the only place in the Declaration where the expression 'men' appeared. She wished to have this changed to 'human beings' or 'persons'.

A vote then followed and the proposal from the UK representative was accepted by the CHR.

The insistence by Mehta for the recognition of women's rights in Article 1 of the UDHR, was picked up in discussions within the UN Sub-Commission on the Status of Women[48] and supported by its Chairperson Bodil Begtrup, who also was an observer on behalf of her Commission, during the deliberations of the UDHR text at the CHR. Several delegations, including the Dominican Republic,[49] also proposed similar language when the CHR draft was reviewed by the Third Committee of the UN General Assembly. The Indian representative at the UNGA Third Committee, Lakshmi Menon, also supported the inclusion of language that included women in Article 1 of the UDHR.

The adopted final text of Article 1 of the UDHR reads:

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

[48] Appointed by the UN Economic and Social Council to 'submit proposals, recommendations and reports to the Commission on Human Rights'. See E/38/Rev.1/App.1/p.14

[49] For more details on the role of delegations other than India see Adami, Rebecca (2015): 'Counter Narratives as Political Contestation: Universality, Particularity and Uniqueness', The Equal Rights Review

(c) Indivisibility of all human rights

The UDHR broke new ground in 1948 with the equal recognition of economic, social and cultural rights alongside civil and political rights. The delegations from the communist and socialist countries contributed to the inclusion of ESC rights in the UDHR. India too played an important role in this regard. Discussions at the CHR, on the right to health, the right to work and the rights of mothers and children, illustrate the type of role played by India's representatives.

In the resolution[50] submitted during the opening discussions of the UDHR by the CHR, India had introduced the 'right to health care' as a human right.[51] This phrasing was in response to the initial list of rights prepared by the UN Division of Human Rights. In that list the phrasing was 'right to medical care'.

In a response to several contributions from NGO's to the draft International Bill of Rights prepared by the Division of Human Rights, Mehta responded:

> *'. . . with regard to the third group of rights, right to medical care is not enough. The real wording is right to health, because the individual expects not merely medical care from the State but also such preventive measures as would protect his health. Therefore, right to health is the recognized terminology and I would like you to substitute it for the right to medical care.'*[52]

After the presentation of the initial draft (Geneva draft) of the UDHR by the drafting committee of the CHR, India and the UK combined their efforts and proposed a revised text, combining several articles from the text prepared by the drafting committee:

'Everyone has the right to a standard of living adequate for health and wellbeing, including security in the event of unemployment, disability,

[50] E/CN.4/11. See the text quoted above in section 6, See also Mehta's contribution in E/CN.4/SR.14.

[51] A/CN.4/SR.14.

[52] E/CN.4/AC.1/3/Add.1

old age or other lack of livelihood in circumstances beyond his control.'

During the discussion on the India-UK text, Mehta added one more phrase to the text: 'Mothers and children shall be granted special care and assistance' to which Mr. Wilson (United Kingdom) said he was not opposed. He did not however wish to be committed to that exact wording.[53] Rene Cassin from France agreed to this formulation and added the phrase 'the right of everyone to an adequate standard of living'.

During the discussions on the right to health in the Third Committee and in the General Assembly prior to the adoption of the UDHR, Mehta's formulation of the right to health (later joined by the UK) and her addition of the rights of mothers and children were codified in the UDHR:

'Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'

Right to work

One of the human rights, contained in India's resolution submitted prior to the discussions at the CHR, was the right to work. During the course of the deliberations, Mehta stressed not only the need to recognise the right to work but also the right to acceptable conditions at work. In the pursuance of this right, India and the UK joined hands and suggested an amendment to the draft (the Geneva draft) prepared by the Division of Human Rights. The Geneva draft merely recognised the 'right to work'.

[53] E/CN.4/SR.66. pp. 1824

The India/UK amendment enhanced the notion of work: Everyone has the right to work under just and favourable conditions.[54] Explaining this draft proposal Mehta stated that:

'Thus amended, the text would take account of the concern of the representative of the American Federation of Labour, which was, if each individual had the right to work, it follows that someone had the obligation to guarantee work for each individual.

The statement concerning just and favourable working conditions covered the provision of article 24, relating to remuneration: unless the latter were satisfactory, working conditions would not be just or favourable.

The second article suggested by her delegation and that of the United Kingdom, replacing articles 24 and 26 similarly covered all the details of those articles while preserving their substance.[55]

Following the discussion, Mehta was one of the delegates chosen to be part of a Sub-Committee to come up with a compromise text for Article 23 on the right to work. Several members of the Sub-Committee felt that the substance of paragraph 2 might be inserted in a general form in the preamble or in the text preceding the enumeration of economic and social rights.

The text of the Sub-Committee:[56]

1. Everyone has the right to work and to just and favourable conditions of work and pay.

2. The enjoyment of these rights should be ensured by such measures (taken by the State or by society) as would create the widest possible opportunities for useful work and prevent unemployment.

3. Everyone is free to form or join trade unions (of his own choice) for the protection of his interests.

[54] E/CN.4/99

[55] E/CN.4/SR.64

[56] E/CN.4/114

4. Women shall work with the same advantages as men and receive equal pay for equal work.

The final wording in the adopted Article 23 of the UDHR:

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

(d) Non-Discrimination

Article 2 of the UDHR articulates a fundamental principle of human rights: that they should apply to all without discrimination. The CHR asked the Sub-Commission[57] on the Prevention of Discrimination and Protection of Minorities to assist in the definition of non-discrimination and equality. The text submitted to the Sub-Commission by the CHR read as follows: 'Everyone is entitled to the rights and freedoms set forth in this Declaration without distinction as to race, sex, language, or religion'.[58]

The Sub-Commission was specifically asked to elaborate on the criteria for non-discrimination including whether to include colour as one of the criteria. M.R. Masani[59] from India was one of the members of the Sub-Commission. Masani vigorously took up the issue of the inclusion of 'colour' in the criteria. At the first session[60] of the Sub-Commission Masani

[57] The Sub-Commission was one of the two bodies established by ECOSOC in 1947. The other body was the Sub-Commission on Freedom of Information and of the Press.

[58] E/CN.4/21, Annex F.

[59] M.R. Masani was a member of the Swatantrata Party and participated in the freedom struggle.

[60] 26 November 1947. For the minutes of this session see: op.cit. 38. Shabbas Volume 1, pp. 1028

made the following two proposals and stated that he did not think it was clear from the text that the idea of colour was included in that of race. The American Federation of Labour had thought fit, in documents, to refer explicitly to colour as well as race in connection with discrimination. He proposed therefore that the Sub-Commission while approving this article should make it more explicit by adding the word 'colour' after the word 'race'. Secondly, the lack of any mention of discrimination based on political opinions seemed to him an omission to be rectified. In his previous statements he had emphasized the importance of political minorities. He therefore proposed that the words 'or political opinion' should be added at the end of the article. Article 6 would then read:

> *'Everyone is entitled to the rights and freedoms set forth in this Declaration, without distinction as to race, colour, sex, language, religion, or political opinion.'*

After discussion in the Sub-Commission the addition of Masani to include 'colour' was not included in the draft sent back to the CHR. Instead a note was included saying that: 'It being understood that the term 'race' includes colour'.

Masani's second proposal to include 'political opinion' was hotly debated by the Sub-Commission. During the debates Masani further clarified his rationale for the inclusion of 'political opinion'. He 'emphasized that his intention in adding the words 'political opinion' had been to extend to political opinions the protection granted by the article to religious beliefs. The minorities that would need protection in the future would be more in the nature of political minorities than the traditional religious minorities, which were tending to disappear.'[61]

The Sub-Commission, in spite of strong objections of the delegate from the USSR, accepted the contribution on 'political opinion'.[62]The draft text sent by the Sub-Commission to the CHR, thus, read as follows:

> *'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction such as race, sex, language, religion, political or other opinion, property status, or national or social origin.'*

[61] Ibid. pp.1030 (check Sub.2/SR3/p.4)

[62] See discussion in op.cit. 36. Morsink.

At the second session of the CHR, during the reading of the draft sent by the Sub-Commission, Mehta attempted to resurrect 'colour' as a basis of discrimination. During the discussion on the drafts before the Commission, Mehta stated that: 'She had understood the term 'race' to include 'colour', but if there was any doubt on the subject, she thought the word 'colour' should be added to the Declaration'. During the same debate Mehta stated that 'She wished to change her proposal to read 'race including colour' since colour was not mentioned in the United Nations Charter.'[63]

Mehta's proposal to include 'colour' was supported by the representatives of Lebanon Mr. Malik and the Philippine Republic, Carlos Romulo. Malik said that 'the representative of India had raised an important point since race and colour did not mean the same thing, neither was the conception of colour included in the term race''.

Mehta's proposal to include 'colour' was voted upon and unanimously accepted by the Commission.[64]

A reading of Article 2 of the UDHR after its final adoption in 1948, demonstrates the significant contribution made by Mehta and Masani to the content of one of the central principles on which the edifice of human rights has been built:

'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

(e) Freedom of Movement

The memorandum[65] submitted by the UN Division of Human Rights contained a list of human rights for consideration by the CHR. The list included the 'right to freedom of movement (migration)'.

[63] E/CN.4/SR.35. op.cit. Volume 2, pp. 1258-1259

[64] Ibid

[65] E/CN.4/W.18

During the opening debates[66] on the various rights presented by the Division of Human Rights and the document presented by India, the Chair of the CHR, Mrs. Roosevelt, stated that she; 'thought that freedom of movement, a right inherent in the human person, ought to be understood only as the ability to leave a country freely. This right would be limited by the immigration laws of the receiving country.'

Mehta, in her intervention was the first to raise the more expansive notion of 'freedom of movement'. Mehta 'drew the Commission's attention to the draft resolution she had submitted in which none of the rights granted released the individual from his obligations towards the State. By freedom of movement she understood not only the freedom to emigrate, but also the freedom to move from one place to another within the boundaries of the State, a right not at present respected in all countries of the world.'

Based on these discussions, the Division of Human Rights prepared a draft outline of the International Bill of Rights. This draft (in its Article 9) stated that: 'Subject to any general law adopted in the interest of national welfare or security, there shall be liberty of movement and free choice of residence within the borders of each State.[67]

Mehta's broad conception of freedom of movement was accepted in the first draft of the UDHR. During the debate on this draft Mehta, with a view to ensuring that her earlier suggestion would be retained in the draft of the UDHR once again stated that:

> *'With regard to the right of freedom of movement, there was another freedom that I wish to mention to you. It is not freedom of migration only, but freedom of movement within the State itself. There are laws today in many States which restrict individuals from one part of the country going into the other part of the country. Therefore, there must be freedom of movement within the State itself. That is very important.'*[68]

[66] E/CN.4/SR.14. Fourteenth Meeting of the CHR, 4 February 1947.

[67] E/CN.4/AC.1/3

[68] E/CN.4/AC.1/3/Add.1

A number of the members of the CHR were still of the view that the freedom of movement had to be more restrictive than what had been proposed by Mehta.

The Working Group on the Declaration of Human Rights, based on the deliberations at the CHR produced a draft Declaration.[69] In this draft the right to freedom of movement had been split into two separate articles (Article 10 and 13). Mehta felt that it was important for the right to freedom of movement to have its own article and:

'pointed out that Article 10 of the Convention contained no provision for freedom of movement within a State. She therefore proposed that paragraph 1 of Article 13 of the Declaration should be inserted at the beginning of Article 10. She asked that the vote should be taken on the substance of the proposal; the wording could be modified later if necessary.'

The amendment was put to a vote and adopted. [70]

During the debates at the Third Committee and in the final plenary of the General Assembly prior to the adoption of the final text of the UDHR, Mehta's contribution was sustained. The UDHR Article 13:

'(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.'

(f) Multiculturalism, Cosmopolitanism and the Universality of Human Rights

Throughout the deliberations during the creation of the UDHR, the Indian delegation distinguished themselves by consistently stressing the principles of multiculturalism and cosmopolitanism. Mehta, Masani, Lakshmi Menon all stressed at different stages of the discussions that the UDHR had to apply to everyone in the world; that the human rights in the UDHR were for people and communities and not for States.

[69] E/CN.4/57

[70] E/CN.4/SR.37. pp. 1281

Early in the deliberations Hansa Mehta, carrying forward one of the core messages of India's freedom struggle as articulated in words and actions by Mahatma Gandhi, stated that: 'Such a bill of human rights must be a simple, forthright document which is easily understood.'[71]

The concept of universality of human rights, however, needed some specificity and Masani and Mehta made major contributions towards that goal. Masani introduced the word 'colour' and 'political opinion' as additional criteria for non-discrimination.[72]Mehta successfully defended the introduction of 'colour' in Article 2 of the UDHR.

The Indian delegation also took active part in the deliberations on the themes of self-determination; the need to strike a balance between individualism and collective rights; the necessary tension between sovereignty and international cooperation towards 'larger freedoms' for all and the right to petition.[73]

The Indian delegation played an important role in not letting the deliberations get bogged down in discussions on the benefits of specific political systems and ideologies. Lakshmi Menon, during the final session at the General Assembly[74]recalled that her delegation had taken part, from the outset, in the work of the Commission on Human Rights. She supported the declaration that the Commission had drawn up. It provided a solid basis for the international cooperation referred to in Article 55 of the Charter; and it expressed the aspirations of peoples, who, though they had but recently attained political freedom, had always accepted and practised the noble ideals of religious tolerance and cultural freedom. Mrs. Menon stated that:

> *'The full significance of the Indian delegation's attitude in the Third Committee could only be understood when considered in relation to the decision taken by the Indian Constituent Assembly to include in the Constitution of that*

[71] E/CN.4/AC.1/7. pp. 310 Schabbas

[72] See discussion in section on 'non-discrimination' above.

[73] Space constraints do not allow a detailed overview of these discussions, see book length treatment on India's contribution to the UDHR. Forthcoming from the Author.

[74] 10 December 1948. Summary records contained in: A/PV.182.

country the same rights and freedoms as were proclaimed in the declaration. The universal declaration of human rights was born from the need to reaffirm those rights after their violation during the war. It was now more than ever necessary to reaffirm those rights. The remedies to be applied to humanity had to be adapted to the seriousness of the conditions in which it lived; and when conditions deteriorated the remedy had to be all the stronger and more drastic.

That was one of the reasons why the present declaration was fuller and more detailed than all the other similar declarations. Earlier declarations had not mentioned rights such as the right to equal pay for equal work; the right of mothers and children to social protection, whether the children were born in or out of wedlock; the right to education; equality of rights for men and women. Those rights were the expression of a new social order, of true democracy based on social justice'.

Mrs. Menon thought, however, that harmony of thought and purity of motive were much more important factors than mere beauty of words. The essential point was the contents of the declaration, and that ought not be sacrificed to considerations of style. Mrs. Menon stated that: 'The Indian delegation stood, as always, against all forms of discrimination' and that the attitude of her delegation had been inspired by the feeling that it was the duty of India, as a country which had just won its own independence, to help other countries which had not yet reached that stage. Mrs. Menon recalled how insistently the Indian delegation had stressed the importance of avoiding mention of any political doctrine either in the declaration or in the preamble. Mrs. Menon stated that:

'It would have been illogical to insist on political convictions which could not be shared by all, while at the same time proclaiming religious tolerance. The right to hold different opinions was a sacred right and the prerogative of every truly democratic people. The Indian delegation had therefore upheld that right, though perfectly aware of the dangers inherent in it. India, like other countries, would never agree to restricting political rights in order to realize social aims, however noble those aims might be.'

In conclusion, Mrs. Menon expressed the hope that 'the declaration would pave the way to a new era of international solidarity, because the basis of rights was neither the State nor the individual, but the social human being, participating in social life, and striving for national and international co-operation.'

Conclusion

Vijaya Lakshmi Pandit, Hansa Mehta, M.R. Masani, Lakshmi Menon were all freedom fighters and, in its most radical sense, scholars/activists. What set them apart was their practical and moral approach towards the contents of the UDHR.

The Indian delegates demonstrated a remarkable degree of magnanimity, forbearance, perseverance and foresight in their written and oral contributions towards the formation of the UDHR. They were able to translate into words and action, lessons learnt from decades of the freedom struggle and to transpose the language learnt from the articulation of human rights and freedoms that was already expressed in the historic resolutions adopted at the Indian National Congress (INC) meetings in Karachi and Lahore; in the Quit India resolution and the drafting that already took place during the first year of the Constituent Assembly. They were able to convey the worldview and demands for the emancipation of all oppressed people's conveyed in the speeches and writings of Mahatma Gandhi and Jawaharlal Nehru and in their own lessons learnt from being active participants in India's freedom struggle.

In the decades following the adoption of the UDHR, Indian delegates continued their active contribution, through the UN, to create a global governance system that stood up for human rights and social justice; it was India that successfully tested the capacity of the UN when its delegates sought to expose apartheid in South Africa; India also joined other countries from the 'South' to insist on the recognition of economic, social and cultural rights; the recognition of self-determination in the two Covenants that were drafted in the 1960's.

The UDHR was embraced in India after 1948 – it contributed to the Constitution; it continues to consistently inform judgments of the Indian

Supreme Court;[75] it has been translated into all of India's official languages and has become a powerful pedagogical tool for human rights education and an inspiring document for social movements across India.

Major challenges, however, remain. Neither the UN nor India has lived up to the visionary potential that the founders of these two entities envisaged. The ideas, principles and foundational postulates are, however, there to be recast into policies. As briefly sketched in this article, however, if any country is destined to pick up the torch for human rights, social justice and peace, it is India; and as Indians we owe it to the great legacy of our freedom struggle and those great leaders, including Mahatma Gandhi and Jawaharlal Nehru, who led the movement of a United Nations for all.

The past, present and the future of India and the UN are intertwined in what should be a seamless thread. It is, however, an open question as to whether India has the vision and the leadership to pick up the mantle of a world governed in 'Larger Freedom' by a multi-lateral organisation.

The challenges the world faces today; racism and growing xenophobia, economic imperialism, narrow nationalism – are not too dissimilar to the devastation that the World Wars, colonialism and imperialism left for the world to deal with. We need once again to recast the country and the UN as harbingers of a more humane world – governed by respect for human rights and compliance with international human rights commitments. The contours of what may constitute such a world are there in the debates that led to the UDHR. The 70th anniversary of the UDHR compels us once again to revisit the incredible repository of knowledge and wisdom that is available in the debates that led to the UDHR.

[75] See, for example, Jain, Tarun (2004): 'Influence of Universal Declaration on the Judicial Interpretation of Fundamental Rights and Directive Principles in the Constitution of India'

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The Sustainable Development Goals and Human Rights:

Exploring inter-linkages and synergies to accelerate the 2030 Agenda and access to human rights

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Abstract

In 2015, a global consensus on the 2030 development agenda took shape with the adoption of the Sustainable Development Goals (SDGs) at the United Nations General Assembly.

This paper examines the inter-linkages and synergies between the SDGs and human rights to suggest that progress on both can be accelerated if implemented in a mutually reinforcing manner. Thus, the human rights paradigm, in both its substantive and procedural forms, can enable the achievement of SDG outcomes, especially those pertaining to equity. Similarly, access to human rights can be increased through the achievement of SDG outcomes.

In addition, this paper examines the manner in which our conceptual understanding of what constitutes both sustainable development and human rights is influenced by each, and will continue to evolve in this manner. For example, as the right to a clean environment is increasingly seen as a human right, perhaps our understanding of what constitute human rights will be informed by the SDGs and the evolution of the global development agenda.

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The first section outlines key debates and developments pertaining to the inter-linkages between the environment, human rights, and environmental human rights. The second section explores the manner in which the right to a clean environment has been interpreted and understood as a human right in India, especially in the courts. The final section maps specific SDGs and human rights, as well as legal entitlements, which stem from our understanding of human rights, to demonstrate complementarities between the two, and indicate the way forward.

Human rights and the environment: key developments and debates

Globally, the discussion on the inter-linkages and synergies between human rights and the environment has centred around three major questions: firstly, whether environmental protection is required to achieve human rights; secondly, whether human rights can contribute towards environmental protection; and thirdly, whether environmental rights are human rights.

This complementarity between the two was first recognized in a Resolution of the UN General Assembly in 1968.[1] The Resolution expressed a concern about the effect of the deterioration of the environment on the 'condition of man, his physical, mental, and social well-being, his dignity, and his enjoyment of basic human rights, in developing as well as developed countries'.[2] An anthropocentric view of the relationship between human rights and the environment is evident here, one which justifies environmental protection on the basis of its positive impact on human well-being. As opposed to this perspective, an eco-centric view justifies environmental protection as an end in itself, independent of its impact on human well-being.[3]

[1] United Nations. 1998. United Nations General Assembly Resolution 2398 (XXII) (1968) https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement (accessed on September 14, 2018)

[2] *Ibid.*

[3] Kortenkamp, K.V., and Moore, C.F., 2001. "Ecocentrism and Anthropocentrism: Moral Reasoning About Ecological Commons Dilemmas," *Journal of Environmental Psychology* 21(3): 261-272; Wapner, P. and Mathew, R.A., 2009. "The Humanity of Global Environmental Ethics," *The Journal of Environment and Development* 18(2): 203-222.

In the Stockholm Declaration on the Human Environment adopted at the UN Conference of the Human Environment in 1972 both approaches are evident.[4] Principle 2 states that natural resources should be safeguarded for the benefit of present and future generations, while Principle 3 states that humans have a special responsibility to safeguard and manage wildlife and that, therefore, nature conservation must be given importance in planning. Principle 1 seems to treat environmental rights as human rights when it states that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.'[5]

The World Charter on Nature adopted in 1982 by the UN General Assembly reaffirmed the need to preserve the environment as an end in itself when it stated that every form of life warrants respect regardless of its worth to man, but also stated that decision-making processes should recognize that 'man's needs can be met only by ensuring the proper functioning of natural systems'.[6]

The report of the World Commission on Environment and Development, the Bruntland Commission, which brought the concept of sustainable development to the forefront of the global agenda, also proposed legal principles for environmental protection and sustainable development, the first one stating that 'all human being have the fundamental right to an environment adequate for their health and well-being'.[7] The subsequent principles called for establishing environmental standards and conducting prior environmental impact assessments to give substantive rights, for example by mandating that environmental pollution must not exceed prescribed limits.[8]

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[4] United Nations, 1972.*Report of the United Nations Conference on the Environment* (United Nations, 1972) http://www.un-documents.net/aconf48-14r1.pdf (accessed on September 14, 2018)

[5] *Ibid.*

[6] United Nations, 1982. United Nations General Assembly Resolution A/RES/37/7, http://www.un.org/documents/ga/res/37/a37r007.htm (accessed on September 14, 2018)

[7] United Nations, 1987.*Report of the World Commission on Environment and Development: Our Common Future*http://www.un-documents.net/our-common-future.pdf(accessed on September 14, 2018)

[8] *Ibid.*

The Rio Declaration on Environment and Development adopted at the UN Conference on Environment and Development in 1992 did not explicitly link human rights and the environment.[9] However, Principle 10 emphasized the need for participation and information sharing while managing environmental issues, and Principle 25 highlights the interdependence between peace, development and environmental protection.

The UN Commission on Human Rights (now, the UN Human Rights Council) appointed a Special Rapporteur on this issue in the early 1990s. She submitted a report in 1994, which reviewed environmental rights and legislation across countries and concluded with a set of 'Draft Principles for a Declaration on Human Rights and Environment'.[10] While these principles have not yet been taken forward as a declaration or convention, they represent a significant milestone in global thinking on the inter-linkages between human rights and the environment.

The Draft Declaration consists of four major parts. The first part reaffirms the interdependence between 'human rights, an ecologically sound environment, sustainable development, and peace' and states that all persons have the right to a secure, healthy and ecologically sound environment.[11] The second part outlines specific environmental rights, such as freedom from pollution, the right to the protection and preservation of natural resources, health, and a safe working environment, among others. The third part specifies procedural rights such as the right to participate in environmental decision-making, and information sharing. The fourth part places certain obligations on sovereign States such as conducting prior environmental impact assessments, and the monitoring, management and equitable sharing of natural resources, among others.

At the regional level, the Aarhus Convention of the UN Economic Commission for Europe established a number of rights to the environment, which became legally binding on the signatories of the Convention after

[9] United Nations, 1992.*The Rio Declaration on Environment and Development* http://www.unesco.org/education/pdf/RIO_E.PDF(accessed on September 14, 2018)

[10] United Nations, 1994.*Draft Principles On Human Rights And The Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994). http://hrlibrary.umn.edu/instree/1994-dec.htm(accessed on September 14, 2018)

[11] Ibid.

it entered into force in 2001.[12] These are procedural rights and include the right to access information, the right to participate in environmental decision-making and the right to access justice.

The Plan of Implementation adopted at the 2002 World Summit on Sustainable Development, urged States to acknowledge the relationship between the environment and human rights but did not include specific actions to take these inter-linkages forward.[13] However, a year later, in 2003, the United Nations Commission on Human Rights (now, the UN Human Rights Council) highlighted these inter-linkages more clearly when it stated that: (i) respect for human rights is essential to achieve sustainable development, (ii) environmental damage can have a negative impact on the enjoyment of some human rights, and (iii) States should be cognizant of the negative effect of environmental degradation on disadvantaged sections of societies in particular.[14]

Since then, the SDGs, adopted as a part of the 2030 Agenda for Development have taken this discussion forward in some ways. This is discussed in greater detail in the third section of this paper. The next section discusses the manner in which the inter-linkages between the environment and human rights have been understood in India, with a focus on court judgments that have interpreted the right to a clean environment as a human right.

Understanding the right to a clean environment as a human right in India

In India, the inter-linkages between the environment and human rights have largely been understood through judicial interpretations of constitutional and legal provisions.

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[12] UNECE, 1998.*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice In Environmental Matters* http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf(accessed on September 14, 2018)

[13] United Nations, 2002.*Report of the World Summit on Sustainable Development* http://www.un-documents.net/aconf199-20.pdf(accessed on September 14, 2018)

[14] United Nations Commission on Human Rights, Commission on Human Rights resolution 2003/71: Human Rights and the Environment as Part of Sustainable Development, 25 April 2003, E/CN.4/RES/2003/71 http://www.refworld.org/docid/43f3134dc.html(accessed September 14, 2018)

One of the first cases to have discussed this inter-linkage was *Municipal Council, Ratlam v. Shri Vardhichand* in 1980.[15] The Court invoked Article 47, a directive principle, which requires that the State take steps for the improvement of public health, to mandate that the Ratlam Municipal Council take action to improve sanitation facilities in the city. The Court also upheld the use of Section 133 of the Code of Criminal Procedure, 1973 which empowers a sub-divisional magistrate to prohibit or regulate any trade or occupation which is injurious to public health, and directed that any breaches of its directives be punished under Section 188 of the Indian Penal Code, which provides for punishment if an order of a public servant is not followed.

In 1985 in *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, the Supreme Court ordered the closure of certain limestone quarries and mandated land reclamation, afforestation and soil conservation in those areas.[16] It pointed out that while the closure of these mines would cause losses to owners and employees, this was a necessity for 'protecting and safeguarding the right of the people to live in (a) healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment'.[17]

A year later, in *MC Mehta v. Union of India*, while deciding on the legality of operations of a fertilizers manufacturing industry, the Supreme Court put forth the principle of absolute liability.[18] It held that it is the responsibility of any enterprise engaged in a potentially environmentally hazardous activity to ensure that: (i) no harm is done to communities residing in the vicinity of the enterprise, (ii) the highest possible standards of operation are maintained to this end, and (iii) those who suffer harm on account of these activities are compensated adequately.

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[15] Municipal Council, Ratlam v. Shri Vardhichand, 1980 SCC (4) 162, https://indiankanoon.org/doc/440471/(accessed on September 14, 2018)

[16] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, 1985 SCC (2) 431, https://indiankanoon.org/doc/1949293/(accessed on September 14, 2018)

[17] *Ibid.*

[18] MC Mehta v. Union of India, 1987 SCC (1) 395, https://indiankanoon.org/doc/1486949/ (accessed on September 14, 2018)

In another landmark case in 1987, *MC Mehta v. Union of India*, the Supreme Court ordered certain polluting industries along the Ganga River in Kanpur to establish primary and secondary effluent treatment plants.[19] While discussing the financial implications of this order, the Court stated that the financial capacity of these industries to set up treatment plants was irrelevant in this context, as 'a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure.'[20]

It was in *Subhash Kumar v. State of Bihar*, in 1991, that the Supreme Court directly linked environmental protection with the right to life guaranteed under Article 21.[21] While delivering a judgment in response to a public interest litigation (PIL) filed against industries, which the petitioner alleged were polluting the Bokaro River, the Court held that the right to life, guaranteed under Article 21, also includes the right to pollution free air and water. It added that Article 32, which provides the right to a legal remedy when a fundamental right is breached, can be used by citizens – either affected communities or any other concerned citizens – to demand a clean environment.

Similarly, in 1996, *Indian Council for Enviro-Legal Action v. Union of India*, the Supreme Court also interpreted the right to life under Article 21 to mean one free of environmental pollutants.[22] In this case, which examined the issue of pollution caused in surrounding areas due to the operation of certain chemical industrial plants, the Court also held government authorities responsible for taking action to ensure compliance with laws and environmental standards.

[19] MC Mehta v. Union of India 1988 SCR (2) 530, https://indiankanoon.org/doc/1208005/ (accessed on September 14, 2018)

[20] *Ibid.*

[21] Subhash Kumar v. State of Bihar, 1991 SCC (1) 598, https://indiankanoon.org/doc/1646284/ (accessed on September 14, 2018)

[22] Indian Council for Enviro-Legal Action v. Union of India, 1996 SCC (3) 212.https://indiankanoon.org/doc/1818014/(accessed on September 14, 2018)

In *Virender Gaur v. State of Haryana*, in 1995, the Supreme Court reiterated this position, and held that the right to life guaranteed under Article 21 includes the right to a pollution free environment, and that consequently environmental pollution is a violation of the provision of the Constitution.[23] The Court held that the leasing of a plot of land which was meant to serve as an open space to ensure environmental sustainability to a private organization for its own purposes was in violation of the law and the Constitution. In addition to invoking Article 21 while deciding on the legality of the action, the Court referred to directive principles included in Article 48-A, which requires that the State endeavour to protect and improve the environment and Article 47, which requires that the State take steps for the improvement of public health. The Court also referred to the UN Declaration on Human Environment, 1972, which it stated, affirmed the necessity of protecting the environment (natural and man-made) for the enjoyment of human rights.

While the cases mentioned above are those in which the Court took a 'judicial review' approach and interpreted the provisions of the Constitutions in a manner which upheld 'environmental rights', there are also judgments which have used a 'pro-project' approach to focus on the possible benefits of a commercial activity and those which have used a 'judicial restraint' approach and upheld the decisions of executive agencies in determining the environmental feasibility of specific activities under consideration.[24]

Nonetheless, the cases discussed above are indicative of the manner in which the courts, in the Indian context, have interpreted the right to a clean environment into existing constitutional and legal rights.

However, while the courts have played an active role in this regard, as was noted by the Supreme Court in 2011 in *Lafarge Umiam Mining Pvt. Ltd v. Union of India*, a court or tribunal can react when an issue is brought to its notice while regulators can take proactive steps through discussion

[23] Virender Gaur v. State of Haryana, 1994 SUPPL. (6) SCR 78. https://indiankanoon.org/doc/27930439/(accessed on September 14, 2018)

[24] Former Chief Justice K.G. Balakrishnan, "The role of the judiciary in environmental protection." D.P. Shrivastava Memorial Lecture, Bilaspur, Chhattisgarh, March 20, 2010. https://www.sci.gov.in/pdf/speeches/speeches_2010/dp_shrivastava_memorial_lecture_20-3-10.pdf(accessed on September 14, 2018)

and public participation.[25]

A number of regulations issued under the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, and Environment (Protection) Act, 1986 have established benchmarks pertaining to air and water standards and waste management.[26] These standards enable the operationalization of the rights mentioned previously by outlining specific parameters that can be used to assess the quality of the environment.

In this context, the SDGs, with their focus on enabling executive action, represent an opportunity to increase access to the rights that the courts have upheld in the judgments discussed above. The next section discusses this in greater detail, but also continuing from the first section, discusses how SDG implementation can similarly be made more effective through the use of rights and entitlements which have been interpreted by the courts into existing legal and constitutional provisions.

Moving forward on SDG and human rights: exploring inter-linkages and synergies

The increasing emphasis on the right to a clean environment as a human right, discussed in the previous section, is also reflected in the 2030 Agenda for Sustainable Development, which has enabled the creation of a framework for a global transition towards sustainability since its adoption by the UN General Assembly in September 2015.[27]

Like the Millennium Development Goals (MDGs) that preceded them, the 17 SDGs, which provide a structure to achieve the 2030 Agenda, are broad based goals with specific targets and indicators to measure progress. For example, Goal 6 seeks to ensure access to water and sanitation to all.

[25] Lafarge Umiam Mining (P) Ltd. v. Union of India, (2011) 7 SCC 338.http://www.indiaenvironmentportal.org.in/files/Lafarge.pdf(accessed on September 14, 2018)

[26] The Water (Prevention and Control of Pollution) Act, 1974 http://www.envfor.nic.in/legis/water/wat1c1.html;The Air (Prevention and Control of Pollution) Act, 1981http://www.envfor.nic.in/legis/air/air1.html; The Environment (Protection) Act, 1986 http://envfor.nic.in/legis/env/env1.html (accessed on September 14, 2018)

[27] United Nations, 2015. United Nations Resolution A/RES/70/1https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (accessed on September 14, 2018)

The progress on Goal 6 will be measured through 8 specific targets which include: (i) achieving universal and equitable access to safe and affordable drinking water for all, (ii) achieving access to adequate and equitable sanitation and hygiene for all and ending open defecation, paying special attention to the needs of women and girls and those in vulnerable situations, (iii) improving water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, (iv) increasing water-use efficiency across all sectors and reducing the number of people suffering from water scarcity, and (v) strengthening the participation of local communities in the management of water and sanitation, among others.[28] These are all time bound targets, to be achieved by either 2030 or in some cases, earlier by 2020.

A global indicator framework, comprising a set of 232 global indicators, was adopted by the UN General Assembly in July 2017.[29] This framework will be used by the Department of Economic and Social Affairs of the UN Secretariat, under the UN Secretary General to monitor progress on each of the targets of the SDGs.[30] Globally, the High Level Political Forum on Sustainable Development also monitors progress on the SDGs annually, using a voluntary peer review mechanism.[31] In addition, countries are expected to develop their own national indicators to measure progress on SDG targets. The Ministry of Statistics and Programme Implementation has prepared a draft National Indicators Framework to measure progress on SDGs in India.[32]

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[28] Website of the United Nationshttps://www.un.org/sustainabledevelopment/water-and-sanitation/(accessed on September 14, 2018)

[29] United Nations, 2018. Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, A/RES/71/313 https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%20refinement_Eng.pdf (accessed on September 14, 2018)

[30] United Nations, 2016. Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators (E/CN.3/2016/2/Rev.1) https://sustainabledevelopment.un.org/content/documents/11803Official-List-of-Proposed-SDG-Indicators.pdf(accessed on September 14, 2018)

[31] Website of United Nations Sustainable Development Knowledge Platform https://sustainabledevelopment.un.org/hlpf (accessed on September 14, 2018)

[32] Government of India, Ministry of Statistics and Programme Implementation, OM. No. M-12012/3/2017/SSD-III Dated March 8, 2017 http://mospi.nic.in/sites/default/files/announcements/SDG_DraftNational_Indicators8mar17.pdf (accessed on September 14, 2018)

Thus, for global reporting on SDGs, done using the global indicator framework, the indicator used to measure progress on Target 6.1 (achieving universal and equitable access to safe and affordable drinking water for all by 2030) is the proportion of the population using safely managed drinking water services.[33] For SDG reporting in India, the draft National Indicator Framework prepared by the Ministry of Statistics and Programme Implementation lists two indicators to measure progress on the same target: (i) the proportion of the population using safely managed drinking water services, and (ii) the proportion of population using an improved drinking water by source.[34]

In this section we examine the manner in which SDGs and human rights are interdependent and argue that the achievement of SDGs can be accelerated through a human rights approach and conversely, more people can access their human rights if there is progress on SDGs. In addition, we argue that, conceptually, the human rights approach offers new perspectives through which to view SDGs and similarly, the global discussion and movement on SDGs could further expand our collective understanding and agreement on which rights are inherent to all humans. We specifically examine two SDGs, but also hope to demonstrate how these inter-linkages and synergies can be mapped for other SDGs.

A human rights approach to sustainable development

A reading of the text of the UN Resolution, which adopts the 2030 Agenda for Sustainable Development, is indicative of the centrality of the human rights approach to the SDGs. The preamble clearly states that the SDGs 'seek to realize the human rights of all', and pledges to leave no one behind.[35] Its focus on ensuring that 'all human beings can fulfil

[33] United Nations, 2018. Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, A/RES/71/313 https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%20refinement_Eng.pdf(accessed on September 14, 2018)

[34] Government of India, Ministry of Statistics and Programme Implementation, OM. No. M-12012/3/2017/SSD-III Dated March 8, 2017 http://mospi.nic.in/sites/default/files/announcements/SDG_DraftNational_Indicators8mar17.pdf(accessed on September 14, 2018)

[35] United Nations, 2015. United Nations Resolution A/RES/70/1 https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf(accessed on September 14, 2018)

their potential in dignity and equality and in a healthy environment' is also reflective of the manner in which the human rights approach underpins the SDGs.[36]

In fact, while outlining its principles and commitments, the Resolution reiterates that 2030 Agenda is 'grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration, and the 2005 World Summit Outcome', and goes on to 'reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law.' It points out that the signatories 'emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.' It envisions a 'world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination, of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to share prosperity.'[37]

Specifically discussing gender equality (Goal 5), it points out that sustainable development 'is not possible if one half of humanity continues to be denied its full human rights and opportunities.'[38] On sustainable production (part of Goal 12), it emphasizes the need to protect labour rights and enforce health and safety standards in accordance with the Guiding Principles of Business and Human Rights, among others.[39]

In addition, the preamble recognizes the close association and mutual reinforcement between sustainable development and peace (part of Goal 16), stating that there is a 'need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

law and good governance at all levels and on transparent, effective and accountable institutions.'[40] Finally, human rights find mention in the follow up and review processes outlined in the Resolution which seek to 'respect human rights, and have a particular focus on the poorest, most vulnerable and those furthest behind.'[41]

Thus the human rights approach is evident at several stages in the process of conceptualizing and operationalizing SDGs, from the kind of society that the signatories hope to create through the achievement of the SDGs, to the manner in which SDGs will be reviewed and monitored. This may explain the absence of a specific goal on the achievement of human rights, as through ensuring that each of the SDGs leads to outcomes which are inclusive and equitable and is implemented in a transparent, participatory and accountable manner, human rights become central to each of the SDGs, which appear to be conceptualized within a broader human rights approach to development.[42]

However, the challenge for policy makers and practitioners will be to take this intent to move beyond the technical achievement of development indicators, towards more inclusive outcomes that leave no one behind. In the next section, we examine the inter-linkages and synergies between 2 SDGs and environmental rights and entitlements in the Indian context, to demonstrate the potential synergies between the two.

Mapping inter-linkages and synergies: Developing strategies to accelerate progress

In this section, we attempt to map constitutional and legal provisions which provide or enable the realization of certain environmental human rights with two specific SDGs: (i) SDG 6, which seeks to ensure the availability and sustainable management of water and sanitation for all, and (ii) SDG 7, which seeks to ensure access to affordable, reliable, sustainable and modern energy for all.

[40] *Ibid.*

[41] *Ibid.*

[42] Wagner, L.J., 2017. "How does the 2030 Agenda relate to human rights?" KfW Development Research Development in Brief https://www.kfw-entwicklungsbank.de/PDF/Download-Center/PDF-Dokumente-Development-Research/2017-06-26_EK_SDGs-und-Menschenrechten_EN.pdf(accessed on September 14, 2018)

Table 1 maps the constitutional provisions and laws which complement the two SDGs in that these provisions and laws seek to enable similar outcomes and have already created institutional frameworks for the realization of these outcomes. Some government schemes, which already work towards providing entitlements along the same lines as each of the two SDGs are also listed.

However, before a more detailed mapping for each of the SDGs is undertaken, it is important to differentiate between fundamental rights and legal rights available under laws enacted by the Parliament and state legislative assemblies which are legally justiciable; and the directive principles and fundamental duties which are not legally justiciable. Nonetheless, the courts have held that the directive principles and fundamental duties can serve as guiding principles for State action.[43] Further, the entitlements provided by government schemes differ from legally justiciable rights, even though beneficiaries may have access to grievance redress mechanisms instituted through these schemes. However, these are included in the mapping as entitlements often seek to operationalize fundamental or legal rights.

Table 1: Mapping select SDGs with rights and entitlements in the Indian context

Sustainable Development Goal	Constitutional provisions	Laws	Government schemes (central)
Goal 6: Ensure availability and sustainable management of water and sanitation for all	*Fundamental rights* **15**: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth **17**: Abolition of untouchability **21**: Protection of life and personal liberty	The Water (Prevention and Control of Pollution) Act, 1974 The Environment (Protection) Act, 1986	National Rural Drinking Water Programme Swachh Bharat Abhiyan Pradhan Mantri Krishi Sinchayi Yojana

[43] Chandra Bhawan Boarding and Lodging Bangalore v State of Mysore (1970) 1 SCC 43, Minerva Mills v Union of India (1980) 2 SCC 591.

Sustainable Development Goal	Constitutional provisions	Laws	Government schemes (central)
	32: Right to constitutional remedies *Directive principles* **39(b)**: The ownership and control of the material resources of the community are so distributed as best to subserve the common good. **47**: Duty of the State to raise the level of nutrition and the standard of living and to improve public health. **48A**: Protection and improvement of environment and safeguarding of forests and wild life *Fundamental duties* **51A(g)**: To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures	The National Green Tribunal Act, 2010	National River Conservation Programme Namami Gange
Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all	*Fundamental rights* **21**: Protection of life and personal liberty **32**: Right to constitutional remedies	The Electricity Act, 2003 The Environment (Protection) Act, 1986	Deendayal Upadhyay Gram Jyoti Yojana Pradhan Mantri Ujjwala Yojana

Sustainable Development Goal	Constitutional provisions	Laws	Government schemes (central)
	Directive principles **39(b)**: The ownership and control of the material resources of the community are so distributed as best to subserve the common good. **47**: Duty of the State to raise the level of nutrition and the standard of living and to improve public health. **48A**: Protection and improvement of environment and safeguarding of forests and wild life *Fundamental duties* **51A(g)**: To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures **51A(h)**: To develop the scientific temper, humanism and the spirit of inquiry and reform	The National Green Tribunal Act, 2010	Integrated Power Development Scheme

Sources: Constitution of India; UN Resolution A/RES/70/1; NITI Aayog (2016).

SDG 6: *Ensure availability and sustainable management of water and sanitation for all*

As seen in Table 1, SDG 6, which seeks to ensure the availability and sustainable management of water and sanitation for all, can be linked

to obligations and entitlements under the right to life guaranteed under Article 21, the directive principle to improve public health outlined in Article 47, and even the fundamental duty under Article 51A (g) to protect and improve the natural environment.[44] The historical exclusion of marginalized castes from access to common sources of water is sought to be addressed through rights guaranteed under Articles 15 and 17.

While water and sanitation are in the State List of Schedule VII of the Constitution, the Parliament enacted the Water (Prevention and Control of Pollution) Act, 1974 at the request of the certain states through resolutions passed by their legislative assemblies.[45] This central law places an obligation on the government to work for the 'prevention and control of water pollution and the maintaining or restoring of wholesomeness of water' and creates pollution control boards at the central and state levels.[46]In 1972, Parliament enacted the Environment (Protection) Act, 1986 to enable it to implement decisions taken at the UN Conference on the Human Environment.[47] It empowers the central government to take measures to protect and improve the quality of the environment and to control and abate environmental pollution, including water pollution.[48] The National Green Tribunal Act, 2010 was enacted to make the enforcement of legal rights connected to the environment more effective through the creation of a National Green Tribunal.[49]

In addition to these laws, which create a set of entitlements and obligations on citizens and the government, several schemes of the central and state governments work towards meeting these obligations and providing these entitlements. Thus, the National Rural Drinking Water

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[44] The Constitution of India, 1950 https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text(accessed on September 14, 2018)

[45] The Water (Prevention and Control of Pollution) Act, 1974 http://www.envfor.nic.in/legis/water/wat1c1.html(accessed on September 14, 2018)

[46] *Ibid.*

[47] The Environment (Protection) Act, 1986 http://envfor.nic.in/legis/env/env1.html (accessed on September 14, 2018)

[48] *Ibid.*

[49] The National Green Tribunal Act, 2010 http://www.greentribunal.gov.in/FileDisplay.aspx?file_id=hp6pqcrv0hY1hc2OYG8Sk8xCFfwF7gv7AbtSt83%2fRxrgXufTbWXFcg%3d%3d(accessed on September 14, 2018)

Programme, Swachh Bharat Mission, and certain other schemes of the central government mentioned in Table 1 are also central to the institutional framework, which was established to guarantee access to clean water in the country.[50]

SDG7: *Ensure access to affordable, reliable, sustainable and modern energy for all*

One of the targets set under Goal 7, Target 7.1, is to ensure universal access to affordable, reliable, and modern energy services by 2030. As recently as 2013, in *TM Prakash v. District Collector*, the Madras High Court held that the right to electricity supply should be considered within the ambit of Article 21, the right to life.[51] The directive principles under Article 39(b), 47, and 48A also place obligations on the State, which can be used to meet this particular target under Goal 7.

Electricity is included in the Concurrent List of the Seventh Schedule, which implies that it falls within the legislative ambit of the national and state legislatures. The Electricity Act, 2003 is a national legislation, which seeks to ensure the supply of electricity to all areas, among certain other objectives.[52] In addition to the Electricity Act, 2003, the Environment (Protection) Act, 1986 and the National Green Tribunal Act, 2010 contribute towards creating certain legally binding obligations on the government which impact electricity access.[53]

Schemes such as the Deendayal Upadhyay Gram Jyoti Yojana, which seeks to ensure the continuous supply of power to rural areas in the country, the Pradhan Mantri Ujjwala Yojana, through which free LPG connections are provided to women from households which fall below the poverty line, and the Integrated Power Development Scheme which works towards strengthening the sub-transmission and distribution network in

[50] While there is much debate on the distinction between rights and entitlements, and the more limited nature of entitlements under specific government schemes, these entitlements stem from certain rights and principles outlined in the Constitution.

[51] TM Prakash v. District Collector, W.P.No.17608 of 2013, https://indiankanoon.org/doc/130400037/(accessed on September 14, 2018)

[52] The Electricity Act, 2003 http://www.cercind.gov.in/Act-with-amendment.pdf(accessed on September 14, 2018)

[53] *Ibid.*

urban areas, stem from the constitutional and legal obligations on the State to provide access to energy to all.

The Way Forward

While mapping synergies between SDGs and human rights can identify spaces and interventions to strengthen both, there are at least two challenges that need to be addressed in order to do so effectively. First, there needs to be greater consensus on what constitutes an environmental right and consequently, what may be considered infringement of that right, and who may be held liable if it is violated. For example, while the dumping of toxic wastes may be more commonly accepted as an infringement of the environmental rights of communities living near the dumping site, if an individual throws garbage on a neighbourhood street, it may not immediately be considered an infringement of a resident's environmental right. Further, in the first case whether it is the company or the regulator that is to be held liable is not always established.

A second issue to be addressed pertains to the availability of reliable environmental data, which is needed to ascertain the impact of an activity on the environment. While the courts and the regulatory framework may enforce environmental standards, it is still challenging to be able to identify causal factors without investing in our research and development capabilities. For example, while monitoring stations can capture the levels of air pollutants in New Delhi, it is more challenging to measure the extent to which various factors lead to the severe air pollution experienced in New Delhi every winter.

Nonetheless, as the preceding discussion on the rights and entitlements which can be complementary to the SDGs shows, there are some synergies between the objectives of the 2030 Agenda and the pre-existing legal and policy framework to deliver environmental human rights to citizens. Identifying these synergies can enable policy makers and practitioners working to achieve outcomes pertaining to SDGs and those seeking to strengthen access to human rights to develop strategies to accelerate progress on both.

Further, since SDGs do not impose legally binding obligations on countries, making use of the pre-existing rights framework in the country can provide practitioners with possible pathways to achieve outcomes under the 2030 Agenda.

Finally, our conceptual understanding of what constitutes sustainable development has been and will continue to be influenced by the human rights approach. One of the key differences between the MDGs and the SDGs is the intent expressed in the 2030 Agenda to leave no one behind. In addition, the procedural emphasis on inclusive and participatory decision making, starting from the long process of consultations which went into framing the 2030 Agenda is reflective of this approach. Similarly, our understanding of which rights are basic to all human beings has been influenced by the discourse on the environment and development, and with SDGs taking this discourse forward to 2030, it is likely that our conception of human rights will grow to include new rights within its ambit, such as the right to a clean environment, the right to access benefits from natural resources, and possibly the right to 'carbon space'.

A continued exploration of the inter-linkages and synergies between the environment, SDGs and human rights at an even more decentralized level, will allow policy makers and practitioners to develop context specific strategies to accelerate progress on both, while also furthering our theoretical understanding of both SDGs and human rights.

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Subhash Kumar v. State of Bihar (1991) 1 SCC 598.

TM Prakash v. District Collector. W.P.No.17608 of 2013

Virender Gaur v. State of Haryana (1994) SUPPL. 6 SCR 78.

Restorative Justice: A Concept for Complete Justice

K. P. Singh*

Abstract

Justice has been the credo of all societies since the dawn of civilization. The administration of justice has therefore been the most important function of the ruling establishment. It is in this spirit that the preamble to the Constitution of India, declares that the state shall secure social, economic and political justice to its citizens. In addition to this, Article 141 of the Constitution bestows extraordinary power upon the Supreme Court of India to pass any order to do complete justice. It can be said that the achievement of justice is a condition sine qua non of the continuity of a legal system. As Krishna Iyer J. observed in the All India Judges' Association v. UOI,[1]

'Law is a means to an end and justice is that end. Law and Justice are distant neighbours, sometimes even strange hostiles. If law shoots justice, people shoot down law and lawlessness paralyses development, disrupts order and retards progress.'

Adjudicating matters as per the law alone cannot do justice; complete justice requires looking beyond law. Traditional criminal justice systems throughout the world are designed to treat crime as acts against the State and to punish offenders for disobedience of the law. In the process, the State becomes the prosecutor, the victims of crime are forgotten and societal concerns are ignored. The offender, as a human being, is neglected and his dependents become non-entities in the justice delivery

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[1] AIR 1992 SC 165 at 176

system. The journey for justice must not end at putting the offender behind bars. In fact, justice lies in addressing the concerns of all the stakeholders, both inside and outside jail.

Crime is fundamentally a violation of people and interpersonal relationships in the community. Every violation should create obligations, liabilities and responsibilities. Therefore, in an ideal Criminal Justice System, liability of the state, offenders' obligations and responsibility of the community should be clearly explained and identified. Restorative justice is a concept that addresses all these issues and concerns and seeks to provide complete justice to all stakeholders. While keeping the adversarial system of criminal justice for grave offences, India needs to experiment with more democratic models aimed at reconciliation and restoration of relationships. Against this background, the concept of Restorative and Reparative Justice has been examined in this article.

Restoration Justice: A Concept

Traditional criminal justice seeks answers to three questions: (1) What laws have been broken? (2) Who broke them? (3) What does the offender deserve? Restorative justice instead asks: (1) Who has been harmed? (2) What are their needs? (3) Whose obligations are these?[2] Liebmann describes restorative justice as a balance between the therapeutic and the retributive models of justice, the rights of offenders and the needs of victims, the need to rehabilitate offenders and the duty to protect the public.[3]

Restorative justice revolves around the ideas that crime is, in essence, a violation of a person by another person rather than a violation of legal rules. This process provides an opportunity for victims to obtain reparation, feel safer and seek closure. It allows offenders to gain insight into the effects of their behaviour and to take responsibility in a meaningful way. It also enables communities to understand the underlying causes

[2] Zehr, H. The Little Book of Restorative Justice, Intercourse, PA: Good Books, 2002

[3] Liebmann, M. *Restorative Justice: How it Works*, 2007, London: Jessica Kingsley Publishers, at 33.

of crime.[4]Restorative theory encompasses the notion of reparation for the effects of the crime. It envisages more replacing of custody with onerous community-based sanctions that require offenders to work in order to compensate victims. It also advocates contemplating support and counselling for offenders, in order to help to reintegrate them into the community. Such theories therefore tend to act on a behavioural premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than the notion of 'just punishment' on behalf of the state.[5]

In the restorative justice process, the primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm, and to ensure that further offences are prevented. Efforts should be made to improve the relationship between the offender and the victim and to reintegrate the offender into the law-abiding community.[6] Restorative justice is not simply a way of reforming the criminal justice system; it is a way of transforming the entire legal system, our family lives, our conduct in the workplace and our practice of politics. Its vision is of a holistic change in the way we do justice in the world.[7]

The main purpose of restorative justice is to bring the offender and the victim closer. The offender apologizes to the victim, which gives some satisfaction to the victim and greater assurance that the offender will not repeat the crime. Offenders are required to repair the damage they have caused. The restorationist vision is founded on a core theoretical postulate, namely, the privatization of the criminal episode. It moves away from a State-centric definition of crime and contemplates a transfer of power from

[4] Devasai V.V. 'Victimology and the role of victims in crime, Cohin University Law Review, 84-85 (1980)

[5] Srivastava S.S., Criminology Criminal Administration, Publication division, Central Law Agency, New Delhi, 395- 397 (2007)

[6] Wright, M, 'Justice for victims and offenders, Milton, Keynes, U.K. Open University Press (1991)

[7] John Braithwaite, (2003), "Principles of Restorative Justice" In: A. Von Hirsh, J. Roberts, A. Bottoms, J. Roach and M. Schiff, Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms, Oxford: Hart, p-87.

the state.[8] It re-conceptualizes the criminal episode as a private conflict between individuals, which has disturbed the relations of community. The essential task of restorative justice is to mend those relations, without the intrusion of the state.

There are three key ideas that support restorative justice. First is the understanding that the victim and the surrounding community have both been affected by the action of the offender, and restoration is necessary. Second, the offender has an obligation is to make amends to both the victim and the involved community. Third, and the most important process of restorative justice, is the concept of 'healing,' or the collaborative unburdening of pain for the victim, offender, and community. All affected parties engage in creating agreements, for how the wrongdoing can be righted, in order to avoid recidivism and to restore safety. This allows the victim to have a direct say in the judgment process. It also gives offenders the opportunity to understand the harm they have caused, while demonstrating to the community that the offender might also have suffered prior harm. Healing by reintegration of offenders into the community strives to restore harmony, health and wellbeing by comprising personal accountability, decision-making and the putting right the harm done.[9]

Restorative justice necessitates a shift in responsibility for addressing crime. In a restorative justice process any citizens that have been affected by a crime must take an active role in addressing that crime. Although law professionals may have secondary roles in facilitating the restorative justice process, it is citizens that must take up the greater share of responsibility for healing the pains caused by crime.[10]

Restorative justice is distinct from mediation though it involves meetings and dialogues to fix responsibility for wrongdoing and to find a solution acceptable to all parties to directly addresses victim's needs

[8] Levrant, Sharon, Betsy Foulton and Francis T. Cullen (1999), "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" Crime and Delinquency, Vol.45 (2), USA: Sage Publications, pp.3-27.

[9] Latimer, J. (2005). "The Effectiveness of Restorative Justice Practices: A Meta-Analysis". *The Prison Journal* 85 (2): 127–144.

[10] Braithwaite, John (2004). "Restorative Justice and De-Professionalization". *The Good Society* 13 (1): 28–31.

and therefore emphasizes the private dimensions of a public wrong. At the same time, it is not a substitute of the formal criminal justice system. It is a good backup to reduce workload of the traditional Criminal Justice System and to increase the sense of justice in the system as a whole.

Restorative justice is very different from the adversarial legal processor that of civil litigation. J. Braithwaite writes, "Court-annexed ADR (alternative dispute resolution) and restorative justice could not be philosophically further apart", because the former seeks to address only legally relevant issues and to protect both parties' rights, whereas restorative justice seeks "expanding the issues beyond those that are legally relevant, especially into underlying relationships".[11]

Considering views of social scientists and legal luminaries, the philosophy of restorative justice may be summarized as the following;

1. Crime causes harm to victims, offenders and communities; crime is fundamentally a violation of people and interpersonal relationships.
2. Violations create obligations and liabilities. Offenders' obligations are to make things right as much as possible.
3. Besides the government, victims, offenders and communities should be actively involved in the criminal justice process.
4. In promoting justice, the government should be responsible for preserving order, and the community should be responsible for establishing peace and tranquillity in society.

Key Values in Restorative Justice Processes

Restorative justice processes involve meetings between the victim, offender and other members of their immediate community. For such a gathering to be truly restorative in character, the processes employed

[11] Braithwaite, J. *Restorative Justice & Responsive Regulation* 2002, Oxford University Press, at 249.

must evidence certain key restorative justice values.[12]

To ensure that the process is safe and effective neutral, impartial and trusted facilitators should guide it. Participants should understand and agree to the process that the facilitators propose, and the facilitators should strive to deliver on expectations created by them in the pre-conference process. Pre-conference preparation should be undertaken with all who will attend the conference.[13]The process should be inclusive and collaborative, open to all parties with a personal stake in what has happened. Such participants should be free to express their feelings and opinions, and to work together to resolve problems. Justice professionals, such as police and legal counsel, may be present, but they are there to provide information rather than to determine outcomes.[14]

The process should be appropriate to the cultural identity and expectations of the participants. No one should be required to participate in a forum that violates his or her cultural or spiritual convictions.[15] Everyone participating in the process should be accorded fundamental respect, even when his or her prior behaviour is condemned as blameworthy. The process should uphold the intrinsic dignity of everyone present. Participants should be encouraged not to disclose what happens at the conference to parties that have no personal stake in the incident.[16]

Restorative processes and agreements should be voluntary. Mutually agreed outcomes are desirable but not obligatory; a well-managed process itself has value for the parties, even in the absence of agreements.[17]The

[12] Abramson, C. Bargen, S. Bergen, (et. al.), "A Charter for Practitioners of Restorative Justice" available at: http://www.sfu.ca/cfrj/fulltext/charter.pdf.

[13] Mika, H. (1992), "Mediation Interventions and Restorative Justice: Responding to the Structural Bias" In: H. Messmer and H.U. Otto (eds.), Restorative Justice on Trial, Dordrecht, Netherland: Kluwer Academic Publishers, p-52.

[14] Bowen, J. Boyack and S. Hooper (2000), The New Zealand Restorative Justice Practice manual available at www.restorativejustice.org.nz.

[15] R.B. Coates and B. Kalanj (1994), Victim Meets Offender: The Impact of Restorative Justice and Mediation, Moonsey, NY: Criminal Justice Press, p-51.

[16] New Zealand Ministry of Justice (2003), "Revised Principles of Best Practice for Restorative Justice Processes in the Criminal Court" available at http://www.justice.govt.nz., accessed on 3 rd of April, 2012.

[17] Boyack, Bowen and C. Marshall (2003), "How Does Restorative Justice Ensure Good Practice – A Value-Based Approach" Adopted by the New Zealand Restorative Justice Network, available at http://www.justice.govt.nz., accessed on 3rd of April, 2012.

process should aim to clarify the emotional, material and consequential harm that has been suffered and the needs that have arisen as a result. The offender's obligations to the victim and to the wider community should be identified and affirmed. The process should invite, but not compel, the offender to accept these obligations and should facilitate identification of options for their discharge.[18]

The process will be ineffective if it is preoccupied with allocating blame or shame rather than addressing the human consequences of the incident. The victim's feelings, physical hurts, losses and questions should be accepted without reproach or criticism. The wrong done to the victim should be acknowledged and the victim absolved of any unjustified blame for what happened.[19]

The process should aim for outcomes that meet present needs. Outcomes should seek to promote the healing of the victim and the reintegration of the offender, so that the former condition of both may be transformed into something healthier.[20]

Restorative justice processes cannot be expected to meet all the personal or collective needs of those engaged in them. Participants should be informed of how restorative processes fit into the wider justice system, what expectations are appropriate for the restorative justice process, and how restorative outcomes may or may not be taken into account by the court.[21]

Braithwaite has identified a number of international human rights values, which have specific relevance to restorative justice, such as restoration of human dignity, property loss, and damaged human

[18] Sharpe, S. (1998), Restorative Justice: A Vision for Healing and Change, Edmonton, CAN: Victim Offender Mediation Society, p-87.

[19] Zehr, H. (1990), Changing Lenses: A New Focus for Crime and Justice, Scottdale, PA: Herald Press, p-121.

[20] Wemmers, J. and M. Canuto (2002), Victims' Experiences With, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature, Montreal, CAN: International Centre for Comparative Criminology, University de Montreal, p-211.

[21] Braithwaite, J. (2002), Restorative Justice and Responsive Regulation, New York: Oxford University Press, p-51.

relationships.[22]It is likely that the rights of those who are disempowered, excluded and vulnerable due to inequalities will be at risk in restorative justice processes.[23] Coercion and the degree of voluntariness are a concern.[24] The assumption that coercion disappears once there is consent to participate in a restorative justice process is dangerous and denies the nuances relating to power that are present in all human interactions.[25]

A blue print prepared by the Economic and Social Council of the United Nations[26] provides the following fundamental procedural safeguards which should be applied to restorative justice programmes and in particular to restorative processes:

a) The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to parental assistance.

b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.

c) Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

Restorative Justice: A Critique

Sociologists and legal luminaries have critically examined the concept of Restorative Justice from various angles. Their views and apprehensions

[22] Braithwaite, J. (2002), "Setting Standards for Restorative Justice" The British Journal of Criminology, Vol. 42(3): pp. 563-577.

[23] Pranis, K. (2001), "Restorative Justice, Social Justice, And The Empowerment of Marginalized Populations" In: G. Bazemore And M. Schiff (eds.), Restorative Community Justice: Repairing Harm And Transforming Communities, Cincinnati: Anderson Publishing, pp. 287-306.

[24] Mika, H. (1992), "Mediation, Interventions and Restorative Justice: Responding towards the structural Bias" In: H. Messmer and H-U. Otto (eds.), Restorative Justice on Trial: Pitfalls and Potential of Victim-Offender Mediation International Research Perspectives, Dordrecht, Netherland: Kluwer Press, pp.44-76

[25] Sullivan, D. (2002) "Navajo Peacemaking History, Development, and Possibilities for Adjudication – Based Systems of Justice: An Interview with James Zion" Contemporary Justice Review, Vol. 5(2): pp. 167-188..

[26] UN General Assembly Resolution 40/34 dated 29 November 1985

enable a better understanding of the dimensions and utility of restorative justice programmes from all perspectives.

In restorative justice processes it is assumed that victims can be generous to those who have harmed them, that offenders can be apologetic and that a facilitator can guide rational discussion and encourages consensual decision-making between parties with antagonistic interests. Any one of these elements may be missing, and this potentially weakens the entire restorative justice process. It may not be possible to have equity or proportionality across restorative justice outcomes when outcomes are supposed to be fashioned to address the particular sensibilities of those involved in the restorative justice encounter. Thus, we should expect 'modest and patchy results' to be the norm, not the exception.[27]

The public and victims generally support the restorative justice model but are very reluctant to accept it in cases of serious crimes.[28] There is also a concern for 'security', which can overrule the priority for restorative responses.[29] Concern for a 'threat to public safety/policy' can be a potent reason to limit the restorative calibre of an intervention.

Some crimes cause serious rifts, severing relationships within families and with people outside the family. Many victims will opt for a healing process and measures that will help distance them from the offender. In the interest of self-protection, they will refuse to follow the legal process, media coverage of their case and participation in the social reintegration of the offender.[30]

Criminal victimization means a loss of power or affirmation of a lack of power, especially in situations where the offender is repeatedly violent or the relationship with the victim is characterized by domination, tyranny

[27] Bottoms, A. E. (2003) "Some Sociological Reflections on Restorative Justice" In: Von Hirsch, A., Roberts and Schiff,M. (eds.), Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms? Oxford, Hart Publishing, p-84.

[28] Umbreit, M. S., B. Vos and R. B. Coates, (2003), Facing Violence the path of restorative justice and dialogue, Monsey, NY: Criminal Justice Press, p. 67.

[29] Zehr Howard and Barb Toews, (eds.), (2004), Critical Issues In Restorative Justice, Monsey, NY: Criminal Justice Press, p. 105.

[30] White, R. (2003), "Communities, Conference and Restorative Social Justice" Criminal Justice, Vol. 3(2): pp. 139-160.

or manipulation.[31] In a restorative justice process it is difficult to meet the needs of persons who are in a weaker position because of their age, gender, social hierarchy and life history.

Restorative justice has been much criticized for its potential to replicate and perpetuate power imbalances that already exist between victim and offender.[32] LaPrairie, in reviewing the operation of sentencing circles in Canada and conferences in Australasia, observed that power and coercion might operate within informal structures to re-victimize the victim.[33]Victims' participation in restorative justice programmes may include a lot of risks. The risks to the rights of victims within such programmes are varied; they include coercion to participate, threats to personal safety, offender-biased proceedings and a lack of information about what to expect from proceedings.[34] Restorative justice processes may leave victims without a remedy if there is a failure of offenders to follow through with an agreement, especially with regard to restitution. This kind of failure may result in overall distrust in these processes to respond to victims' particular needs.[35]

What victims want most in a number of cases is symbolic reparation, primarily an apology.[36] But there may be another philosophy that most victims want more than an apology. Cretney and Davis suggested that a 'victim has an interest in punishment, not just restitution or reparation, because punishment can reassure the victim that he or she has public

[31] Wallller, I. (1989), "The Needs of Crime Victims" In: E. Fattah (ed.), The Plight of Crime Victims in Modern Society, Basingstoke, UK: Macmillan, pp. 125-129.

[32] Abel, R. (1982) "The Contradictions of Informal Justice" In: R.. Abel (ed.) The politics of informal justice: the American experience, New York: Academic Press, p. 18.

[33] LaPrairie, C. (1995), 'Altering Course: New Directions in Criminal Justice and Corrections: Sentencing Circles and Family Group Conferences' Australia and New Zealand Journal of Criminology, Special Issue: Crime, Criminology and Public Policy, December, pp.78-99.

[34] Retzinger and Scheff (1996), "Strategy for Community Conferences: Emotions and Social Bonds." In: Burt Galaway and J. Hudson (eds.), Restorative Justice: International Perspectives, Monsey, New York: Criminal Justice Press, p-136.

[35] John Braithwaite, (2002), "Setting Standards for Restorative Justice" British Journal of Criminology Vol. 42, p-570.

[36] Strang, G., Braithwaite and Sherman, L. W. (1999), Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE), available at: www.aic.gov.au/rjustice.

recognition and support.[37] The restorative justice processes have very limited utility in such circumstances.

Even though restorative justice processes are often referred to as victim-centred, restorative justice programmes are still offender-oriented.[38]Restorative justice processes require the offender to acknowledge responsibility before referral to a restorative justice programme; the rights to be presumed innocent until proven guilty and to remain silent are no longer applicable. It may be argued that the offender is voluntarily relinquishing these rights in order to benefit from the restorative justice option, but the extent to which these decisions are made voluntarily is in doubt.[39]

From the above analysis, it is evident that no universal tailor made restorative justice process can be prescribed for all crime situations. Every crime situation is different from others and requires a customized solution to address the issues related to all the stakeholders involved in it. Therefore, before adopting a restorative process, it would be imperative to understand the socio-economic, cultural and political environment prevailing in the community where it is to be applied.

Restorative Processes: International Practices

Restorative Justice is not a new concept. Restorative justice processes and practices have been in use in almost all social systems. In ancient societies the penal law was not law of crime, but law of wrong. The person injured could proceed against the wrong done by an ordinary civil action and recover compensation in the shape of money/damages through the chief of the tribe. The Maori tribal tradition in New Zealand, Navago Tribal Culture of America, Buddhist Taoist and Confucian traditions in 600 BC in India are classic examples of restorative justice practices in ancient societies.

[37] Cretney, A. and Davis, G. (1995) Punishing Violence. London: Routledge, p-178.

[38] Van Dijk, J.J.M. (1996), "Crime and Victim Surveys" In: C. Sumner (et al.) (eds.), International Victimology: Selected Papers from the 8th International Symposium, Canberra: Australian Institute of Criminology, p-86.

[39] Warner, K. (1994), "Family Group Conferences and the Rights of the Offender" In: C. Alder and J. Wundersitz (eds.), Family Conferencing and Juvenile Justice: The way forward or Misplaced Optimism? Canberra, AUS: Australian Institute of Criminology, p-241.

The declaration of King Henry I in the 11th Century, that a criminal offence shall be treated as an act against the King, *aka* the State, was a turning point in the history of criminal jurisprudence throughout the world. Accordingly, in medieval societies, the penal system developed as a mix of retribution and restitution. The responsibility of protecting citizens was the primary duty of the King/ruler, and the ruler was authorized to punish the offender and to order him or her to pay compensation to the victim of crime.

In the modern world, the concept of doing justice revolves around the practice of punishing the offender by the state as per the codified laws. The victim of crime is also paid compensation out of the fine recovered from the offender. In the last couple of decades, the world has progressed towards replacing the adversarial model of criminal justice, partly or wholly, with different models of restorative justice. These restorative processes are more collaborative, consensual and inclusive than the adversarial system. But this should not to be confused with the *khap panchayat* model of arbitrary decision-making by a few elders of the locality, as is a practice in some North Indian States. Due process requirements are followed in restorative justice while participation is enlarged and made transparent, inclusive and accountable.

In Canada a restorative justice movement has emerged in the past 30 years. In 1996, the sentencing principles in the Criminal Code were amended to encourage the use of community-based sentencing to promote a sense of accountability in offenders. The long history of New Zealand providing restorative justice conferencing began in 1989 by introducing restorative justice processes with Family Group Conferencing. The United States offers a wide range of restorative justice practices, programmes and policies. Victim–offender mediation is the most important form of restorative justice programme practiced there. The U.N. Congress on Prevention of Crime and Treatment of Offender took up the cause and contributed to it substantially by drafting a declaration of victims' rights.[40]

In the UK, The Criminal Injuries Compensation Act, 1995, makes it

[40] The UN General Assembly Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

mandatory for the Secretary of State to make necessary arrangements to provide compensation to victims of crime.[41] The Criminal Injuries Compensation Scheme (2001) was framed in the U.K, which, inter alia, specifies the standard amount of compensation payable in respect of each type of injury.

The Crime (Restorative Justice) Act, 2004 has been implemented in the Capital Territory of Australia to provide a restorative conferencing scheme for adults.[42] The main objective of this act is to confer power on victims to decide how the harm done by the offence can be repaired and to provide a safe environment to the victims and their family members.[43]

Thus, there is enough evidence to suggest that restorative processes of different kinds are becoming popular throughout the world. These restorative options include sharing circles, victim-offender dialogue, victim impact panels, community reparation boards, circles of support and accountability (COSA), sentencing circles, conferencing with juveniles and adults, and restorative discipline in educational settings. It would be worthwhile to examine these processes in order to understand their scope.

(a) Restorative Justice Conferencing

A restorative justice conference involves the victim and offender meeting with support people, community members, and professional facilitators. The facilitator assists both parties to reach agreement on matters such as reparation for the victim, an apology and community service etc. There may also be an agreement that the offender attends an appropriate treatment programme. The agreement may be monitored to ensure compliance and to reduce reoffending.

(b) Circles of Support and Accountability (COSA)

The development of COSA can be traced back to the work carried out by the Canadian Mennonite Church in 1994 in response to sex offenders being released from prison back into their communities. The COSA is

[41] Criminal Injuries Compensation Act, 1995

[42] National commission on restorative justice, march 2008 interim report, p.23

[43] http://www.legislation.act.gov.au/b/db_13812/20040805-15695/pdf/db_13812.pdf

centred on pillars of safety and support and often offers public protection and reintegration of the offender with the community. The aim of COSAs is to reduce the risk of recidivism in sex offender. The circles are groups of volunteers, often from faith communities, that form an agreement with a released high-risk sex offender to accept the circle's help and advice, to pursue a predetermined course of treatment and to act responsibly in society.

(c) Sentencing Circles

These are based upon Aboriginal practices in Australia. The elders, families and people in conflict discuss and resolve issues flowing from an offence. In sentencing circles, the type of sentence an offender should receive is determined in a meeting of the victim, offender, family and community members along with a judge, lawyers, police, and others. The victim and the community have the opportunity to express themselves to the offender. They may also take part in developing and implementing a plan relating to the offender's sentence.

(d) Victim Offender Mediation Programs (VOMP)

Victim-offender mediation is a process that brings interested victim and the accused person together with a mediator to discuss the crime and to develop an agreement that resolves the issue. This approach has been incorporated into hundreds of programmes throughout Canada, The United States, The United Kingdom and other Western European countries.

(e) Community Conferencing

Community Conferencing is a broad term used in Canada for a practice called Family Group Conferencing. It is rooted in Maori culture in New Zealand where, as in other parts of the world, the indigenous population is over represented in the court and prison system. It was introduced to the juvenile justice system in New Zealand as an alternative to youth court and later expanded to Australia, North America and other countries. In Canada, this model has been adapted to include not only the notion of family involvement but also the participation of supporters of both the offender and the victim.

Concepts *Akin* to Restorative Processes in India

When the British codified Indian penal laws and procedures, they included therein concepts like compounding of offence and compensation to victims of crime and false accusation. After the Indian Constitution was promulgated in 1950 some other concepts akin to restorative and reparative processes like plea bargaining, rural courts and *Lok Adalats* etc. were included in criminal procedures from time to time. It would be worthwhile to examine the scope of these processes.

(a) Compoundable offences:

The Criminal Procedure Code, 1973 (Cr.PC) allows the parties to undergo what is called 'compounding of cases' in certain offences without the permission of court and, in some cases, with the approval of the court[44]. The offences, which affect individuals but do not affect society, can be compounded without the permission of the court, whereas, offences listed under Section of 320(2) Cr.PC are of a grave nature and can be compounded only with the permission of the court. The effect of successful compounding would amount to acquittal. It is clear that this procedure is merely a way to dispose of petty cases, as no condition for restoration/ reparation of harm afflicted to the victim finds mention in the section. No detailed guidelines/process have been prescribed in the Cr.PC for compounding. Only a very small number of offences are classified as compoundable offences. Because of this, the process has not become popular.

(b) Lok Adalats

The Legal Services Authority Act, 1987[45] provides for alternative dispute resolution mechanism in limited criminal matters for offences that are compoundable under section 320 Cr.PC. The scope of the Act may be expanded to include other offences. The procedure prescribed for settlement under the Act needs to be reviewed. At present, the trial courts refer cases for settlement in the *Lok Adalats* after the police have submitted final reports. Parties may be given an option to settle the cases

[44] Section 320 of The Criminal Procedure Code, Act No. 2 of 1974.

[45] Act No. 39 of 1987

through *Lok Adalats* at any stage after registration of the case.

(c) Plea bargaining

After the Malimath Committee Report,[46] the Cr.PC was amended in 2006[47] to include the concept of 'Plea bargaining' in criminal procedures. Plea-bargaining provides an opportunity to victims of crime and offenders to come to the settlement table and negotiate for the case to be settled outside the court. If a compromise is reached, the court may offer an option to the offender to compensate the victim for a reduced punishment. These provisions are contained in section 265 (A to Z) Cr.PC. However, it is a fact that there is hardly any take-up of the process because of its limited scope. Plea-bargaining is available only for offences entailing punishment of up to 7 years. Socio-economic crimes, which account for almost 60% of the total crimes reported in India, are also excluded from the scope of plea-bargaining. Also, crime against women and children cannot be plea-bargained. Moreover, the stigma of conviction will remain attached to the accused if he settles his case through plea-bargaining.

(d) Right to Victims of Crime in Matters of Appeal

After the recommendations of the Malimath Committee, a proviso to Section 372 was added by way of an amendment[48] in Cr.PC to allow victims of crime to prefer appeal in criminal matters, if they so desire. It enables victims of crime to have a say in criminal proceedings.

(e) Victim Compensation: Provisions of law

Several provisions exist in Indian laws and procedures to compensate victims of crime. Section 359 of the Cr.PC provides that a court can order payment of cost to the affected party in a non-cognizable case, if the case ends in acquittal. Section 5 of the Probation of Offenders Act[49] empowers the court to order released offenders to pay restitution and cost

[46] Malimath Committee was appointed by Ministry of Home Affairs, Government of India on 24 November, 2000 to consider measures for revamping of the Criminal Justice System in India.

[47] Criminal Law Amendment Act 2005.

[48] Criminal Law Amendment Act No. 5 of 2009

[49] Act No. 20 of 1958

to the victims. Section 21 of the SC and ST Act[50] imposes an obligation on the State Government to ensure economic and social rehabilitation of the victims of atrocities. Section 124-A of the Railway Act[51] provides for compensation to the victims. The Workmen Compensation Act[52] provides for the payment of compensation to the victims of accidents that occurred in the course of employment.

Some other laws including The Protection of Women from Domestic Violence Act 2005[53], The Maintenance and Welfare of Parents & Senior Citizen Act, 2007[54] and The Sexual Harassment of Woman at Workplace (Prevention, Prohibition & Redressal) Act 2013[55]etc. provide protection and compensation to special categories of victims. Section 326A was recently added in Indian Penal Code[56] by way of amendment[57] to compensate victims of acid attacks and gang rapes.

(f) Victim Compensation Scheme/Victim Compensation Fund

In 2009, the Cr.PC was amended[58] and a new Section 357A was added to provide for compensation to the victims of crime. The trial court can recommend compensation to victims from the Victim Compensation Fund under section 357A Cr.PC, at the conclusion of the trial, if the court is satisfied that the compensation awarded under Section 357 Cr.PC is not adequate or where the case ends in acquittal or discharge of the accused, or where the offender is not traced or identified and where no trial takes place. The State or the District Legal Services Authority, as the case may be, may also order for immediate first-aid facility or medical treatment to be made available free of cost to alleviate the suffering of the victim. It is evident that the scope of the Victim Compensation Scheme under Section 357 A is very narrow.

[50] Act No. 33 of 1989

[51] Act No. 24 of 1989

[52] Act No. 8 of 1923

[53] Act No. 43 of 2005

[54] Act No. 56 of 2007

[55] Act No. 14 of 2013

[56] Act No. 45 of 1860

[57] The Criminal Law Amendment Act 2013, w.e.f. 3.2.2013

[58] Criminal Law Amendment Act No. 5 of 2009

Evolution of Victim Jurisprudence in India: Role of Judiciary

Victim compensation is an essential ingredient of the restorative justice process. Judiciary has played a vital role in the development of victim jurisprudence in India. Some landmarks judgments in this regard require mention.

In British India, 'the king can do no wrong' was the rule and citizens were not permitted to sue the State for claim against any damages inflicted by the State or its instrumentalities. After independence, Article 300 of the Constitution of India empowered citizens by providing that the State can sue but the State can also *be* sued. This provision bid farewell to the concept of sovereign immunity and opened the window for citizens to sue the State to claim compensation for wrongs and damages suffered by them. Accordingly, in *Kasturi Lal v. UP Government*[59] the Supreme Court held that citizens can sue the State and held the State liable to pay compensation. In *Rudal Shah v. State of Bihar*[60] the Supreme Court disallowed the plea of sovereign immunity and the State was ordered to pay compensation to Rudal Shah for illegal detention in jail. In *Khatri v. State of Bihar,*[61] popularly known as the *Bhagalpur Blinding case*, Bihar Government was ordered to pay compensation to the victims.

The Supreme Court has continuously evolved the jurisprudence of victim compensation through its pronouncements. In *State of Maharastra v. Ravi Kant Patil,*[62] the State was ordered to pay compensation for handcuffing an under trial accused. In *Nilbati Behera v. State of Orissa*[63] the Supreme Court ordered the State to pay compensation to the next of kin of a deceased person who was taken into custody by the police and whose dead body was found on a railway track near the police station. In *Kartar Singh v. State of Punjab*[64] the State was asked to pay compensation to a victim of torture by police. Thus, victims of abuse of power were

[59] AIR 1965 SC 1039

[60] 1983 SCR (3) 508

[61] (1983) 2 SCC 266

[62] (1991) 2 SCC 373

[63] (1993) 2 SCC 746

[64] (1994) 3 SCC 569

recognized as victims eligible to be compensated by the State.

In a landmark judgment in *Arvind Singh Bagga v. State of U.P*[65] the Supreme Court gave an option to the State to recover the amount of compensation from the abuser/negligent public servant whose mistake/ negligence was responsible for award of the compensation to the victim.

In *D.K. Basu v. State of West Bengal*[66] it was held that compensation under public law is in addition to remedies available under the private law for claiming damages for tortuous act by police. In *Chief Secretary v. Students of APAU*[67] the Supreme Court awarded compensation of Rs. Five lakh to the female victim of an acid attack in order to meet the cost of treatment. However, the Court observed that the case should not be treated as precedence.

The Supreme Court reminded, on a number of occasions, that victims of crime are not a forgotten entity in the justice delivery system in India. In *K.A. Abbas v. Sabu Joseph*[68] it was held that power to award compensation is not ancillary to other sentence but is in addition there to, and the Supreme Court recommended all courts to exercise it. The Court observed- 'it is a reminder to the victim that he is not forgotten'. In *Roy Fernandes v. State of Gao*[69] the Supreme Court held that consideration on question of compensation was to be mandatory in each case. In *Ankush Shivaji Giakwad v. State of Maharastra*[70] the Supreme Court again reiterated that there existed a mandatory duty on the court to apply its mind to the question in every criminal case for awarding compensation to victims of crime. An enquiry can precede an order of sentence to enable the court to take a view on the quantum of sentence and compensation. The factors to be considered for awarding compensation under section 357 Cr.PC are facts and circumstances of the case, nature of the crime, justness of the claim and capacity of the accused to pay.

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[65] AIR 1995 SC 117

[66] (1997) 1 SCC 416

[67] (2005) 12 SCC 448,

[68] (2010) 6 SCC 230

[69] (2012) 3 SCC 221

[70] (2013) 6 SCC 770

The Supreme Court laid down a law for awarding compensation to acid attack victims in *Laxmi v. Union of India.*[71] The Court observed that the minimum compensation of Rs. 3 lac per acid attack victim had not been fixed in each State and Union Territories, despite orders by the Supreme Court in *Laxmi v. Union of India.*[72]

The Supreme Court in Suresh v. State of Haryana spelt out the philosophy of adequate compensation.[73] "The Court observes that provisions of section 357A of Cr.PC has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out by the Court that the upper limit of compensation fixed by some of the States is arbitrarily low. District Legal Services Authority/State Legal Services Authority is to decide quantum of compensation, which may be beyond the maximum limit prescribed by Government."

In *State of MP v. Mehtaab,*[74] the Supreme Court laid down another important principle of victim compensation, and ordered the State to pay compensation under section 357-A Cr.PC, when the accused is not in a position to pay fair compensation. In *Manohar Singh v. State of Rajasthan*[75] the Supreme Court ordered that the State make up for just compensation.

From the above judicial pronouncements, it is evident that the Indian Judiciary has not only expanded the definition of 'victim', as laid down in the Cr.PC, but has continuously evolved the jurisprudence of victim compensation.

Restorative Justice: A Way Forward in India

The processes of Restorative Justice, if adopted and applied in true spirit, would be a win-win situation for all the stakeholders involved when a crime is committed. The following way forward is suggested to strengthen principles of restorative justice in the Indian Criminal Justice System.

1. Appropriate and adequate restorative justice processes need to be

[71] Writ Petition (Crl. No. 129 of 2006) D/d 10.04.2015

[72] (2014) 4 SCC 427

[73] (2015) 2 SCC 227

[74] (2015) 5 SCC 197

[75] (2015) 3 SCC 449

codified and institutionalized at appropriate places in the criminal procedures/laws.

2. The definition of 'victim' in section 2(wa) of the Cr.PC may be expanded to include all the primary, secondary and tertiary victims of crime as well as victims of abuse of power. It would be appropriate if the definition of 'victim of crime', given by United State General Assembly Declaration on Basic Principles of Justice for Victim and Abuse of Power, 1985 is adopted in criminal procedures.

3. Provisions of compounding, contained in section 320 Cr.PC, and plea-bargaining, contained in Sections 265A to 265L, may be reviewed to enhance their utility.

4. The Legal Services Authority Act, 1987 may be reviewed to expand and establish scope of alternative dispute resolution in criminal matters.

5. At present identification of the victims of crime and verification of the financial capacity of the offender to pay compensation are not a part of criminal investigations. The Cr.PC and relevant rules may be amended to expand the scope of criminal investigations in this regard.

Conclusion

The need of hour is for the introduction of the concept of restorative justice in criminal procedure. Though a restorative justice process cannot be expected to change the basic course of the Criminal Justice System, it could prove to be an effective alternative to incarceration in a large number of petty and non-serious offences, which constitute more than 50 percent of the total crimes reported in India. It can produce mitigated results in terms of victim participation in the justice delivery process and reparation for injury/loss caused to the victims as well as to the community.

Though the objectives of restorative justice processes are laudable, we must be careful not to be hasty in embracing this option. It would be relevant to take time to identify suitable parameters of the underlying philosophy and associated restorative practices. It is important to implement initiatives

in this area gradually by evolving an array of strategies. Best practices in use elsewhere may be studied carefully and those found suitable in our national context may be adopted.

It should be understood that a restorative justice process is not a universal magic solution to all crime related issues. Restorative justice processes should be used to supplement the traditional justice delivery system. It should remain an option for some crimes in all circumstances and for all crimes in some situations. It should never be considered an easy option of doing justice, as no tailor made solution is available for all the situations.

It is also suggested that discussion on the restorative justice approach must not be confined to a small circle of experts. The community will never embrace and participate in restorative justice processes unless it understands the purpose, aims and limitations. Hence, there is a need to make the general public aware of the concept and philosophy behind restorative justice programmes, before their codification and institutionalization in criminal procedures.

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Human Rights for Sustaining Peace: Emerging UN Perspectives

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Abstract

Human rights and peace are connected by an umbilical cord. Their relationship exemplifies a two-way street. There is no peace if human rights are denied and likewise human rights cannot be realized if there is no peace. The sheer absence of armed conflict doesn't signify peace unless there is a healthy respect for human rights. This mutually dependent relationship between human rights and peace, so vital in today's conflict torn world, is often overlooked in policy circles as well as in scholarly analysis.

The United Nations has always been emphatic about including human rights concerns in its broader schema of peace. The recent passage of the Right to Peace is seen as a critical step forward in UN parlance. Mentioned seven times in the UN Charter, human rights are acknowledged as one of three founding pillars of the UN peace agenda. The coupling of peace and security with human rights and development highlights the pivotal role of human rights in the UN's approach to peace. While celebrating the 70th anniversary of the Universal Declaration of Human Rights (UDHR), it is therefore instructive to explore the growing imprint of human rights on the emerging peace agenda of the United Nations.

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Although an intrinsic element of many civilizations and cultures, human rights concerns assumed centrality with the growing realization that peace is not simply an absence of direct violence but includes the elimination of all forms of violence – direct and indirect.[1] Many other approaches, such as the liberal democratic theory of peace, drawing on foundational ideas of Immanuel Kant, Woodrow Wilson and many contemporary scholars, have argued that democracies are unlikely to engage in mutual war and that democratic governance and human rights reinforce peace and stability within states.[2] However, it was indeed the gruesome genocide unleashed by the Nazis during the Second World War that rallied the shaken world consciousness behind the formation of the United Nations, to recognize 'human rights' as the minimum standards of dignity. Since then the protection and promotion of human rights have been an intrinsic concern of all UN agencies and entities.

UN and Human Rights: Expanding Scope

The past seven decades has seen a steady growth in United Nations human rights activities, leading to its constant expansion. Beginning with the establishment of the UN Commission on Human Rights (UNCHR) in 1946 and the Centre for Human Rights (CHR) followed, in the 1980s, by the Economic and Social Council (ECOSOC) and the creation of the Office of the High Commissioner for Human Rights (OHCHR), the General Assembly in 1993, and the establishment of the Human Rights Council (HRC) in 2006.

The Universal Declaration of Human Rights (UDHR) drafted by the UNCHR in 1948 links human rights with international peace and security. The first paragraph of its preamble mentions the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world. The third preambular paragraph thus suggests universal human rights are also seen as the foundation of domestic peace, stating; 'It is essential if a man is not to be

[1] Upadhyaya p. et al. 2018. Long Walk of Peace: Towards Conflict Prevention, UNESCO. 30-31unesdoc.unesco.org/images/0026/002628/262885e.pdf.

[2] Richmond, Oliver P. 2014.*Peace: A very Short Introduction*. Oxford: Oxford University Press,pp. 97-99.

compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.

Undeterred by Cold War constraints, the UNCHR prepared numerous human rights treaties on a range of issues that form the core of peace-building and human security. These include an agreement on two groundbreaking treaties made in 1966: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Entering into force in 1976, both covenants address key rights in civil, political, economic and social fields. These two treaties, together with the 1948 Declaration, constitute what is known as the International Bill of Human Rights. Other significant accomplishments include the successful adoption of the Convention on the Elimination of All Forms of Discrimination against Women in (CEDAW) 1979 and the United Nations Convention against Torture in 1984. UNCHR-led human rights treaties have engendered international legal norms on a range of issues which form the core of the UN peace agenda including preventing racial discrimination; promoting economic, social and cultural rights; civil and political rights; women's rights; the prohibition of torture; children's rights; and migrant workers' rights, among others.

Similarly, the OHCHR has provided the overarching institutional machinery to promote human rights in various areas that converge and intersect with the UN actions for peace. It has served as the hub, bringing together different dimensions of the United Nations human rights agenda. It was due to the facilitating role of the OHCHR that within a decade, in the 1990s, the number of National Human Rights Institutions(NHRI) increased rapidly on all continents from 5 to 100. At the same time, they obtained a particular status within the United Nations, whereby they broke the exclusivity of States and non-governmental organizations (NGOs) as sole actors in the system. 'This development was a global engine in human rights implementation, and the Office played a key role in the process.[3] OHCHR's thematic priorities have strengthened international human rights mechanisms; enhancing equality and countering

[3] See OHCHR Management Plan, 2014-2017, Working for your rights. https://www2.ohchr.org/english/OHCHRreport2014_2017/OMP_Web_version/media/pdf/0_THE_WHOLE_REPORT.pdf.

discrimination; combating impunity and strengthening accountability and the rule of law; integrating human rights in development and in the economic sphere; widening the democratic space and early warning and protection of human rights in situations of conflict, violence and insecurity.

Human Rights Council

Significant progress in the institutional growth of human rights was accomplished with the creation of the Human Rights Council in 2006, which replaced the sixty-year-old UNCHR. Endowed with a new mandate, the HRC was made directly responsible to the UN General Assembly with the proviso that it would ensure 'universality, objectivity and non-selectivity... and the elimination of double standards and politicization'.[4] For many observers, the creation of the HRC demonstrated the UN's willingness to credit due importance to the protection of human rights – the third pillar of its foundational commitment. Its inaugural two-week session in June 2006 attracted a significant response from several thousand participants and state representatives from across the world.[5] The HRC launched many new initiatives to uphold and monitor civil, political, economic, social and cultural rights globally, through independent human rights experts designated as Special Rapporteurs, Special Representatives, Working Groups and Independent Experts. In 2007, it established a new complaints procedure to address gross violations of human rights reported by individuals, groups or non-governmental organizations claiming to be the victims of violations or who had direct, reliable knowledge of such human rights violations.[6] By the end of 2016 there were 80 active Special Procedures mandate holders covering 57 mandates, comprising 43 thematic mandates, including water and sanitation, arbitrary detention, the rights of migrants, violence against women, torture and human trafficking, and 14 country-specific mandates.[7]

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[4] United Nations. 2006. *UN Global Counter Terrorism Strategy*. A/ RES/60/288. New York, NY: United Nations. Available from: www.un.org/en/ga/search/view_doc.asp?symbol =A/ RES/60/288.

[5] Steiner, H.J., Alston, P. and Goodman, R. 2008. *International Human Rights in Context: Laws, Politics, Morals*. Oxford: Oxford University Press.

[6] UNHRC. 2007. *United Nations Human Rights Council: Institution-Building, Resolution* A/HRC/ RES/5/1,ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc(accessed 22 April 2018).

[7] United Nations. 2011. *Report of the OpenEnded Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council*. UN Doc A/HRC/WG.8/2/1. New York, NY: United Nations,www.un.org/en/ga/president/65/issues/IGWG%20 Report%20 (AHRCWG821.pdf (accessed 22 April 2018).

However, during the past decade, in the wake of rising civil violence, the HRC has remained overworked and has often been faulted for not doing enough to address large-scale human rights violations in Iraq, South Sudan, Sudan, Sri Lanka, Syria and Yemen, among others. A review process mandated by UN General Assembly Resolution 60/251 in 2011 has underlined the limitations of the council, especially its inability to respond swiftly to urgent human-rights situations. However, the HRC has recently seen a shift from questioning whether UN human rights bodies will address an issue, to assuming an issue will be addressed and posing the question: 'What are you going to do about it?'[8]

The fact is that the HRC is still trying to find its moorings. However, as Ramcharan observes: 'Its promotional and standard-setting activities are animated by sentiments of aspirational justice, and it has begun to indicate the role of Truth and of Transitional Justice. Its justice practice is pragmatic and, at times, a selective one. It would behove the Council to strive to develop a stronger justice role, faithful to the UN General Assembly's Basic Principles and Guidelines on remedies and reparations. The Council should, in the future, be judged by how faithful it is to these principles and guidelines of justice'.[9]

National Human Rights Institutions (NHRI)

The other notable human rights approach to peace relates to the nurturing of National Human Rights Institutions (NHRI) designated by ECOSOC in 1946 as 'local human rights committees within their respective countries'. Furthermore, in 1991, the UN Commission on Human Rights drafted the Principles Relating to the Status of National Human Rights Institutions, popularly known as the 'Paris Principles'. In 1993, these were followed with the Vienna Declaration and Programme of Action, adopted at the Vienna World Conference on Human Rights. This created the International Coordinating Committee of National Institutions (ICC) to determine the level of implementation of the Paris Principles for individual

[8] Gallen, J. 2016. 'Between rhetoric and reality: ten years of the United Nations Human Rights Council', *Irish Studies in International Affairs*, 27: 125143.

[9] Ramcharan, B.G. 2015. *The Law, Policy and Politics of the UN Human Rights Council*. Leiden: Brill Nijhoff, p. 269.

NHRIs. It also iterated the commitment to develop national institutions as instruments for promoting human rights, disseminating human rights information and providing human rights education. Since then, the UN General Assembly has adopted numerous resolutions calling for the strengthening of NHRIs, which function as the first port of call for reporting human rights violations across the world.

Growing recognition of human rights as a prerequisite for nurturing peace, reflected in strong human rights mandates for peace missions, has led to active partnerships between OHCHR and the Departments of Peacekeeping Operations (DPKO), Political Affairs (DPA) and Field Support (DFS).These partnerships safeguard and integrate the sustenance of human rights in UN Peace Operations and Political Missions. The OHCHR also strives to empower the population to assert and claim their human rights and enables state and other national institutions to implement their human rights obligations and uphold the rule of law. Human rights teams on the groundwork in close cooperation and coordination with other civilian and uniformed components of peace operations in relation to the protection of civilians, especially with regard to addressing conflict-related sexual violence and violations against children; and strengthening respect for human rights and the rule of law through legal and judicial reform, security sector reform and prison system reform.[10] National human rights commissions can indeed play a more active role in raising awareness of international human rights standards at the national level. They could also join hands with civil society organizations to foster greater space for debate and dialogue promoting tolerance, justice, and human rights, all of which are vital to sustaining peace.

Humanitarian Challenges

In recent times, the international community has come under increasing pressure to play a proactive role during protracted episodes of human catastrophes, when major harm to civilians is occurring or thought to be imminent, and the state in question is incapable or unwilling to protect its own citizens. In this context, human rights are increasingly viewed as

[10] United Nations. 2012. *Protect Human Rights*. New York, NY: United Nations, http://www.un.org/en/ sections/what-we-do/protect-human-rights/ (accessed 22 August 2018).

rights possessed by the individual, for which they could seek redress from the international community.[11] Such human rights assertions became more pronounced in the wake of an increasing surge in internal violence, where the state has either acquiesced or collaborated with violent groups. Indeed, the genocide in Rwanda and the civil wars in Somalia and the former Yugoslavia deeply moved the consciousness of the international community. However, there was little legal or logistical preparedness at the time to meet these new challenges. While the war in the former Yugoslavia drew attention to this issue, the Rwandan genocide made the international community's failure to prevent, or effectively react to mass killing, painfully clear. This led to a rethinking of the UN peace agenda with increased support for humanitarian intervention.

Conscious of the inadequacy of existing provisions to deal with such human emergencies, the UN community has galvanized itself in recent years to meet such situations of internal violence, often defining these as a threat to international peace and security to justify enforcement action under Chapter VII of the UN Charter. These developments have fuelled critical debate on the limits of sovereignty and on many state-centric provisions of the UN Charter itself. New concepts of human security, humanitarian intervention and 'sovereignty as responsibility' have surfaced to protect threatened or victimized populations, either from local actors, whom the government is unable or unwilling to control, or from the government itself.

Responsibility to Protect (R2P) is a notable human rights discourse within the current UN peace agenda. First articulated in the Report of the International Commission on Intervention and State Sovereignty (2001), R2P defined the legitimacy and scope of international action vis-à-vis a wide range of human rights violation.[12] In 2004, the High-level Panel on Threats, Challenges and Change set up by former Secretary-General Kofi Annan, endorsed the emerging norm of a responsibility to protect as a collective international responsibility, 'exercisable by the Security Council

[11] Upadhyaya, P. 2005. 'Human security, humanitarian intervention, and third world concerns'. *Denver Journal of International Law and Policy*, 33(1): 86-89.

[12] ICISS (International Development Research Centre). 2001. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty ICISS*. Ottawa, ON: ICISS, http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 22 April 2018).

authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing and serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent'.[13] The United Nations World Summit (2005) again endorsed the responsibility of each state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. In the event of the failure of the concerned state to do so, the international community should act collectively in a 'timely and decisive manner' in accordance with Chapters VI and VIII of the UN Charter.

However, there has been an underlying current of opinion that, in the absence of clear guidelines, the R2P is likely to be used by the powerful governments having prerogatives within the Security Council. For this reason, the HRC has firmly opposed developing this notion. In some HRC resolutions in the past, there has been some attempt to elaborate the responsibility to protect, such as 'prevention of genocide' put forward by Armenia, but its level of success has been limited to date.

Based on the outcome document of the 2005 World Summit, a 2009 report by the Secretary-General outlined a strategy around three pillars of the responsibility to protect: (i) the state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; (ii) the international community has a responsibility to encourage and assist states in fulfilling this responsibility; (iii) the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations 57 from these crimes[14]. The Secretary-General's report on early warning, assessment and the responsibility to protect (2010) identified gaps and proposed ways to improve the UN's ability to use early warnings more effectively, where there is a risk of genocide, crimes against humanity, war crimes or ethnic cleansing.[15] Similarly, the Secretary-General's report

[13] United Nations.2012. *The Responsibility to Protect: Who is Responsible for Protecting People from Gross Violations of Human Rights?* New York, NY: United Nations, www.un.org/en/ preventgenocide/rwanda/pdf/bgresponsibility.pdf (accessed 22 April 2018).

[14] United Nations.2012. *Background Information on the Responsibility to Protect*. New York, NY: United Nations, www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml (accessed 22 April 2018).

[15] United Nations. 2010. *Report of the Secretary General on Early Warning, Assessment and the*

in 2011 emphasized the need for effective global-regional collaboration to help implement the responsibility to protect.[16] In practice, the Security Council made the first official reference to the responsibility to protect in April 2006 when it authorized the deployment of UN peacekeeping troops to Darfur. Subsequently, R2P featured prominently in the Security Council resolutions on Libya (2011), Côte d'Ivoire (2011) Yemen (2011), South Sudan (2011) and Syria (2012). One of the effective steps taken in the wake of R2P has been the creation of the UN Office on Genocide Prevention and the Responsibility to Protect. Its task is to raise awareness of the causes and dynamics of genocide, to alert relevant actors where there is a risk of genocide, and to advocate and mobilize for appropriate action. The office also develops key tools to be used by international, regional and national actors to assess the risk of atrocity crimes, as well to strengthen atrocity prevention capacities and strategies.[17]

Right To Peace

The Right of Peace, which has recently gained much importance in the UN parlance, was proposed by the UNGA way back in 1948. This 'Right of Peoples to Peace' proclaimed 'that the peoples of our planet have a right to peace and the promotions of its implementation constitute a fundamental obligation of each State, renunciation of the use of force in international relations and the settlement of international disputes by peaceful means'.[18] However at that time the Right to Peace didn't gain much ground. Clubbed with similar rights (often branded as the third generation rights, such as right to development or to a safe environment, it was undermined by legal experts as having 'no independent and specific meaning' and it was predicted that these rights will probably remain without much influence in the future'.[19]

Responsibility to Protect, UN Doc A/64/864. New York, NY: United Nations.

[16] United Nations. 2011. *Report of the SecretaryGeneral: Preventive diplomacy: Delivering results. United Nations Security Council, S/2011/552*. New York, NY: United Nations.

[17] United Nations. 2014. *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*. New York, NY: United Nations, www.un.org/en/genocideprevention/documents/ publicationsandresources/ Framework%20of%20Analysis%20for%20Atrocity%20 Crimes_EN.pdf (accessed 22 April 2018).

[18] See A/RES/39/II, 12 November, 1948.

[19] Forsythe, David P., 1993.*Human Rights and Peace: International and National Dimensions*, Nebraska: University of Nebraska Press.

The recent validation of the Right to Peace represents another prominent development in the emerging salience of human rights in the UN peace agenda. Just as SDG 16 and the resolutions on 'sustaining peace' have bonded peace with Declaration of Human Rights as the basis of enduring peace and recognized the inherent dignity and equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. In accordance with the foundational UN ethos, which positions peace as a pivot of human rights, there has been a longstanding demand in the UN system to recognize and declare the Right to Peace. However, such demands made little headway during Cold War imbroglios between rival power blocs, and the efforts only gained impetus after its conclusion. Even then, nearly a quarter of a century elapsed before the Right to Peace was finally passed in the UN General Assembly. The process involved several challenges, some of which were quite recent. Notably, there was a lack of consensus among the Member States concerning the Right to Peace as a human right. The debate highlighted the division among the Member States, especially regarding the codification process of the new right. European states affirmed their rejection of a legal basis to the right to peace but reiterated their willingness to discuss linkages between peace and human rights. Together with the non-aligned Member States from Latin America, Member States of the Association of Southeast Asian Nations (ASEAN) defended the legal basis of the right to peace and the need for its elaboration in a declaration. On the other hand, civil society organizations found the existing codification of the Right to Peace insufficient as a measure to advance the status of international human rights law, since the draft neither defined the emerging right nor adequately developed its elements.

The lack of consensus continued well into 2015, resulting in criticism from civil society and NGOs. For instance, the Women's International League for Peace and Freedom found that, even at this late stage, 'achieving consensus proved to be a very difficult goal for States as some are just not ready to recognize a Human Right to Peace or even a 'Right to Peace'.[20] Moreover, the draft was criticized as weak in its measures for

[20] WILPF (Women's International League for Peace and Freedom). 2015. *UN States Refuse to Recognize the Human Right to Peace.* 7 May 2015, wilpf.org/un-states-refuse-to recognize the-human-right-to-peace (accessed 22 April 2018).

compliance, failing to acknowledge the Right to Peace as a human right, and instead creating the notion of an entitlement to 'enjoy peace'.

Clearly, the need to implement the Right to Peace will bring new challenges. However, the achievement of forging a consensus among the Member States, civil society and NGOs deserve appreciation. Indeed, much work remains to be done to realize the full potential of the right to enjoy peace, human rights and development. Ratification of the declaration represents a process involving international commitment that can serve to strengthen this work. Forging an international consensus is a much-needed vital first step on the long road ahead, towards realizing the Right to Peace.

Agenda 2030 and Sustaining Peace

With the unprecedented emphasis on sustaining peace, the UN system has accorded a high priority to reinstating a holistic conception to peace, development and human rights. Agenda 2030 and the reframing of peace building as 'sustaining peace' both have a live connection between human rights, peace and development. Investing in 'sustaining peace' means investing in basic services, bringing humanitarian and development agencies together, building more effective and accountable institutions, protecting human rights, promoting social cohesion and diversity, ensuring the meaningful participation of women and girls in all areas of society, and moving towards sustainable energy. Strengthening the rule of law and promoting human rights are pathways to this process, as are reducing the flow of illicit arms, and strengthening the participation of developing countries in institutions of global governance. Within this matrix, 'sustaining peace' is construed as both an enabler and an outcome of sustainable development. [21] While development and human rights are being defined in a more comprehensive manner, the concept of peace

[21] United Nations, 2016. *Review of the United Nations Peace building Architecture.* UN Doc A/70/262. New York, NY: United Nations. Un Doc A/RES/243. New York, NY: United Nations, www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/243 (accessed 24 August 2018) United Nations. 2017. *Building Sustainable Peace for All: Synergies between the 2030 Agenda for Sustainable Development and Sustaining Peace*. High Level Dialogue of the President of the General Assembly for the 71st session, 24 January 2017. New York, NY: United Nations, www.un.org/pga/71/wpcontent/uploads/sites/40/2016/12/SustainablePeaceand2030Agenda_Conceptnote_FINAL.pdf (accessed 22 April 2018).

has been expanded through various resolutions, reports and goals. This emerging awareness is reflected sharply in the recent recognition of the complementarily between sustaining peace and the goals of Agenda 2030. Recognizing the organic links between the two amid intertwined global challenges such as rising inequality and climate change, UN Secretary-General Guterres has called for 'a global response that addresses the root causes of conflict, and integrates peace, sustainable development and human rights in a holistic way, from conception to execution'.

The UN Security Council and General Assembly thus adopted landmark identical resolutions on sustaining peace in April 2016, thereby multiplying the scope of peacebuilding.[22] The preamble of the dual resolution introduces a brand-new conceptual trajectory of 'sustaining peace', comprising 'activities aimed at preventing the outbreak, escalation, continuation and recurrence of conflict, addressing root causes, assisting parties in conflict to end hostilities, ensuring national reconciliation, and moving towards recovery, reconstruction and development'. The holistic vision of 'sustaining peace' is one of the key trajectories of the new UN plan to foster peaceful, just and inclusive societies, free from fear and all forms of violence. Predicated on the concept of 'sustaining peace', the UN General Assembly and the UN Security Council have reached a well-formulated consensus to prevent all forms of violence, recognizing the symbiotic relationship between peace, sustainable development and human rights across a wide humanitarian expanse.

As stated by Secretary-General Guterres in his address to the Human Rights Council in February 2017, 'Perhaps the best prevention tool we have is the Universal Declaration of Human Rights—and the treaties that derive from it. The rights set out in it identify many of the root causes of conflict, but equally, they provide real-world solutions through real change on the ground.'[23] Indeed, human rights monitoring and analysis can provide

[22] United Nations, 2016. *Review of the United Nations Peace building Architecture. UN Doc A/70/262*. New York, NY: United Nations. Un Doc A/RES/243. New York, NY: United Nations, www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/243 (accessed 22 April 2018); UNSC (United Nations Security Council). 2016. *Resolution 2282 (2016), S/2282(2016)*, 27 April 2016.

[23] UN Secretary-General, 'Remarks to the Human Rights Council,' February 27, 2017, available at www.un.org/sg/en/content/sg/speeches/2017-02-27/secretary-generals-human-rights-council-remarks.

early warning of grievances that, if left unaddressed, may lead to violence. Widespread human rights abuses can be an indicator of future instability or a harbinger of the imminent risk of violent conflict. Human rights can thus serve as a preventive tool for sustaining peace.

Respecting life and dignity

The emerging notion of 'quality peace' has recently spelt out the importance of human rights in building sustainable peace. Peter Wallensteen, a renowned peace researcher provides a model of 'quality peace' that aims to overcome the traditional dichotomy of negative versus positive peace. Drawing on past peace building experiences, he defines quality peace as the creation of post-war conditions that make the inhabitants of a society secure in life and dignity, now and for the foreseeable future. Peace is not simply a matter of living without war for a period: 'It is a matter of maintaining conditions that don't produce wars in the first place or – as some form of peace has failed previously – not repeating the same failure'.[24] The quality of peace is composed of three critical standards: security, dignity and predictability (or durability). The consolidation of peace building requires the assurance of security, equal rights and respect for the dignity of all inhabitants and stakeholders in the conflict. Wallensteen refers to the citing of human dignity in the UN Charter and amplifies its significance to argue that: 'Violation of dignity in the form of discrimination, repression and persecution may have sparked the war that the world much later tries to prevent from recurring'.[25]

Summing Up

The three-pillar approach enshrined in the UN Charter and reaffirmed in scores of UN proclamations offers a transversal normative framework for conflict prevention and sustaining peace. The twin resolutions on 'Sustaining Peace' have well recognized the fundamental interface between peace, sustainable development and human rights, within the UN system. The real challenge facing the international community today

[24] Wallensteen, P. 2015. *Quality Peace: Peacebuilding, Victory, and World Order*. Oxford: Oxford University Press, pp. 6-7.

[25] ibid.

is how to prevent conflicts as well as, to identify the most effective ways to strengthen the inter-linkage between the three UN pillars: peace and security, human rights and development.

While summing up the discussion on Human Rights as a vector of peace, it is useful here to refer to the HRC led panel of 27 February 2017 wherein Peter Thomson, the President of the General Assembly, drew attention to imminent threats of human rights violations as an early indicator of potential conflict. Preventive measures include; helping to strengthen domestic human rights protections through capacity-building and knowledge sharing; ensuring accountability for human rights violations, as both a matter of justice and as deterrent for potential perpetrators; by using mechanisms, such as the Universal Periodic Review, to monitor the implementation of human rights recommendations that can help to sustain peace; and finally, ensuring that the expertise of the Human Rights Council is mainstreamed throughout the United Nations system, breaking down 'silos' within the UN system, and overcoming any fragmentation of approach across the three pillars, or indeed between Geneva and New York.[26]

There is, of course, no dearth of detractors who continue to interrogate the relevance of human rights standards in the practical demands of peacemaking.[27] However, it is important to remember that the quest of peace based simply on conflict resolution with win-win formulas may not go a long way if they fail to reckon with the imperatives of human rights. Indeed, the quest for sustainable peace requires insights and strategies from both the human rights and the conflict transformation fields. As such, the human rights perspectives offer instructive insights into the socio-political nature of conflict and violence as also the need to analyse the role and responsibility of the state as well as the imperatives of human governance. The universal credentials of human rights could be harnessed to promote worthy peace ideas and practices. In the recently concluded

[26] Human Rights Council, Thirty-fourth session, 'The contribution of human rights to peace building through the enhancement of dialogue and international cooperation for the promotion of human rights'.

[27] See Parlevliet, Michelle: Human Rights and Conflict Transformation: Towards a More Integrated Approach, 378 https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/parlevliet_handbookII.pdf.

meeting of the Human Rights Council, it was emphasized that the 'Respect for international human rights law provided the necessary building blocks to build and sustain peaceful societies and allow them to flourish…..if man was not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, human rights should be protected by the rule of law. The Deputy High Commissioner asserted that people who did not face discrimination in access to employment, education, food, health care and housing, and who could speak, complain and vote freely to remove tyrants, would rarely take up arms. [28]

[28] Human Rights Council, Thirty-ninth session, 10–28 September 2018 Agenda items 2 and 3.

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Human Rights Lawyering: Whose Responsibility is it Anyway?

Sarasu Esther Thomas*

"Justice has nothing to do what goes on in a courtroom; justice is what comes out of a courtroom".

–Clarence Barrow

Abstract

In the legal profession, equating justice with courts and lawyers with litigating is a paradigm that is quickly shifting. This is very visible in the role of a human rights lawyer because the human rights lawyer is often the midwife facilitating a delivery of justice to a litigant. However this is not the only role of a human rights lawyer. If one were to look at the standards of human rights in the Universal Declaration of Human Rights which is the basic document dealing with rights the world over, it clearly says 'all are equal before the law and are entitled, without any discrimination, to the equal protection of law, all are entitled to protection against any discrimination in violation in its declaration and any incitement to such discrimination.'[1]

Today, in an era where we find large scale violations of human rights and in a context where human rights defenders or for that matter, even one who seeks uncomfortable information through an RTI, feels threatened,[2]

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[1] Article 7, Universal Declaration of Human Rights.

[2] See for instance Commonwealth Human Rights Initiative, "Attacks on RTI users in India: Hall of Shame statistics update" Available at http://www.humanrightsinitiative.org/download/Attacks%20on%20RTI%20users%20in%20India.pdf Accessed on 20 July 2018.

we need to ask ourselves, whose responsibility is human rights lawyering, and what should be the role of human rights lawyers? Whether we need them is not an issue; a daily perusal of any newspaper or news channel makes it clear that we live in an era of widespread human rights violations and impunity in which the rule of law is violated.

This paper looks at the different hats worn by human rights lawyers and the roles they play in addressing various facets of human rights lawyering. It also tries to place the responsibility for human rights lawyering on all facets of the legal profession- universities, the Bar and the Bench.

What is Human Rights Lawyering?

For the purposes of this paper, a broad definition of human rights lawyering has been given. All lawyers who play a role in the furtherance of human rights, particularly of marginalized sections, are covered within its ambit. Cause lawyering is a subset also called social lawyering, covering those who work through political and legal institutions to bring about social change.[3]Street lawyers are those who provide legal counsel for the poor and pro bono lawyers often do the same, although the latter term could simply mean a lawyer who provides some free service while retaining a commercial practice.

The term 'Human rights lawyers' covers a wide range of persons and institutions, from large institutions to smaller firms to single individuals handling and funding a public interest litigation. This is similar to movements in the United States where the American Civil Liberty Union (ACLU) and the National Association for the Advancement of Coloured People(NAACP) were the big law organisations of the 1970s and 1980s that brought about political change. Today however, there are very many more involved social organisations that use lawyers groups to further their own agendas, many of them dealing with social transformation as well.[4]

[3] Seminal work has been done by Austin Sarat and Stuart Scheingold who have edited volumes on Cause Lawyering some of which has been referred to in this paper.

[4] Bettina E. Brownstein, 'Private Practice and Cause Lawyering: A Practical and Ethical Guide', 31 UALR L. Rev. 601 (2009) at 602.

The myth of the neutrality of lawyers and the conceptions that lawyers must not choose sides is something that is challenged in human rights lawyering. Human rights lawyering encourages lawyers to choose sides and identify with causes that clients' cases are associated with.[5]According to Sarat and Scheingold, the role of 'cause' lawyering is not only to provide legal services or to provide legal consciousness for that matter, but also to raise political consciousness.[6]

Being involved in causes may not necessarily have anything to do with skills as lawyers, although legal skills and acumen may be useful. It may include direct action such as *dharnas* or joining protests and so on.[7] While it is true that very often the accused may be from a community that is, for instance, in conflict at a political level, it might be considered the role of some criminal lawyers to advance both political and legal goals as well.[8] They may be moved by ideologies or a sense of moral outrage. Ensuring justice to the victim as well as to the community being targeted may thus be the goal of a criminal defence lawyer. One distinction between conventional lawyers and human rights lawyers is the motivation to bring about social change.

Some studies in other jurisdictions have pointed out motivations such as procedural rights and criminal justice reform especially to change the law as it appears on the statute books, or the application of the law. Sometimes test cases may be taken up. Lawyers are also motivated to give the unheard defendant voice and have direct control over the processes affecting them, including the right to make their own decisions. The professional worker model also motivates some lawyers, making sure that underprivileged people are adequately served. The experience and identity of an individual lawyer often plays an important role in determining

[5] Stuart Scheigold and Anne Bloom, 'Transgresses Cause Lawyering : Practice Sites and the Politicization of the Professional', 5 Int'L J .Legal Prof. 209(1998) pp. 209-210.

[6] See generally Austin Sarat and Stuart Scheingold (eds), Cause Lawyering: Political Commitments and Professional Responsibilities (Oxford University Press 1998).

[7] See for example Stuart Scheigold and Anne Bloom, 'Transgresses Cause Lawyering : Practice Sites and the Politicization of the Professional', 5 Int'L J .Legal Prof. 209(1998) p. 236.

[8] Margarath Etienne 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers', The Journal of Criminal Law and Criminology (1973), Vol. 95, No. 4(Summer, 2005).

the kind of human rights work that the lawyer engages in. Very often, for instance African American lawyers would cater largely to African American clients.[9]

Not being neutral may lead to what David Luban dubs the 'double agent problem'. This originates in the fact that the lawyer is an agent for both the client and the cause; as the name suggests, 'the role of double agent carries within it the seeds of betrayal.'[10] Putting the cause before the client may be something that is seen as unethical in a profession that protects the lawyer-client relationship.

Insisting on neutrality both in cases of human rights lawyering and in medical research, without looking at it in terms of social good, is something that may not be in the best interests of society. Of course there is always a danger that a human rights lawyer who believes in a cause might be blind to the difficulties of the case, but nevertheless there is value in being involved in a cause and this does not clash with any professional ethics theory.[11]

Be it a cause or a client, there is no gainsaying the fact that social change is best served by the human rights lawyer.

Legal Aid: Stagnation at the Beginning of Human Rights Lawyering

Very often the role of a human rights lawyer is seen first and foremost as providing services pro bono or, in the Indian context, of providing free legal aid. Pro Bono lawyering in India has not really taken off and attempts to study its prevalence in private practice and among law firms did not throw up many responses.[12]

[9] See generally Margarath Etienne 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers', The Journal of Criminal Law and Criminology (1973), Vol. 95, No. 4(Summer, 2005).

[10] Cited in Michelle N. Meyer, 'The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem', Harward Law Review, Vol. 119, No. N.O. 5 (Mar. 2006) pp. 1510-1531.

[11] Michelle N. Meyer, 'The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem', Harward Law Review, Vol. 119, No. N.O. 5 (Mar. 2006) at 1531.

[12] SumanSaha, "Pro Bono Lawyering in India", in Human Rights Lawyering, 2017, National Law School of India University. See generally.

'Pro Bono'- the term is derived from the Roman term *Pro Bono Publico* mean ing the good of the public and over time it has begun to be taken to include clinical legal aid or low bono(or subsidised) services and public service to different individuals who are in need of legal representation and assistance.[13]

Legal Aid Lawyering or Pro Bono work is sometimes seen as a task engaged in by elite lawyers giving some of the time to pro bono practice. It has also been seen as taking place for motives including, among other things, recognition, contacts, experience and building of expertise for someone who is just starting up in the field.[14]

The functions of the State Bar Council, according to the legislation, includes promoting and supporting law reform[15] and organising legal aid to the poor in the prescribed manner.[16] Similarly the Bar Council of India in Section 7 has obligations for promoting and supporting law reforms[17] and laying down and promoting legal aid education.[18]

The duty of lawyers in delivering free legal aid has long been debated. While it developed as a noble profession in England where lawyers would not charge money for their services, the position is very different today. In the days of reforming the judicial administration, the Law Commission of India, way back in 1958, did make suggestions as far as the role of lawyers were concerned. The Law Commission recognised that there was a need for legal aid and that this is something that lawyers provide. However they also realised that it would be difficult to make it compulsory for lawyers to represent needy clients.[19] While of course it is a Constitutional right

[13] Judith L Maute, 'Changing Conceptions Of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige To Stated Expectations' (2002-2003) 77 Tulane Law Review 91. Cited from Ibid.

[14] Carrie Menkel- Meadow, 'The Causes of Cause Lawyering: Towards an Understanding of the Motivation and Commitment of Social Justice Lawyers' in Austin Sarat and Stuart Scheingold (eds), Cause Lawyering Political Commitments and Professional Responsibilities (Oxford University Press 1998) pp 37-40.

[15] Advocates Act, 1961, Section 6 (e).

[16] Advocates Act, 1961, Section 6 (eee).

[17] Advocates Act, 1961, Section 7(e).

[18] Advocates Act, 1961, Section 7 (h).

[19] Law Commission of India, 'Reform of Judicial Administration' (14th Report, 1958). Available at http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf (accessed on 29th July 2018).

being first recognized by the Supreme Court[20] and later by Constitutional Amendment,[21] it is seen more as a duty of the State and not of individual lawyers to perform.

Legal Aid is often a first step for lawyers to get slowly involved in causes and a good way to mainstream human rights lawyering.

Public Interest Litigation: Necessary but not Nearly Enough

There is often anticipation that an article on human rights lawyering would necessarily be an article on Public Interest Litigation. Searches for articles on human rights and lawyers often throw up searches that are relevant to Public Interest Litigation. In fact right from the 1980's until the recent past it was quite common to find a series of articles as well as books on Public Interest Litigation. While Public Interest Litigation has evolved as a tool to protect human rights, human rights lawyering is a much broader term.

PIL serves an important function in India by ensuring proper access to courts, important in the context of a Parliament, which does not make many laws to further human rights or make laws in violation of human rights. This is also needed in a situation where vulnerable populations are faced with bureaucratic apathy or collusion and corruption.

Many articles on human rights in India tend to situate it at the time the Emergency began and usually in the framework of Public Interest Litigations.[22] While cooperation between lawyers and grassroots was very strong immediately after the period of Emergency, that situation has not evolved in the modern India, and we see that very often lawyers even file cases where they do not have clients directly affected by the matters. [23]

Public Interest Litigation has been an important human rights lawyering tool, although there are many writers who have pointed out in the recent past that public interest litigation has not been unequivocally a

[20] M H Hoskot v State of Maharashtra AIR 1978 SC 1548.

[21] 42nd Amendment which added Article 39A.

[22] See for example, Jayanth K. Krishnan, 'Lawyering for a Cause and Experiences from Abroad', California Law Review , Vol. 94, No. 2, (Mar, 2006) pp 575-615 at 593.

[23] Ibid at 614.

useful tool for human rights lawyering. The change in priorities in Public Interest Litigation cases has been documented in much literature and the 'dislodging of the poor has seen one of the lamented changes that has characterised the change in the nature of Public Interest Litigation'.[24] We have come a long way since the early phase of Public Interest Litigation when it dealt with issues of undertrials, poverty and, in the later stage, the environment.

Many writers credit the public interest litigation phenomena with the rise in the Supreme Court power that happened in the aftermath of the emergency; it is something that has been led by the judiciary since those heady days of PIL.

However public interest litigation often depends on whether it catches the imagination of the judiciary or not. For instance, in some cases like the Ganga Pollution Case, which caught the imagination for the judiciary, detailed orders were given and, as pointed out, the court often functioned in the nature of a village panchayat giving direction and ensuring that it should be cleaned up. We find similar procedures been conducted in other cases that attract that attention like the *Cehat* litigation, challenging the lack of implementation of the PC PNDT Act.[25] In this case to 'protect the unborn girl child,' the judge followed up diligently to make sure that the directions of the court were carried on and followed up with governments, which were required to give detailed reports. While it is good that some cases receive such judicial attention, there are many other cases dealing with human rights issues that may not be lucky enough to receive such attention. In such instances, the role of a human rights lawyer can be extremely frustrating trying to get justice for the people and the causes they represent.

Law Reforms as Integral to Human Rights Lawyering

Human rights lawyers don't just working within the framework of existing laws and challenge laws through public interest litigation. Some are also involved in actively transforming laws. When we look at the law

[24] AnujBhuwania, COURTING THE PEOPLE : PUBLIC INTEREST LITIGATION IN POST-EMERGENCYINDIA, (2017) at 113.

[25] Cehat v. Union of India [2001] 3 SCR 534.

reforms recommendations that have come up, we see that very often it has happened because of the active intervention of a human rights group and social movements.

There have also been attempts to introduce law reform among law students. In its initial years there were community based law reform competitions at the National Law School of India University, Bangalore, which tried to encourage law students from different colleges and universities to draft laws to bring about social change based on a given theme. The laws have to be drafted by understanding communities and by participation of communities at the grassroots level. Though this competition ran for only three years, it was a very enriching exercise for students to see how law worked at the grassroots level and how changes would affect the community. Although this has been discontinued[26], discussions on law reforms and suggestions for changing legislations are often encouraged in law schools through project writing and other media.

The availability of sites like PRS,[27] which has Bills that have been tabled in Parliament, are useful for students to easily access pending legislations. The practice of some Ministries and Departments to put Draft Bills into the public domain in order to get feedback has been another useful step; as has the Law Commission recommendations calling for inputs from the public. These give a good opportunity for human rights lawyers to have their ideas heard.

Law School: The Cradle of the Human Rights Lawyer

Human rights lawyering does not start from the time of enrolment at the bar. It is something that is practiced as a goal through legal education and its institutions, through the legal services clinics in educational institutions and of course later by individual lawyers. Many human rights lawyers have pointed to the inspiration that they received in their universities and exposure they received through legal services clinic and through clinical courses. There is therefore a value in having a good human rights

[26] This has been revised by the Mar Gregorios College of Law in association with MILAT, Trivandrum in 2017. www.mgcl.ac.in/fnrlc/ accessed on 28th July 2018.

[27] http://www.prsindia.org/.

curriculum for law students.[28]

This is also borne out in a study conducted by the National Law School of India University, on the human rights curriculum for law students in which many human rights lawyers emphasize the importance of human rights education at the undergraduate level. They used different terms to describe this; ethics, values, especially sensitivity to the Constitutional mandate and awareness of the development of human rights discourse and the politics behind them.[29]

This would also work to dismiss criticism that has been raised in certain quarters that human rights is a western concept, that human rights education and curriculum are not as much as desired and reliance must be placed only on the model of rights as guaranteed by the Constitution.[30]

This philosophy that lawyers are not supposed to be completely cut off from clients and that lawyers have a role in social engineering has been emphasized in university education in the National Law School model. Provisions in the National Law of India University Act seem to reinforce this.[31] In order to emphasise this, along with compulsory courses on human rights compulsory courses on areas such as law and poverty which was first introduced at the National Law School, Bangalore and later taught at the NALSAR, Hyderabad tried to build perspectives and skills and, most importantly, to sensitise students to the need to look at rights within the framework of poverty.

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[28] Arvind Narrain, Soumya Uma "Breathing Life into the Constitution", Alternative Law Forum at pp.33 and 34.

[29] Chitra Balakrishnan "Human Rights Curriculum For Law Students- A Status Report" in human rights lawyering, National Law School of India University, 2017, pp. 86-87.

[30] For instance, Nandita Haksar points out that very often human rights discourse is seen as a form of western imperialism. Nandita Haksar, "Human Rights In Legal Education" Journal of the Indian Law Institute, Vol. 40, 1998 pp. 317 to 327 at 318.

[31] Section 4 of National Law School of India University Act, 1986 Objects of the School etc., The Objects of the School shall be to advance and disseminate learning and knowledge of law and legal processes and their role in national development, to develop in the student and research scholar a sense of responsibility to serve society in the field of law by developing skills in regard to advocacy, legal services, legislation, law reforms and the like, to organise lectures, seminars, symposia and conferences to promote legal knowledge and to make law and legal processes efficient instruments of social development

Jerome Frank and Karl Llewelyn critiqued the so-called scientific case book method of teaching and focussed on experiential learning.[32] Changes came up later in the 1960s and 1970s, when the movement for socially relevant legal education was spearheaded by Arthur Kinoy.[33] Legal education has come a long way right from moving from a scientific casebook method to more experiential learning, to bring in social relevance in legal education.[34]

The shift that India is going through right now is similar to the shift that took place in the 1980s and 1990s in the United States following the important ABA Report of the Task Force on law schools and the profession.[35] This report was also called as the McCrate report. It has been credited with moving clinical legal education and legal education in general from social justice to an emphasis on practical lawyering skills.[36]

While certainly students can learn from reading human rights, in order to be empathetic and to act for social justice and ensure that rights are not endangered or violated, there must be experiential learning of human rights.[37].

Recent Challenges to Human Rights Defenders

In a study done by the Alternative Law Forum[38] the writers examined challenges that human rights lawyers in India currently face. Many of the challenges have remained the same for many years. They probably did not change prior to independence and continued after independence to the modern era of liberalisation, privatisation and globalisation. Some of

[32] Jerome N Frank, "Why not a Clinical Lawyer- School?" 81, U.Pa. L. Rev at 907 (1933) ; Karl Llewelyn, "on What's Wrong With So- Called Legal Education?" 35, Cloum. L. Rev. 651(1935).

[33] Arthur Kinoy, 'The Present Crisis in Legal Education', 24 Rutgers L. Rev. 1, 7 (1969).

[34] Deena R. Hurwitz, 'Lawyering For Justice and Inevitability of International Human Rights Clinics', 28 Yale J Int'l L., 505 (2003).

[35] American Bar Association, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development- An Educational Continuum; Report of the Task Force on Law Schools and the Profession; Narrowing the Gap in 1992.

[36] Deena R. Hurwitz, ' Lawyering for Justice and Inevitability of International Human Rights Clinics', 28 Yale J Int'l L., 505(2003) at p. 526.

[37] Deena R. Hurwitz, ' Lawyering for Justice and Inevitability of International Human Rights Clinics', 28 Yale J Int'l L., 505(2003) at p. 528.

[38] ArvindNarrain, Soumya Uma "Breathing Life into the Constitution", Alternative Law Forum.

these include the absence of Rule of Law, financial challenges, threats to life, corruption, arbitrary arrest and detention etc, which have dogged the effective practice of human rights lawyering for many years.[39]

Not just lawyers, but also those who use law to defend rights are often affected. A classic case is that of Teesta Setalvad.

Teesta Setalvad is a social activist who is famous for her involvement in representing victims in the Gujarat Riots case. As secretary of the Citizens For Peace and Justice, her demand for the criminal trial of the then Chief Minister brought her into the limelight.[40] Her activities for the uplift of marginalised and vulnerable groups are well known.[41] She was credited for her contribution to and work in the human rights field and won awards including Padma Shri.[42]

Various charges were levelled against her and the bank accounts of her organisation were frozen. This was challenged but the accounts remained frozen, however the Court granted an extension for anticipatory bail until 31st May, 2018. Prior to the allegation of misappropriation of funds, she had also faced charges for pressurising witness Zaheera Sheikh in the case famous Best Bakery Case.[43]

There have been criticisms of Ms. Setalvad regarding a few of her cases claiming that the human rights issues that she raised were false. But as most of the cases are pending or at the investigatory stage, it is necessary to consider her contribution towards human rights lawyering. It is evident that such activities have made these human rights lawyers vulnerable and subjects of political hatred.

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[39] Ibid pp 181-195.

[40] Teambeaninspirer, "TeestaSetalvad : Independent Journalist who actively works for peace and security in India, Feb 9, 2018 available on https://beaninspirer.com/teesta-setalvad-independent-journalist-who-actively-seeks-justice-and-peace-in-the-indian-nation/ (Last accessed on 28th July, 2018).

[41] The activities of Ms. Teesta Setalvadis covered in her NGO profile provided in https://sabrangindia.in/ (last accessed on 28th July, 2018).

[42] *Supra n.1.*

[43] http://archive.tehelka.com/story_main10.asp?filename=ts010105press.asp.

Individual lawyers have of course borne the brunt of State action. A recent example is that of Sudha Bharadwaj.

Ms.Sudha Bharadwaj, is known for her contribution to human rights advocacy, particularly civil rights movements, labour rights, and involved in the protection of trade union.[44] She is currently the secretary of the non-governmental organisation, People's Union for Civil Liberties (PUCL) in Chhattisgarh. PUCL has gained its relevance in society through various cases that they have filed for the rights of citizens. She has represented several cases involving rights of trade unions, civil liberties including land cases for adivasis etc.

Ms. Sudha Bharadwaj, is one of those human right lawyers who was attacked by the media on a 'supposedly letter' written by her[45] to a Maoist leader. A prominent TV channel alleged that she had written a letter calling herself "Comrade Advocate Sudha Bharadwaj". Ms. Sudha Bharadwaj refuted this as one of the classic means to limit or attack a human rights lawyer.[46] This is one among many examples of human rights lawyers being targeted for the work they carry out.

Organisations also have not been spared. Lawyers Collective is a classic case.

Lawyers Collective is a body of lawyers committed to working towards the betterment of many lives. Advocate Indira Jaising is known for the various human rights cases she has initiated and represented.

They have also been under the watch light of the Government with regard to foreign funds they have received. In the case of *Lawyers collective v. Union of India &Ors*,[47] before the Bombay High Court, the Court directed

[44] Lawyers interview, " Chhattisgarh Dairies: Meet activist, lawyer Sudha Bharadwaj" on April 6th , 2016 available at https://barandbench.com/chhattisgarh-diaries-part-ii-sudha-bharadwaj/ (last accessed on 28 July, 2018).

[45] The Wire, "There is an attempt to silence lawyers who defend the marginalised :Sudha Bharadwaj, https://thewire.in/media/there-is-an-attempt-to-silence-lawyers-who-defend-the-marginalised-sudha-bharadwaj (last accessed on 28th July, 2018).

[46] Republic's TVs hounding of rights activist shows "urban Naxal" is convenient label to crush dissent https://scroll.in/article/885664/republic-tvs-hounding-of-rights-activist-shows-urban-naxal-is-convenient-label-to-crush-dissent (last accessed on 28th July, 2018).

[47] CA No. 36/2017 Before the Bombay High Court available on www.livelaw.in last.

the De-freezing of the account pending the hearing. Lawyers Collective also faced charges under the Advocates Act for establishing foreign firms in India as early as in 1995, by the Bar Council of India in the case of *Lawyers Collective v. Bar Council of India & Ors*[48].

In spite of the allegations, it is noteworthy that Advocate Indira Jaising is responsible for the petition filed for live streaming of court proceedings, and thereby bringing about transparency in the court proceedings, which is definitely the need of the hour. [49]

Conclusion: A Collective Responsibility of the Legal Fraternity

As pointed out by Justice Bhagwati in *Bandhua Mukti Morcha*[50] the reason for PIL (also applicable to human rights lawyering) 'so that the fundamental rights may become meaningful not only for the rich and well -to- do who have the means to approach the court but also for the large mass of people who are living lives of want and destitution and by reasons of lack of awareness, assertiveness and resources unable to seek judicial redress.'

Is there a value to litigation at all or should issues of human rights be determined in other ways and other forums rather than the courts? Legal processes are very often long and tedious. They require the affected parties who are claiming redress to go to far off places where courts are situated and they cost immense sums in terms of legal fees. Even assuming there are human rights lawyers, would other initiatives be better for human rights? While that may be so, there is definitely a value in human rights lawyering including regular old-fashioned human rights litigation. Unlike protests and political lobbying, this would allow movements to directly approach courts on the agenda of the Constitutional framework and other competing human rights framework. Amicus briefs could be used to advance rights and perspectives of certain groups. Grassroots level

[48] WP No. 1526/1995 available on http://media2.intoday.in/businesstoday/images/Judgement.pdf (last accessed on 28th July, 2018).

[49] Indira Jaising v. Union of India & Ors, Writ Petition filed under Art. 32 available on http://www.lawyerscollective.org/the-invisible-lawyer/senior-advocate-indira-jaising-files-petition-seeking-live-streaming-proceedings-supreme-court (last accessed on 28th July, 2018).

[50] Bandhua Mukti Morcha v. Union of India AIR 1984 (SC) 802 at para 105.

organisations and others can come together to speak with one voice. It may also be in some cases a less risky manner of publicising the demand of a group or addressing violations of rights. It also could be a good way of building solidarity among like-minded people or movements.[51]

Regular litigation is no longer seen as viable for bringing about social change. The public confidence in it has been shaken.[52]

To quote Martha Minow,[53] 'I will talk here about this disturbing time; about what lawyering at the margins in this context could mean; and about emerging sources of hope'[54] While the writer was speaking in a different at context, i.e. that of the United States, she points out what is happening there including that the courts are withholding judicial leadership, that public bodies are being denied to the rights to adequately represent disadvantaged people and that many civil rights reforms are being dismantled and so on,[55] she could be also speaking of India where human rights lawyering has become extremely challenging in this new era of liberalisation, privatisation and globalisation.

Martha Minow points out three sources of hope as she calls them, three developments in lawyers' work. One is where lawyers are involved in multi disciplinary problem solving, the second where they have moved from adversarial advocacy to alternate strategies and development work and thirdly where lawyers are shifting from civil rights to human rights as the governing framework.[56]

While it is true that there are many who are drawn to human rights lawyering, it must not be seen as something 'deviant' those for something

[51] Mary Ziegler, 'Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change', 94 Marq. L. Rev. 263 (2010) pp. 307 - 309.

[52] Ibid at 310.

[53] Martha Minow, Lawyering for Human Dignity, 11 Am. U. J. Gender Soc. Pol'Y and L. 143 (2002).

[54] Martha Minow, Lawyering for Human Dignity, 11 Am. U. J. Gender Soc. Pol'Y and L. 143 (2002) at p. 145.

[55] Martha Minow, Lawyering for Human Dignity, 11 Am. U. J. Gender Soc. Pol'Y and L. 143 (2002) at p. 146-147.

[56] Martha Minow, Lawyering for Human Dignity, 11 Am. U. J. Gender Soc. Pol'Y and L. 143 (2002) at p. 157-158.

for 'pseudos' to do. It must be recognised as work that is contributing very importantly to society and to the legal profession. It should also be seen as a responsibility of the legal profession to contribute to human rights lawyering either by volunteering time, or pro bono services or financially contributing to causes, or supporting lawyers groups.

Human rights lawyers often find it difficult to work in the commodified legal practice world where they have to take up cases from all kinds of clients and may not have the agency to refuse cases that they disagree from if they are earning a salary. They may be Lawyers that have the freedom to choose what they wish to do and what they morally and ethically are drawn to.[57]

There are about 20 lakh (2,000,000) lawyers enrolled under the Bar Council of India.[58] The Bar Council Vision Statement 2011-2013 has pointed out that the Indian legal profession has about 12 lakh registered advocates. There are around 950 law schools that have been recognised by the Bar Council and the Bar Council estimates that there are about 4-5 lakh law students at the time across the country and that approximately 60,000 to 70,000 join the legal profession every year in India.[59]

There is a need for the legal community as a whole to recognise the important contribution made by human rights lawyers and to appreciate them for the work that is the burden of the community lawyers as a whole. We must speak out against acts when they restrict rights of lawyers in so many different ways. There must be support given to them while they are fighting cases and we must not remain silent to attack against human rights defenders including those in the legal fraternity. As the saying goes, we must speak truth to power, so that truth becomes more powerful and power becomes more truthful.

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[57] Stuart Scheigold and Anne Bloom, 'Transgresses Cause Lawyering : Practice Sites and the Politicization of the Professional', 5 Int'L J .Legal Prof. 209(1998) pp. 231-232.

[58] Available at https://www.legallyindia.com/the-bench-and-the-bar/bci-mishra-s-guesstimate-of-real-fake-lawyers-in-india-spikes-to-record-2-million-20160602-7664#liprefbox (accessed on 28th April 2018).

[59] Available at http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/vision-statement-2011-13/ (accessed on 28th April 2018).

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Best Interest of the Elderly with Dementia-A Human Rights Discourse

Anuja.S*

Abstract

The experience of old age with memory loss is increasingly marked by vulnerability, exclusion, discrimination, deprivation and abuse and is equally emotionally devastating for the care giver and care recipient. It produces a woeful saga of distress for both. This form of disability in elders makes them dependent upon family members and often results in them to being regarded as a liability or burden. Dementia represents a serious societal problem in terms of organizing services and the cost of care. The practice of abandonment and institutionalisation of the elderly is common in such situations. The author strongly believes that that the problems of care-givers and care recipients cuts across territorial borders and is irrespective of age, sex, class or ethnicity. A needs based approach, taking into account the propensity for human rights violations and deprivations against such people, is required. This paper presents the need of the hour for a social model of disability care for the elderly with dementia, bringing with it compatibility of lived experiences with a human rights discourse harnessing the potentialities of law and policy, both at the national and international levels.

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Setting the tone

According to the World Health Organisation dementia is the seventh largest cause of death in the world. As the global population ages, the number of people living with dementia is expected to triple from 50 million to 152 million by 2050.[1] India ranks third after United States of America and China, as the largest community of persons suffering from dementia in the world with an estimated 45 lakh people.[2] There has been an alarming rise in the incidences of dementia being reported not only among the elderly but also among younger adults. Medical Research has substantiated this phenomenon with studies that show that dementia is not just a normal process in the ageing. WHO has developed a Global Action Plan on the Public Health Response to Dementia 2017-2025 that provides a blueprint for dealing with this issue holistically.[3] The Sustainable Development Goals 2030 considers the ageing population as an issue cutting across goals on poverty eradication, good health, gender equality, economic growth and decent work, reduced inequalities and sustainable cities, with its acclaimed motto of *no one should be left behind*. This heralds the inclusion of discourses concerning elderly with dementia and their issues of vulnerability, seclusion and exclusion

India's National Health Policy 2017 remains silent on the issue of elderly with dementia, suggesting only a blend of private health care for public health goals in general. The Rights of Persons with Disabilities Act 2016 has been enacted with moorings in the United Nations Convention on Rights of the Disabled 2006, with a social model of disability framework. The mental Health Care Act 2017 discusses rights of persons with mental illness.[4] The rights of mentally ill persons enumerated in the Act is redundant in the context of the elderly with dementia since it discusses at length entitlement of full capacity to make decisions for themselves. What constitutes mental health and the delivery of mental health care in

[1] http://www.who.int/mediacentre/news/releases/2017/dementia-triple-affected/en/ Last visited on 29/1/2018.

[2] http://www.livemint.com/Home-Page/5J0qR7eAFLUGErzsZTfvZN/Health-experts-call-for-National-Policy-on-Alzheimers-Disea.htmlLast visited on 28/1/2018.

[3] For more details on the action plan Refer Supra Note.1.

[4] Refer Chapter V of the Mental health Care Act,2017, Sections18-28.

general is left to the citizen's imagination. Medically and scientifically there exist differences between diagnosing of mental illness and dementia.[5]The interface of law and policy in this unique issue presents diverse and versatile insights against the backdrop of *is* and *ought* propositions.

The social invisibility

Dementia discourse has historically been dominated by a highly 'medicalised' notion of dementia: as a disease associated only with irreversible decline and deficits and where 'nothing can be done'.[6]Dementia is an umbrella term which defines organic disorders or syndromes where changes to the physical structure of the brain is the cause of the illness, including the death of brain cells or damage in parts of the brain that deal with thought processes. This leads to a decline in mental ability, which affects memory, thinking, problem solving, concentration and perception.[7] Alzheimer's disease, the most common form of dementia making up 60% of cases, is degenerative, and its exact causes are unknown.[8] Dementia is a disorder of the brain affecting memory and language skills in elderly people. Coming to the situation of an elderly person with dementia he/she is happy in their world of the past and the good old days, and the new generation finds it difficult to walk a few steps backwards along with their parents or grandparents. There exists a conflict of interest among these generations, which ought to be bridged. In short, the presence of an elderly person with dementia in our home has the potential to change and reverse the expected family roles, which in turn leads us to view this problem from the perspective of both care recipients and the care givers.

A person is often defined or recognized by their social status, their economic status, based on the accumulation of property, their cultural

[5] Nicole L Batsch, Mary S Mittelman; Chapter 1 Background; World Alzheimer Report 2012 ;Overcoming the stigma of dementia; Alzheimer's Disease International p.12.

[6] https://www.mentalhealth.org.uk/sites/default/files/dementia-rights-policy-discussion.pdf Last visited on 15/8/2018.

[7] Regan, M. The interface between dementia and mental health: An Evidence Review. London: Mental Health Foundation. Policy paper 2016. Published in collaboration with The Centre for Mental Health,The Mental Health Foundation, Mind, Rethink Mental Illness and NSUN. http://www.who.int/mental_health/neurology/dementia/en/ Last visited on 29/1/2018.

[8] Id.p.7.

background, the social relationships he/she has with the outside world, the status he/she has within the familial space, his/her interpersonal skills both within and outside the community and his/her ability to adapt to situations within society. Elderly with dementia whether, male or female, face social rejection and live with the stress of isolation and abandonment. He/she no longer has the capacity to make his or her own decisions. Instead, family members or caregivers take decisions. The crucial aspect of participation in public debates is lost in the context of 'best interest' of the elderly. At the individual level, the person with dementia continues to be recognized as 'the sufferer' or the 'demented patient', with dementia referenced as a 'living death'.

Ageism is an added factor that contributes to the stigma and discrimination of dementia. Lack of capacity to challenge the social system and report incidents that occur in the form of physical, psychological, emotional and verbal abuse leads to a system wherein the elderly person becomes a victim and not a survivor. Given the context that age is an added disadvantageous factor, the issues of elderly with dementia hardly features in debates relating to development. This group is deprived of the right to adequate and proper health care services. People with dementia are often, and inappropriately, prescribed antipsychotic drugs used to treat schizophrenia. This is extremely harmful. Institutionalized violence is also another facet of human rights violations against this group. The stigma and discriminatory policies nurtured within the community and in care homes and hospitals pose a serious threat to their very existence and wellbeing. The issues of dignity and non-discrimination of people with dementia has often been overlooked and underestimated, due to the limited representation of these issues in public debates and the lack of strong focus of research and policy on issues such as welfare sustainability and the wellbeing of caregivers.[9]

Social attitudes towards the elderly with dementia are key to the needs based approach for providing care to this population. A victim may be viewed through a more paternalistic lens and regarded as needing others to make decisions about their care. Use of services for reducing

[9] https://www.unece.org/fileadmin/DAM/pau/age/Policy_briefs/ECE-WG.1-23.pdf Last visited on 25/1/2018.

stress in the home through respite services or home health services or movement to assisted living facilities may be recommended. A survivor may be regarded as someone possessing sufficient resilience to move toward a state of independence and freedom from abuse. Services in the form of crisis intervention, safety planning, or temporary stays in shelters may be indicated.[10] Dementia is often regarded by society as a normal part of ageing that does not have a cure. Dementia cases are being reported in children and younger adults, but the factor of ageism adds a different dimension to the mental health status of younger people. The widespread assumption that dementia is merely "getting old" rather than a serious disease has resulted in unequal treatment for elderly people with dementia, including poor rates of diagnosis and a lack of appropriate services.

Another problem with understanding the issue is the individualistic attitude towards ageism. There are set patterns of understanding of an elderly person within the society; that he or she ought to take a back seat and should be dependent upon the persons who are earning in the family. We tend to attribute their symptoms and stories to age-related causes like falls, memory loss, dementia or physical weakness rather than enquiring into a holistic aspect of the problem.[11]In short the elderly with dementia are made invisible and voiceless by society and as well as within the family. The conventional ways of defining and describing dementia draw largely on medical and clinical language and often problematizes it in terms of ageing demographics.[12] The rights based approach in human rights discourse helps us to understand that people with dementia and caregivers should be treated with dignity and should receive care and support based on individual need, rather than assumptions about the condition.[13]

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[10] Teresa Kilbane and Marcia Spira (2010) Domestic Violence or Elder Abuse? Why It Matters for Older Women. Families in Society: The Journal of Contemporary Social Services: 2010, Vol. 91, No. 2, pp. 165-170.

[11] UNECE policy brief No.14, 2013 'Abuse of Older Persons' focused on this issue, discussing how negative stereotypes about older people may provide the basis for abusive situations.

[12] Supra Note 6.

[13] https://www.alzheimers.org.uk/info/20091/what_we_think/141/equality_discrimination_and_human_rights Last visited on 25/1/2018.

The Law and Policy Framework: International and National

The Universal Declaration of Human Rights (UDHR) proclaims that all human beings are 'born free and equal in dignity and rights'. The International Covenants on Civil and political Rights and the Social Economic and Cultural Rights exhort the need for extending civil and political rights, such as the right to life, freedom from torture, etc., as well as social, economic and cultural rights, which include rights to health, social security and housing. These essential rights are considered as inalienable, interdependent and inherent by nature. The UDHR explicitly prohibits discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status,' but not a word is mentioned about age. Does this remarkable omission mean that by ageing you lose your right to life and liberty? This goes to show the little attention that was given by international human rights mechanisms to the human rights of older persons.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and its Optional Protocol adopted on 13 December 2006 was another milestone providing a charter enumerating a holistic approach towards the disabled, whether mental or physical. There is explicit mention of social development dimension adopting a broader categorization of persons with disabilities, which reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.[14]

The Convention on the Rights of Persons with Disabilities directly applies to all older persons who are persons with disabilities or who are targeted for discrimination because they are perceived as persons with disabilities.[15] It protects older persons with disabilities against discrimination based on age as well as against discrimination based on disability; therefore older persons with disabilities have a right not to be institutionalized against their will based on age, disability, or a combination of any such factors.[16] Older persons with disabilities must not be placed

[14] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html Last visited on 15/8/2018.

[15] CRPD/C/ESP/CO/1, paragraphs 19-20; CRPD/C/CHN/CO/1, paragraphs 25-26.

[16] Article 19, United nations Convention on Rights of Persons with Disabilities,2006.

against their will in psychiatric institutions, social care homes, nursing homes, rehabilitation facilities or any other housing arrangement or discriminatory detention regime.[17] The Convention mandates that persons with disabilities are entitled to be recognized everywhere as persons before the law; to be recognized as having equal legal capacity as others in all aspects of life; to be provided with access to support that the individual may need in exercising her or his legal capacity; to be assured protection against any abuse of their right to have and exercise legal capacity, including by standards requiring that all measures respect the person's autonomy, will and preferences; are tailored to the person's own needs; and provide opportunities for review to ensure that the support arrangements are working satisfactorily.[18] The Committee on the Rights of Persons with Disabilities has clarified the requirements for implementation of Article 12 in the context of Concluding Observations addressed to states parties.[19]

In 2002, the United Nations General Assembly endorsed the *Political declaration and Madrid international plan of action on ageing.* Three priorities for action were identified in their recommendations: "older persons and development; advancing health and well-being into old age; and ensuring that older people benefit from enabling and supportive environments".[20] This international consensus recognizes older people as contributors to the development of their societies.[21]

In 2002, the World Health Organization (WHO) released *Active ageing: a policy framework,* which defined active ageing as "the process of optimizing opportunities for health, participation and security to enhance quality of life as people age".[22] The word disability cannot be equated with

[17] Ibid, Article 5.

[18] Ibid, Article 12.

[19] Refer CRPD/C/CHN/CO/1, paragraph 22. See also CRPD/C/HUN/CO/1, paragraphs 25-26.

[20] Political declaration and Madrid international plan of action on ageing. New York: United Nations; 2002 (http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf, accessed 4 June 2015).

[21] World Report on Ageing and Health,2015 ; World Health Organization available on the WHO website (www.who.int) Last visited on 28/1/2018.

[22] Walker A. A strategy for active ageing.IntSocSecur Rev. 2002;55(1):121–39. doi: http://dx.doi.org/10.1111/1468-246X.00118.

the situation of elderly with dementia. It could be termed as intellectual disability as different from physical disabilities. None of these International documents goes beyond the terminology of mental health needs of the older persons. The specific context of dementia and its associated implications both on the elderly and the care giver whether by a family member or by the State, under the Welfare State policy within a paternalistic approach is neither deliberated upon nor discussed at length. The mental health needs of the elderly with dementia ought to be viewed as a unique domain wherein the needs and necessities of care givers and care recipients is to be considered. A broad mandate set by these International documents serves little use for clarifying the grey area on health care needs of the elderly with dementia in the national scenario. The de-prioritization of elderly with dementia in the international instruments becomes a justification for evading obligations towards this invisible population.

The invisibility of so significant a population group in the international human rights framework is itself a statement of society's de-prioritisation and neglect of the rights of older persons.[23] While international human rights instruments *do* address violence against women and violence against children, there is no equivalent for violence against older persons. The global consensus on elderly people catalyse a global paradigm shift away from the failed charitable and traditional approaches of the past, and toward the recognition of older persons from victims to rights holders, and thus from charity to accountability; from arbitrariness to the rule of law, and from pity to power. The national legislative, administrative and judicial approaches remain deaf and dumb to the needs and existence of the elderly with dementia.

Article 41 of the Constitution of India talks at length of the pious obligation of the State within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want within

[23] Craig Mokhiber; The human rights of older persons: International law's grey area; Facing the facts: The truth about ageing and development. Age international Report https://www.ageinternational.org.uk/Documents/Age%20International%20Facing%20the%20facts%20report.pdf Last visited on 15/1/2018.

its Welfare State Policy spectrum. Section 20 of the Hindu Adoption and Maintenance Act, 1956, *makes it an obligatory provision to maintain an aged parent irrespective of whether it is a son or daughter.* According to Mulla, children are bound to maintain their parents if the latter is unable to earn for themselves. There exists no personal law for Christian and Parsis for providing maintenance to aged parents. In such cases, where there is a vacuum in providing maintenance, general Criminal Law, which is secular in nature, comes to help under Section 125 of the Criminal Procedure Code, wherein elder parents can claim maintenance from their children.

The Protection of Women from Domestic Violence Act, 2005 is gender specific legislation, which provides for violence free homes and upholds the dignity of women within the four walls of the home, providing for a regulative framework to deal with domestic violence cases. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 provides for more effective provision for maintenance and welfare of parents and senior citizens by declaring a legal obligation on the children and heirs to provide maintenance to senior citizens and parents, by a monthly allowance not exceeding Rs.10,000. Maintenance envisaged under the Act includes provision for food, shelter, clothing, medical attendance and treatment. This Act also provides a simple, speedy and inexpensive mechanism for the protection of life and property of older persons. These laws only take into account issues of maintenance of the elderly from a financial perspective or at most, acknowledging violence or abuse meted out to the elderly in general. The needs based specific approach towards protection of an elderly person with dementia who is not in a position to claim their rights is not addressed through the legislative framework. To what extent a right based approach or how effective it could be carried forward is debatable in the context of the voicelessness and the invisibility of the elderly with dementia.

The Rights of Persons with Disability Act 2016 (RPWDA) passed by both the houses of the Parliament and notified on December 28, 2016 after receiving presidential assent, is in compliance with the principles enshrined in the UNCRPD. This enactment has its moorings in the vision of the Government of India in tandem with the exercise of India signing and

ratifying the UNCRPD in 2007.[24] The new Act has expanded the horizon of the rights of persons with disabilities vis-à-vis the repealed Persons with Disabilities Act, 1995. The Act mandates at the national level full compliance with UNCRPD and discusses at length the respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons. The Act lays stress on non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women, respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities. The principle reflects a paradigm shift in thinking about disability from a social welfare concern to a human rights issue.

The RPWD Act, 2016, list of disabilities has been expanded from 7 to 21 conditions and it mentions the condition of Parkinson's disease along with other conditions like cerebral palsy, dwarfism, muscular dystrophy, acid attack victims, hard of hearing, speech and language disability, specific learning disabilities, autism spectrum disorders, chronic neurological disorders such as multiple sclerosis blood disorders such as haemophilia, thalassemia, and sickle cell anaemia, and multiple disabilities. The Act defines a “person with disability” as a person with long term physical, mental, intellectual or sensory impairment, which in interaction with barriers hinders his full and effective participation in society equally with others.[25]The emphases on reasonable accommodation, accessibility, inclusive education, employment security, research and surveys, proactive measures to contain the issue of disability, protection against violence, legal guardianship, rights to appeal, etc. are commendable provisions under the law. The recurring clauses within the Act like ‘within the limit of their economic capacity and development’, ‘without imposing a disproportionate or undue burden’, ‘the extension of time depending on their state of preparedness and other related parameters’, ‘cannot be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim’ all leave

[24] Refer Preamble, The Rights Of Persons with Disabilities Act, 2016.

[25] Ibid, Section 2(s).

ample room for denial of justice or leading to a situation preferably unheard or deliberately silenced. These clauses bring within them the potential for elusiveness of exclusivity, which hampers the goal of empowerment and the resurrection of a social model of care.

There are three main initiatives in India, which are aimed at elder care or support and health, and include some specific dementia-related initiatives in them, namely a Scheme of Integrated Programme for Older Persons (IPOP), under the Ministry of Social Justice and Empowerment, National Programme for the Health Care for the Elderly (NPHCE) under the Ministry of Health and Family Welfare and the Indira Gandhi National Old Age Pension Scheme (IGNOAPS) and other such schemes which are part of the National Social Assistance Programme (NSAP)under the Ministry of Rural Development.[26] None of these schemes have benefitted the elderly with dementia apart from providing for pensions to old aged, providing for help lines and old age homes etc.,

Many countries, including England, France, Scotland, Norway, Ireland, Switzerland, Australia, Japan, Canada and the USA have developed national programs for addressing Alzheimer's disease.[27]There was a clarion call from health experts in India recently regarding the need for a national dementia policy with a clear, well defined action plan, given that about 6% of people in the age group of 65-70 years suffer from this problem. With very little or no social security available to people in India and with the increase of nuclear rather than extended families, care is hard to come by for the elderly.[28] It is also proposed alongside that the government should set up a national fund for the aged on the lines of the national fund for rural development and provision of free health counsellors for elderly people living alone.[29]

[26]https://swapnawrites.wordpress.com/resources-for-volunteers-for-dementia-care/dementia-and-care-indian-context/dementia-policies-schemes-laws-in-india/ Last visited on 28/1/2018.

[27]https://www.health.gov.il/English/Topics/SeniorHealth/DEMENTIA/Pages/National_program.aspx Last visited on 28/1/2018Australia has come up with National Framework for Action on Dementia 2015-2019.Read for more details https://agedcare.health.gov.au/older-people-their-families-and-carers/dementia. Also Refer UNECE | United Nations Economic Commission for Europe | Working Group on Ageing | www.unece.org/pau | ageing@unece.org Nations Economic Commission for Europe | Working Group on Ageing |www.unece.org/pgeing@unece.org.

[28] Supra Note 2.The views are expressed by Dr. ManjariTripathi, Professor of Neurology at the All India Institute of Medical Sciences (AIIMS) and president, ARDSI-Delhi Chapter .

[29] Ibid. The views are expressed by Age well Foundation an NGO.

Some Reflections

Newspaper reports help us understand that nursing services and homes are failing the patients with dementia. In clinical and health settings there is a mandatory policy that supports the principle of non-discrimination towards the elderly. These help to ensure that health and clinical settings do not discriminate against, dismiss or disadvantage people on the basis of age or sex. Older patients, as with everyone else, have rights to care, informed consent, choice, decision-making and respect regardless of their age and the years they have left to live. What is required is a needs based training and a comprehensive awareness programme introduced in a phased manner starting from school and college, for general and medical students and for clinical students in specific health professionals and social workers from the bottom to senior level. Health and social care has to be culturally and gender-sensitive and also person-centred, placing both the care provider and the care recipient at the centre.[30] The recommended societal approach to population ageing, which includes the goal of building an age-friendly world, mandates a paradigm shift away from disease-based curative models and towards the provision of integrated care that is centred on the needs of the elderly. Timeliness and sensitivity of diagnoses, coordination of care services, access to palliative care, training of professionals, and systematic assessment of quality of care must be the key components of any strategy. Clinicians and service managers need to clarify the minimum standards for care homes for older people.

Dignity and non-discrimination for people with dementia can only be successfully ensured with a comprehensive approach encompassing all policy levels. This includes respect for dignity and autonomy, non-discrimination, participation and inclusion, respect for differences, equality of opportunity, accessibility and gender equality. From a policy perspective, Availability, (in consonance with Article 26 of UNCRPD i.e. Rehabilitation, re-ablement and support services) Affordability, (in consonance with Articles,27,28,29 and 30 of UNCRP i.e., comprehensive access to

[30] Alexandre Kalache, Ina Voelcker; Living longer, living well? The need for a culture of care; Facing the facts: The truth about ageing and development https://www.ageinternational.org.uk/Documents/Age%20International%20Facing%20the%20facts%20report.pdf Last visited on 15/1/2018.

services, including work, adequate standard of living, participation in civic life, culture/recreation/sport) Accessibility(in consonance with Article 9, 13 and 19 of UNCRPD i.e. access environments, transport, information, services, using of judicial system, access to community support to live and remain in the community) and quality assurance(in consonance with Article 25 of UNCRPD i.e. good health and health services) becomes relevant here irrespective of haves and have-nots. The Scottish Charter of 'Rights for People with Dementia and their Carers' is a description of how the human rights and the UNCRPD should apply to people with dementia and their carers.[31] These rights discourses emanate from the basic claim of right by virtue of being human, the right to remain human and right to live a human existence within a civilized society. This rights discourse potentially opens up a range of possibilities for people with dementia and the caregivers to explore an explicit expression of what their rights are in national and international legislation. This role of legislations and policies enhances its potential as a tool of social engineering acting as a major catalyst to drive institutional and systemic change.

Human rights do not diminish with age, but they do need greater protection. Elderly with dementia should not be made to feel they are a 'liability' or a 'burden', and instead should be imbued with feelings of self-worth and value. Critically, they must also be recognized for the social and economic contributions that they have made to their families, their communities and societies as a whole.[32] Dignity is the quintessential factor associated with elderly with dementia, since the way in which affected people are treated by others influences their own experience of the disease.

> *Not long ago, when I arrived to visit Mom, I found her sitting in the activity room holding in her lap, with practiced ease, a very realistic baby doll dressed in a purple outfit. Seeing me, she smiled, and beamed down at the doll. "Look at him! So cute!" She shifted him gently in her arm, fussed a little*

[31] Supra Note 6.

[32] Facing the facts: The truth about ageing and development https://www.ageinternational.org.uk/Documents/Age%20International%20Facing%20the%20facts%20report.pdf Last visited on 15/1/2018.

> *with his outfit, and looked up at me again. "I don't think he's going to wake up. The fact that my mother was holding a doll, and that she likely could not clearly distinguish it from a real live baby is, to me, less important than the revelation that this moment offered, of the persistence within her of the procedural knowledge of how to care, and the desire and need to do so. The progress of her dementia makes it difficult for Mom, now, to comprehend the nature of other people's needs or the sources of their suffering, but she still does notice and respond to others, and is still moved to try to alleviate their distress.*[33]

This statement adds to the need for sensitivity and understanding towards the elderly with dementia. The lack of cognitive abilities suited to the needs of modern society might be lost to them but still the love and affection, the basic compassionate feelings remain the same.

At the individual level alternative care system can be adopted, such as spending more time with them, helping them to recall events they had been a part of, allowing them free time with their grandchildren, anything rather than locking them away in closed rooms within the house or in institutions. This individualized efforts from the caregiver is also to be supported more fully by other family members, the community and at the workplace.

Employees living with elderly with dementia could be provided with relaxed timings in their job without compromising on their job expectations, given incentives for home care services availed by them to cater to the interest of the elderly. Providing for leave equivalent to maternity leave situations can be made available to the caregivers.[34] Flexible work policies, working hours and work place *reasonable accommodation* for employees taking care of dependents with dementia or family responsibilities is one of the strategies envisaged by the International Labour Organisation (ILO) to

[33] Janelle S. Taylor: Medical Anthropology Quarterly, New Series, Vol. 22, No. 4 (Dec., 2008), pp. 313- 335.

[34] Promoting diversity and inclusion through workplace adjustments: a practical guide / International Labour Office. - Geneva: ILO, 2016 ,p.13. Persons with family responsibilities include those who are pregnant or breast-feeding, and those caring for dependent children or other dependent family members, such as a parent or sibling.

promote equity for caregivers confronting the issue of dementia. This type of policy would go a long way towards enabling and extending individualized services to the elderly with dementia. Elderly with dementia would need specialized services, but it also compassion, understanding of their needs, appropriate activities, and human interaction. These things need time and a special kind of personnel/staff who enjoy working with elderly people with challenging problems.[35] NGO's working in this field(e.g. Alzheimer's and Related disorders Society of India (ARDSI)),health care professionals engaged in higher studies in this field, home nursing service providers, nurses at hospitals and college students interested in such causes could be targeted stakeholders while imparting specialized training. The need of the hour is the blend of alternative care system and the need based approach for elderly with dementia.

Providing for government policies like free travel-allowances for elderly with dementia along with the travel concession for the caregivers assisting them with travel, user friendly alarm buttons to be provided underneath the seats while alighting from public transport, or in public transport systems equivalent to western countries especially Germany, could be another policy model that can be adopted at a broader level of functioning. Constant monitoring of such systems in place is away forward for ensuring that benefits percolate down to beneficiary level. Concessional travel packages in trains, flights and buses for picnic/touring families involving elderly with dementia could be well thought about in our system. Home health care services at government level, which are individualized in nature like pathology tests of the elderly with dementia at concessional rates and also incentivizing professionals in day care services by nurses or social workers who takes up such initiatives in the form of tax exemptions/ travel concessions/vehicle subsidy etc. could help to uphold the best interest of the elderly with dementia. This kind of attractions that could be envisaged also forms a part of the National Health Policy, 2017 in India.[36] Such policy initiatives help the elderly positioned in rural and remote areas to have access to health care.

[35] Joan Scott, Chris Edwards, Chris Fox, Clive Bowman and Graham Stokes Source: British Medical Journal, Vol. 323, No. 7326 (Dec. 15, 2001), pp. 1427-1428.

[36] Refer 11th Objective under the National health policy,2017.

Preventing and providing redress for violence against women in their older age and ensuring older women's non-discriminatory access to services, including lifelong education and training, transport and financial services is an agenda which ought to be at the priority list of developing nations.[37] This is where the principle of equality, non-discrimination and best interest of elderly women steps in. Reviewing health models based on healthy global practices,[38] developing of practice guidelines etc. can be difficult, especially with limited resources and work pressures. While families continue to play an important role in providing care and it is older people's wish to age in their own home and community, governments need to ensure that such families are sufficiently supported through a clear policy, legal framework, action plan and allocation of human and financial resources for the implementation.

The issue of elderly with dementia ought to be viewed as the tip of the iceberg. This is a problem for which education and community support constitute the main pillars to address it. Strengthening community support and networking to raise awareness on the issue is one of the policies envisaged under the National Health Policy, 2017. It requires a higher level of awareness and a greater level of training on the part of the professionals involved in the development of effective measures for its prevention and detection. This would improve the level of protection rendered to this group.

NGO's and the media can play an important role in influencing public perceptions. Espousing the cause of this population group should be prioritized. Information regarding policies and welfare services to be availed by the elderly with dementia and the concession granted to the care givers are to be projected by the media. The media is also crucial in projecting alarming cases of abuse, abandonment or violence as against elderly with dementia. A proactive role ought to be played by the media in illustrating a more positive and realistic image of persons living with this health condition. This type of

[37] Follow-up to the Fourth World Conference on Women and to the special session of the General Assembly entitled "Women 2000: gender equality, development and peace for the twenty-first century" E/CN.6/2015/NGO/258 p.5/5.

[38] Austria, Canada, Germany, Ireland, Italy, Malta, Norway, Serbia, Slovakia, Spain, Switzerland, United States of America are considered to be healthy models as per UNECE Policy Brief on Ageing No. 16 August 2015.

approach can instil confidence in care givers and goes beyond the existing negative stereotypes to show what persons with dementia can do to contribute to society as envisaged by WHO in 2012.

The specific theme of 2012 Vienna Ministerial Declaration was *ensuring a society for all ages: promoting quality of life and active ageing.* In fostering the implementation of MIPAA/RIS in its third implementation cycle (2013-2017), UNECE member States "are committed to raising awareness about and enhancing the potential of older persons for the benefit of our societies and to increasing their quality of life by enabling their personal fulfilment in later years, as well as their participation in social and economic development." (Targeted in goal III: Dignity, health and independence in older age)[39]. This is where a horizontal application of civic environmentalism in elderly care starts to accountability from state to citizens or rather the sharing of responsibilities.

Conclusion

It seems to be that the history of human rights is really a history of gradually admitting all of humanity, group by group, into its fold.
(Professor Gerard Quinn, human rights lawyer and one of the architects of the UNCRPD)

The medical model of care, which reflects the ideology of elderly with dementia as the oppressed, excluded and passively dependent on the care givers, and the social model of care which focuses on changing attitudinal barriers for elderly with dementia transforming them as empowered individuals reflects the *is* and the *ought* respectively. The '*ought'* posits the best interest theory of the elderly with dementia. At the core of the social model of disability lies a human rights perspective. However, the human rights lens has not been widely applied in relation to the lived experience, the policy response or the services that are provided to people with dementia. A Human Rights Discourse on the elderly with dementia is all about an integrated, comprehensive and holistic care approach towards them like any other individual in society. It is high time for neglect, abuse and violence against elderly with dementia to be made visible, and made to end.

[39] Dignity and non-discrimination for Persons with Dementia ;UNECE Policy Brief on Ageing No. 16, August 2015.

The Convention on the Rights of Persons with Disabilities, the WHO Disability Action Plan 2014-2021, Community Based Rehabilitation and the Sustainable Development Goals with special focus on elderly with dementia must be considered in dementia plans and policies. The four non-derogable facts can help us find the way forward 1) The number of elderly with dementia is increasing; 2) Rights of elderly with dementia irrespective of age and sex need care and protection at all levels as the degeneration of brain cells cannot be held back; 3) elderly with dementia are part of the family in specific and society in general; 4) elderly with dementia *do* have needs and they are part of the solutions and not the problems. Christine Bryden who was first diagnosed with dementia in 1995 says in her autobiography, *Dancing with Dementia;*[40]

> *Try to enter our distorted reality, because if you make us fit into your reality, it will cause us extra stress. You need to enter into our reality, connect with us by touch, or by look. You need to be authentically present, not far away. You need to realise that we are not far away or lost, but trapped by an inability to communicate and to think clearly, to express this strange mixed-up world being created by our brain damage. Think about this inner reality that we are experiencing, and try to connect with it. Be imaginative, be creative, try to step across the divide between our worlds.*

The importance of the authentic voice of the lived experience cannot be denied. A transition from a medical care model to a social model requires massive change at the micro and macro (individual, institutional and systemic) levels. The overarching message is optimistic: with the right policies and services in place for the policy makers and service providers, elderly with dementia can be viewed as contributors and assets for both individuals and societies. The change requires several 'change agents', with people with dementia being one of them. The Best interest of the elderly with dementia in the backdrop of rights based articulation is the need of the hour.

[40] Bryden, C. Dancing with Dementia: My Story of Living Positively with Dementia. London: Jessica Kingsley 2005, pp.147–8https://www.scie.org.uk/publications/guides/guide03/files/ConnectWithUs.pdf?res=true Last visited on 29/1/2018.

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Three Generations of Human Rights: Present and Future Role of NHRC

Jatindra Kumar Das*

Abstract

Protection and promotion of human rights is a universal phenomenon since the end of World War II in general and form 10 December 1948 in particular. Over time a large number of human rights instruments have been adopted at international level. The Constitution of India is a modern Indian human rights document and thus she is not lagged behind in protecting human rights at domestic level. In the light of the Indian Constitutional jurisprudence the paper examines the factors responsible for evolution of the first, second and third generation of human rights comparing the international human right jurisprudence and role of the NHRC for monitoring these rights and its prospect and retrospect.

Introduction

While various principles of human rights derive from ancient doctrines of "natural rights" founded on natural law, the modern expression "human rights" is of recent origin, emerging from the post Second World War instrument, the Charter of the United Nations.[1] Although there are

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[1] See Jeffrey Kahn, "Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights," 56(1) *Virginia Journal of International Law* (2016) pp. 1-49; S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008); Rhonda L. Callaway and Julie Harrelson Stephens (ed.), *Exploring International Human Rights: Essential Readings*, (Lynne Rienner Publishers, USA, 2007); Emilio García Méndez, "Origin, Meaning and Future of Human Rights: Reflections for a New Agenda," 1(1) *International Journal on Human Rights,* (2004) pp.7-19; Heinrich Albert Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy,* (Liberty Fund Inc., Indianapolis, USA, 1998); Eleanor Roosevelt, "The Struggle for Human Rights," *Department of State Bulletin*, (10 October 1948), pp. 457- 466.

controversies among thinkers about the definition of human rights, we find one prevalent definition; simply the rights one has by virtue of being human. Thus, Jack Donnelly[2] explains that human rights "are held by all human beings, irrespective of any rights or duties individuals may (or may not) have as citizens, members of families, workers, or parts of any public or private organization or association. They are universal rights." Martin Golding[3] defines human rights as those rights, which are essential for a human community at large, that transcend the various needs of any special community of which an individual is a member, so that the individual should enjoy a good life in the community.

Similarly, according to Joel Feinberg,[4] human rights are "moral rights held equally by all human beings, unconditionally and unalterably." These definitions suggest that human rights apply to all people in all states; but they still fail to provide any specificity of what actually constitutes a human right. At the national level, the persistent inability to come to any consensus has led to 'definitions of convenience' as states carve out meanings and conceptions that serve their own best interests. In India, Section 2(d) of the Protection of Human Rights Act, 1993 defines human rights as follows:"[H]uman rights means rights relating to life, liberty, equality and dignity of the individual, guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India." However, one category of human rights conflicts with the other category and preferential debates are going on which are based on the needs of the contemporary era. Amartya Sen's path breaking work on famines emphasises the importance of upholding a wide range of civil and political rights in order to ensure that potential famines are exposed and remedied in advance. Other commentators have been less optimist about the extent to which a democratic society will provide adequate protection for economic, social and cultural rights. In this context the issues are: Do needs and rights represent a basic contradiction? Do the former really undermine the latter?

[2] Jack Donnelly, International Human Rights, (Westview Press, Boulder, 1998) at p. 18.

[3] Martin Golding, "Towards a Theory of Human Rights", 52(4) The Monist, (1968) pp. 521-549, at p.548.

[4] Joel Feinberg, Social Philosophy, (Prentice Hall, 1973) at p. 85.

Sen argues that-[5]

> *[T]his is altogether the wrong way to understand, first, the force of economy needs and, second, the silence of political rights. The real issue that have to be addressed lie elsewhere, and they involve taking note of extensive interconnections between the enjoyment of political rights and the appreciation of economic needs. Political rights can have a major role in providing incentive and information toward the solution of economic privation. But the connection between the rights and needs are not merely instrumental, they are also constitutive. For our conceptualization of economic needs dependents on open public debates and discussions and the guaranteeing of those debates and those discussions requests an insistence on political rights.*

There is a general question as to whether Sen's understanding is consistent with UN's formulation of two sets of rights (civil and political rights and, economic, social and cultural rights). The UN Committee on Economic, Social and Cultural Rights[6] asserted that: "there is no basis whatsoever to assume that the realization of economic, social and cultural rights will necessarily result from the achievement of civil and political rights, or that democracy can be a sufficient condition for their realization, in the absence of specifically targeted policies." In response to the UN Committee's assertion Conor Great[7] argues that the proponents of judicially enforceable economic, social and cultural rights down play the deep systemic weaknesses that afflict the judicial system in most democracies, while speaking to avoid the more legitimate goal of improving the responsiveness and legitimacy of the democratic system, rather than simply listing and accepting its shortcoming. For him "it is through policies rather than law" that economic, social and cultural rights are best promoted.

[5]Amartya Sen, "Freedoms and Needs" The New Republic (10 and 17 January 1994), p. 31.

[6] *See*, UN Doc. E/C.12/1990/8, p. 85. *See also*, R.E. Goodin, "The Development-Rights Trade-off: Some Unwarranted Economic and Political Assumptions," 1 *Universal Human Rights* (1979), pp. 31– 42; R. Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights?, 5, *Human Rights Quarterly* (1987), pp. 467–490.

[7] Conor Great, "Against Judicial Enforcement" in C. Gearty and V. Mantouvalou, *Debating Social Rights* (Hart Publishing, Oxford, 2011), pp. 90–98.

It is matter of fact that during the preferential debate of human rights the concept of first, second and third generation of human rights emerged.

First and Second Generations of Human Rights

(A) The Concept

For a long time the notion of different "generations" of human rights has established itself in human rights literature and teaching.[8]The rights of the "first generation" are the "classical" civil and political rights which have been formulated since the latter part of the 18th century, while rights of the "second generation" are linked to the economic, social and cultural rights which developed on the national level in the course of the "social question" of the latter part of the 19th century. The first generation of human rights include, *inter-alia,* the prohibition of torture, justice-related rights (such as equality before the law, the presumption of innocence, fair trials, etc.), the right to the freedom of religion or belief, opinion, assembly and association, as well as the participation in the administration of public affairs and the right to vote. The examples of second generation of human rights are the right to work, just and favourable working conditions, social security, health, adequate housing, food, clean drinking water and sanitation, as well as the right to freely participate in cultural life. These two generations of human rights are recognised under modern international human rights instruments especially adopted during post Second World War era. Thus, besides the adoption of 1948 Universal Declaration of Human Rights (UDHR), the international community in 1966 came up with two binding instruments of modern human rights law, namely, (i) the International Covenant on Civil and Political Rights (ICCPR), and (ii) the International Covenant on Economic, Social and Cultural Rights (ICESCR). Initially, ideological battles centred upon the tensions between and ideological divisions underpinning civil and political rights and economic, social and cultural rights. Thus, since 1966 the generational dichotomy of human rights is widely debated putting the substance of the concept of human rights.

[8] E. S. Venkataramiah, "Human Rights in the Changing World" in E. S. Venkataramiah (ed.) *Emerging Human Rights* (International Law Association, New Delhi, 1988) pp. 355-361.

(B) Importance and Implications

The importance and implications of this issue has been mirrored by a prodigious output of human rights treaties and Constitutional dispensation. Consequently, there were a number of criticisms against the "rights status" of economic, social and cultural rights with an attempt to rank them lower than civil and political rights. Thus, Article 37 of the Constitution of India, which has been considered a provision of economic, social and cultural rights, provided that directive principles (under Articles 36-51, Part-IV) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. The directive principles under the Constitution have been described as forerunners of the UN Convention on Right to Development as inalienable human rights,[9] but ultimately the notion of human rights generations often goes hand in hand with a problematic weighting whereby classical civil and political rights are portrayed as the actual and basic human rights and as such are given priority over economic, social and cultural rights.

The above view is based on the meanwhile outdated perception that only civil and political rights amount to basic "negative rights" that must merely be respected by the state, whereas economic, social and cultural rights are always resource dependent "positive rights", even luxury rights, which always required comprehensive activities on the part of the state. Initially the Courts in India took the view that in case of conflict between directive principles (economic, social and cultural rights) and fundamental rights (civil and political rights), the later would supersede the former.[10] By this time in India the Court's philosophy underwent a change and the Apex Court in *Chandra Bhavan,*[11] *Kesavananda Bharathi*,[12] and *Minerva Mills*,[13] took the view that fundamental rights and directive principles of

[9] See *Air India Statutory Corporation* v. *United Labour Union*, AIR 1997 SC 645: (1997) 9 SCC 377.

[10] See Jatindra Kumar Das, *Human Rights Law and Practice* (PHI Learning Private Limited, Delhi, 2016) at pp. 275-276.

[11] *Chandra Bhavan* v. *State of Mysore*, AIR 1970 SC 2042: (1970) 2 SCR 600.

[12] *Kesavananda Bharathi* v. *State of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 225.

[13] *Minerva Mills* v. *Union of India*, (1980) 2 SCC 591: (1981) 1 SCR 206.

the Constitution should be treated as of equal value and the Court's attempt should be to bring about harmony between the two. Consequently, the Apex Court held that the right to life enshrined in Article 21 of the Constitution, which is a fundamental right, means something more than survival or mere animal existence.[14] In *Bandua Mukthi Morcha* v. *Union of India*,[15] the Supreme Court held that the right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of state policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. The right to travel abroad,[16] right to free legal assistance,[17] right against solitary confinement,[18] right against bar fetter,[19] right against handcuffing,[20] live with human dignity,[21] right to prisoners to interview,[22] right to compensation,[23] right to sustenance allowance during suspension,[24] right against delayed execution,[25] right against custodial violence,[26] right against public hanging,[27] right to means of livelihood,[28] right to a pollution free environment,[29] right to

[14] *Kharak Singh* v. *State of U.P,* AIR 1963 SC 1295: (1964) 1 SCR 332

[15] AIR 1984 SC 802: (1984) 3 SCC 161.

[16] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597: (1978) 1 SCC 248.

[17] *M. H. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548: (1978) 3 SCC 544.

[18] *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675: (1978) 4 SCC 494.

[19] *Charles Sobraj* v. *Supt. Central Jail,* AIR 1978 SC 1514: (1978) 4 SCC 104.

[20] *Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535: (1980) 3 SCC 526.

[21] *Francis Coralie Mullin* v. *Union Territory of Delhi,* AIR (1981) SC 746: (1981) 1 SCC 608.

[22] *Prabha Dutt* v. *Union of India*, AIR 1982 SC 6: (1982) 1 SCC 1.

[23] *RudulSah*v. *State of Bihar*, AIR 1983 SC 1086: (1983) 4 SCC 141.

[24] *Maharashtra* v.*Chandrabhan* , AIR 1983 SC 803: (1983) 3 SCC 387.

[25] *T.V. Vatheeswaran* v. *State of Tamil Nadu*, 1983 (1) SCALE 115: (1983) 2 SCC 68.

[26] *Sheela Bhasre* v. *State of Maharashtra*, AIR 1983 SC 378: (1983) 2 SCC 96.

[27] *Attorney-General* v. *LachmaDevi*, 1986 Cri L J 364.

[28] *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180: (1985) 3 SCC 545.

[29] *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965: 1986 (1) SCALE 199.

health,[30] right to safe drinking water,[31] right to education,[32] right to shelter,[33] right to speedy trial,[34] right to gender equality,[35] right to a fair trial,[36] right to a quality life,[37] right to family pension,[38] right against police atrocities,[39] right to food,[40] right to portable drinking water,[41] rights of sex workers,[42] rights of sewage workers,[43] rights of juveniles,[44] and rights of transgender[45], have been held to be part of right to life under Article 21 of the Constitution. In *Grih Kalyan Kendra Worker's Union* v. *Union of India*,[46] the Apex Court held that in determining the scope and ambit of fundamental rights the Court may not entirely ignore the directive principles and should adopt the principle of harmonious constriction so as to give effect to both as much as possible and thus approach of reading directive principles into fundamental rights should be adopted by the court.

Third Generation of Human Rights

(A) The Concept

The next significant evolution occurred with the advent of the "third generation" of human rights. These rights are nothing but solidarity or group or collective rights, of society or peoples' rights, which were articulated

[30] *Consumer Education and Research Center* v. *Union of India*, AIR 1995 SC 922: JT 1995 (1) SC 636.

[31] *APPCB* v. *M. V. Naidu,* AIR 1999 SC 822.

[32] *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178: (1993) 1 SCC 645.

[33] *Shantistar Builders* v. *N.K. Totame,*AIR 1990 SC 630: (1990) 1 SCC 520.

[34] *Common Cause* v. *Union of India*, AIR 1997 SC 1539: 1996 (8) SCALE 557.

[35] *Vishaka* v. *State of Rajasthan,* AIR 1997 SC 3011: JT 1997 (7) SC 384.

[36] *Police Commissioner, Delhi* v. *Registrar, Delhi High Court,* AIR 1997 SC 95: (1996) 6 SCC 323.

[37] *Lal Tiwari* v. *Kamala Devi* , AIR 2001 SC 3215: JT 2001 (6) SC 88.

[38] *S.K. Mastan Bee* v. *General Manager*, JT 2002 (10) SC 50: (2003) 1 SCC 184.

[39] *Batchav. State,* (2011) 7 SCC 45: [2011] 3 SCR 1091.

[40] *Kishen Patnaik* v. *State of Orissa*, AIR 1989 SC 677.

[41] *Environmental and Consumer Protection Fund* v. *Delhi Administration*: 2011 (13) SCALE 503.

[42] *Budhadev Karmaskar* v. *State of West Bengal,* 2011 (8) SCALE 155: [2011] 9 SCR 680.

[43] *Delhi Jal Board* v. *National Campaign for Dignity,* 2011 (7) SCALE 489: (2011) 8 SCC 568.

[44] *Sampurna Behura* v. *Union of India*, 2012 (3) JCR 113 (SC): 2011 (11) SCALE 512.

[45] *National Legal Services Authority* v. *Union of India* , AIR 2014 SC 1863: (2014) 5 SCC 438.

[46] AIR 1991 SC 1173: (1991) 1 SCC 611.

in second half of the 20th century.[47] The third generation of human rights symbolised by rights to: (i) economic development;[48] (ii) self-determination; (iii) prosperity and peace; (iv)benefit from economic growth; (v) social harmony; (v) a healthy environment and health; (vi) participation in cultural heritage;[49] (vii) natural resources; (viii) inter-generational equity.[50] The third generation of human rights are necessary for ensuring appropriate condition of society to be able to provide first and second generation human rights. Categorizations of these three generations of human rights should not be merely an academic distinction but should be blurred and fused together by all countries of the world. These rights were rooted in post-colonial discourses. Unlike the first and second generation, these newer rights cannot be understood as a reaction to colonialism. The hallmark of third generation rights, in contrast with first generation civil and political rights and second generation social, economic, and cultural rights, is that they involve big global problems that no state or region of the world can solve alone. For this reason, third generation rights are often referred to as rights of "fraternity" or "solidarity."[51]

(B) Importance and Implications

The advent of the right to self-determination as a collective right has been realised and implemented under common Article 1 of ICCPR and ICESCR[52];

[47] See Rosa Freedman, "Third Generation' Rights: Is there Room for Hybrid Constructs within International Human Rights Law?" (2)4 *Cambridge Journal of International and Comparative Law* (2013) pp. 935–959;Jason Morgan-Foster, "Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement"8 *Yale Human Rights and Development Law Journal* (2005) pp. 67-116; Bülent Algan, "Rethinking 'Third Generation' Human Rights" 1(1) *Ankara Law Review* (2004) pp. 121-155.

[48] Stephen Marks, "The Human Right to Development: Between Rhetoric and Reality" 17 *Harvard Human Rights Journal* (2004) pp. 136-168.

[49] See J. K. Das, "Right to Education of Indigenous Peoples and Their Culture and Language in International Human Rights Perspective" 1(4) *Journal of Development Management and Communication* (2014) pp. 442-453.

[50] See S. Prabhu, "Is it Possible for Dalits in India to Enjoy Third Generation Human Rights? -An Overview" 10(5) *Indian Journal of Applied Research* (2015) pp. 444-446; J. K. Das, "Rights of Indigenous Peoples Related to Development and Environmental Security: A Comparative Human Rights Perspective," 3(2) *Indian Human Rights Law Review* (2012) pp. 261-278.

[51] See M. Christian Green, "From Third Wave to Third Generation: Feminism, Faith, and Human Rights" in M. Christian Green (ed.) *Feminism, Law, and Religion* (Ashgate Publishing, 2013), pp. 141-171.

[52] See J. K. Das, "The Right of Self-determination of Indigenous Peoples: Developing Dynamics of Human Rights", 33 *Indian Journal of International Law*, (2003) pp.705-728.

that right being the oldest and most enshrined third generation right. The right to self-determination, then, represents neither a distinct ideology of human rights nor any new construction of third generation human rights identity, but a reaction to subjugation and oppression and thus falls under the post-colonial discourse.[53] Similarly, the right to sovereignty over permanent resources is another response to the collective experience of colonialism and occupation, with the imperial powers having laid claim to the resources within states under their control. Again, this right represents a post-colonial discourse rather than having a distinct ideology. States that had been formed out of the ashes of colonisation sought to assert rights to govern themselves as well as to economic and social development[54] and to participate in and benefit from the common heritage of mankind.[55] The 1986 UN Declaration on the Right to Development contains unique features of the third generation of human rights. Classical human rights were moulded on an individual's entitlement in his or her own State and the third generation of human rights calls for new approaches. The right to development differs in nature from the first and second generation in that they constitute group or collective rights. But in so far as a group or collective is an assemblage of individual the so-called collective rights are also individual rights. As such they require States and the community of States to create conditions necessary for the exercise of the rights in question.[56] To illustrate, the Declaration on the Right to Development spells out this obligation in Article 3(3):

> *"States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights."*

[53] See Karel Vasak, *The International Dimensions of Human Rights* (Unesco, 1982).

[54] See GA Res 41/128, 4 December 1986 regarding "Declaration on the Right to Development".

[55] See Convention Concerning the Protection of World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

[56] Isabella D. Bunn, "The Right to Development: Implications for International Economic Law"15(6) *American University International Law Review*, (2000) pp. 1425-1567.

This provision makes it clear that the right to development imposes a responsibility on all States to eliminate obstacles to development. Sovereignty, which shields States action from the purview of international scrutiny, cannot plausibly be a valid defence against violation of a right to development. These "newer rights" at various stages in their development, reflect ideological perspectives of a range of states that were unable to make their voices heard during international human rights law's creation and development.[57] The right to development has a fore of its own, because it embodies the felt needs of mankind. In as much as it expresses the felt needs of the international community for whose well being it is meant for, its future is assured. This reasoning applies *mutatis mutandis*[58] to other rights of the third generation also. It can be said that the third generation of human rights presages a new development in human rights jurisprudence. To appreciate this phenomenon, we need "to move beyond the traditional approaches to human rights and structure respect for every person's right to be human."[59] The right to be human is the prime objective of the third generation of human rights.

It is a matter of fact that the right to a clean and healthy environment has not been included in the core human rights treaties on civil and political rights and economic, social and cultural rights. However, this right is enunciated in a number of international human rights instruments such as the Protocol of San Salvador,[60] the African Charter on Human and Peoples' Rights,[61] the United Nations Declaration on the Rights of Indigenous

[57] J. Donnelly, "The Theology of the Right to Development: A Reply to Alston", 15 *California Western International Law Journal* (1985) pp.-519-536.

[58] Mutatis mutandis is a Latin phrase which means "the necessary changes having been made" or "once the necessary changes have been made, see Ishwarlal Girdharlal Joshi v. State of Gujarat, AIR 1971 SC 65.

[59] See Upendra Baxi, "The Development of the Right to Development" in Janus Symonides (ed.) *Human Rights: New Dimensions and Challenges*, (Ashgate, Dartmouth, 1998) pp. 99-111.

[60] Adopted in San Salvador on November 17, 1988. This is known as Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Adopted in San Salvador on November 17, 1988.

[61] African Charter on Human and Peoples Rights was adopted in Nairobi on June 27, 1981 and entered into force on October 21, 1986.

Peoples,[62] and in "soft law" documents including UN resolutions, reports and the creation of a Special Procedures Mandate on the impact on human rights caused by dumping of toxic and illicit waste.[63] These instruments have articulated many thirdgeneration human rights as human rights, owing to their "impact on other human rights", by describing them in such a way that the rights are viewed through a human rights perspective. The third generation of human rights changes the focus on the substance of rights and imposes responsibilities and duties rather than on rights. The substance of the initial approach of the third generation of human rights focuses on the rights themselves. Thus, the right to self-determination under 1966 ICCPR and ICESCR was drafted in such a way so as to focus only on the substantive aspect of the right. Common Article 1 of ICCPR and ICESCR provide:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[64]

The initial approach towards the right to self-determination has changed over time and the right to a democratic and equitable international order demonstrates a new approach towards the right to self-determination, and thus, the resolution creating a Special Procedures Mandate[65] sets out 16 substantive aspects of the right, which include States responsibilities.[66] Thus, under the said Special Procedures Mandate some of the substantive aspects focus on the right, while others focus on states responsibilities, including: (i) the shared responsibility of the nations of the world for

[62] See GA Res 61/295, 2 October 2007 on the "United Nations Declaration on the Rights of Indigenous Peoples". For various issues on rights of indigenous peoples see J. K. Das, *Human Rights and Indigenous Peoples* (APH Publishing, New Delhi, 2001); J. K . Das, "Protection of Rights of Indigenous Peoples under Human Rights Law", 1 *Indian Human Rights Law Review,* (2010) pp. 197-227.

[63] CHR Res 1999/23, UN Doc E/CN.4/1999/167, 26 April 1999 and CHR Res 1995/81, 8 March 1995 on adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

[64] Common Article 1, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3 and International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171.

[65] HRC Res 8/5, 18 June 2008 on "Promotion of a Democratic and Equitable International Order".

[66] Ibid.,para. 3(a)-(p).

managing worldwide economic and social issues,[67] (ii) the promotion and consolidation of transparent, democratic, just and accountable international institutions in all areas of cooperation,[68] and (iii) the promotion of equitable access to benefits from the international distribution of wealth through enhanced international cooperation, in particular in international economic, commercial and financial relations.[69] Thus, the third generation of human rights have attempted to satisfy the human need of the world.

(C) Indian Approach

In India the third generation of human rights, including the right to development and environmental protection are recognised under the Constitution of India. The Apex Court of India in *State of Uttaranchal* v. *Balwant Singh Chaufalan*,[70] emphasized that the directions that while deciding a case on development including sustainable development, the court should meet the requirements of public interest, environmental protection, elimination of pollution and sustainable development. While ensuring sustainable development it must be kept in view that there is no danger to the environment or the ecology. In *M.C. Mehta* v. *Kamal Nath*,[71] the Supreme Court was of the opinion that Articles 48A and 51A(g) of the Constitution of India must be considered in the light of Article 21 of the Constitution of India. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21. In the matter of enforcement of rights under Article 21, the Supreme Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 and has held that if those rights are violated by disturbing the environment, it can award damages, not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, the Apex Court, through its various judgments has

[67] Ibid.,para. 3(p).

[68] Ibid.,para. 3(g).

[69] Ibid para. 3(n).

[70] AIR 2010 SC 2550: (2010) 3 SCC 402.

[71] 2000 (5) SCALE 69: (2000) 6 SCC 213.

given effect to the rights available, to the citizens and persons alike, under Article 21. The court also laid emphasis on the principle of "Polluter-Pays". According to the court, pollution is a civil wrong. It is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages or compensation for restoration of the environment and ecology.

The National Human Rights Commission and Its Active Role in Protecting Human Rights

India acceded to the ICESCR and ICCPR in 1979.[72] Subsequently, the Protection of Human Rights Act, 1993[73] was enacted in India for the constitution of the National and State Human Rights Commissions for better protection of human rights and for matters connected therewith or incidental thereto.[74] The Human Rights Commission Bill introduced in the Lok Sabha on May 14, 1992 was referred to the Standing Committee on Home Affairs of Parliament. The President of India promulgated an Ordinance, which established a National Commission on Human Rights on September 27, 1993, owing to pressure from foreign countries as well as on the domestic front. Thereafter, a Bill on Human Rights was passed in the Lok Sabha on December 18, 1993 to replace the ordinance promulgated by the President. The Bill became an Act, namely, the Protection of Human Rights Act, 1993[75] which was enacted in India for constitution of National and State Human Rights Commissions for better protection of human rights relating to life, liberty, equality and human dignity of the individual guaranteed by the Constitution or embodied in the International Covenants[76] and enforceable by Courts in

[72] India had ratified / acceded to the ICCPR and ICESCR on March 17, 1979.

[73] Received the assent of the President on January 8, 1994 and published in the Gazette of India, Extra. Part II, Section 1, dated 10th January 1994, pp.1-16 Sl. No. 10.

[74] *Remdeo Chauhanv.Bani Kant Das,* AIR 2011 SC 615: JT 2010 (12) SC 516; *Bani Kanta Das* v. *State of Assam,* 2009 (8) SCALE 65: (2009) 15 SCC 206. see, Parmanand Singh, " The Epistemology of Human Rights: A Theoretical Essay" 57(1) *Journal of Indian Law Institute* (2015) pp. 1-26.

[75] Received the assent of the President on January 8, 1994 and published in the Gazette of India, Extra.Part II, Section 1, dated 10th January 1994, pp.1-16 Sl. No.10.

[76] "International Covenants", according to Section 2(d) of the *Protection of Human Rights Act* 1993, means the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* adopted by the General Assembly of the United Nations on December 16, 1966. See *People's Union for Civil Liberties* v. *Union of India*, JT 2005 (1) SC 283: (2005) 2 SCC 436.

India,[77] and for matters connected therewith or incidental thereto.

(A) Structure of the NHRC

The National Human Rights Commission (NHRC) consists of (i) a Chairperson, retired Chief Justice of India, (ii) one member who is, or has been, a Judge of the Supreme Court of India, (iii) one member who is, or has been, the Chief Justice of a High Court, (iv) two members to be appointed from among persons having knowledge of, or practical experience in, matters relating to human rights, (v) in addition, the Chairpersons of four National Commissions of (Minorities, Scheduled Castes, Scheduled Tribes and Women) serve as ex officio members. There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him. The headquarters of the Commission shall be Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.[78] The appointment of the Chairperson and other Members are elaborately discussed under Section 4 of the Act. The other provisions relate to the removal of a member of the Commission,[79] the term of office of Members,[80] a member to act as a Chairperson or to discharge his functions in certain circumstances,[81] the terms and conditions of service of members,[82] vacancies, etc., not to invalidate the proceedings of the Commission,[83] the procedure to be regulated by the Commission,[84] the officers and the other staff of the Commission.[85]

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[77] *Remdeo Chauhan* v. *Bani Kant Das,* AIR 2011 SC 615: JT 2010 (12) SC 516; *Bani Kanta Das* v. *State of Assam,* 2009 (8) SCALE 65: (2009) 15 SCC 206. see, Parmanand Singh, " The Epistemology of Human Rights: A Theoretical Essay" 57(1) *Journal of Indian Law Institute* (2015) pp. 1-26.

[78] Section 3 of the Protection of Human Rights Act 1993.

[79] Ibid., Section 5.

[80] Ibid., Section 6.

[81] Ibid., Section 7.

[82] Ibid., Section 8.

[83] Ibid., Section 9.

[84] Ibid., Section 10.

[85] Ibid., Section 11.

(B) Functions of the NHRC

The National Human Rights Commission is to perform the following functions: (i) proactively or reactively inquire into violations of human rights or negligence in the prevention of such violation by a public servant, (ii) by leave of the court, to intervene in court proceeding relating to human rights, (iii) to visit any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates and make recommendations, (iv) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation, (v) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures, (vi) to study treaties and other international instruments on human rights and make recommendations for their effective implementation, (vii) undertake and promote research in the field of human rights, (viii) engage in human rights education among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means, (ix) encourage the efforts of NGOs and institutions working in the field of human rights, (x) such other function as it may consider it necessary for the protection of human rights.[86]

The National Human Rights Commission shall perform functions pursuant to the directions issued by the Supreme Court in exercise of the jurisdiction under Article 32 of the Constitution. The Supreme Court in *Pararnjit Kaur* v. *State of Punjab*,[87] stated: "the Commission would function pursuant to the directions issued by this Court and not under the Act under which it is constituted." In deciding the matters referred by this Court, the National Human Rights Commission is given a free hand and is not circumscribed by any condition. Therefore, the jurisdiction exercised by the National Human Rights Commission in these matters is of a special nature not covered by enactment of law, and thus acts *sui generis.* The Apex Court in exercise of powers under Article 32, entrusted

[86] Ibid., Section 12.

[87] IR 1999 SC 340: (1999) 2 SCC 131.

the National Human Rights Commission to deal with certain matters. It has held that, all authorities in the country, including the National Human Rights Commission, are bound by the directions of the Supreme Court. The NHRC has the power to approach the High Courts or the Supreme Court for an order directing the responsible public body or person to pay the specified compensation.[88] The NHRC may, after completing an inquiry, recommend that the responsible Government or authority grant immediate relief to the victim or the members of his family.[89] The Commission has held that the "immediate interim relief envisaged under Section 18 (3) of the Act has to relate specifically to the injury/loss suffered as a result of the human rights violation, and that this will not absolve the State of its liability for compensation."[90] In a case, the NHRC held that "This provision (Section 18 (3) of the Protection of Human Rights Act, 1993) has been generously operated and the power conferred under it is widely exercised by the Commission in deserving cases. The Commission has in this connection kept itself alive to the spirit of various United Nations instruments."[91]

In *People's Rights* v. *Union of India*,[92] a petition was filed before the Supreme Court praying for constituting high level committee to investigate occurrence of occupational disease and thus the issue was whether action programme could be evolved so as to alleviate grievances of those workers who had died in between on account of said disease. In this connection the National Human Rights Commission (NHRC) submitted a report. The Supreme Court, given the importance of the interest of the kith and kins of those people who died on account of the disease and in the interest particularly of those orphan children of those deceased, directed the State to, forthwith, comply with the direction of the NHRC in its report. Thus the Court directed that the State shall pay a certain amount to the kin of the deceased, who had been identified by the NHRC, and also arrange to deposit in their names in fixed deposits, so that the monthly interest

[88] NHRC, Annual Report 1998-1999, II. 2.19.

[89] Section 18 (3) of the Protection of Human Rights Act, 1993.

[90] NHRC, Annual Report 1998-1999, Case No.144/93-94/NHRC.

[91] NHRC, Annual Report 1998-1999, Case No.3177/96-97/NHRC.

[92] 2016 (5) SCALE 46.

accruing there from can be availed by the kin of the deceased.

(C) Active Role of the NHRC

The NHRC plays an active role for proper implementation of various rights, as discussed under headings, first, second and third generations of human rights, and for this purpose there is a well organised investigation division within the NHRC. The primary duty of this investigation division is to look into complaints received by the Commission. For this purpose the investigation team makes on the spot investigations. The Act outlines the investigative role of the Commission. Subsection 1(b) of Section 11 provides, "Such police and investigative staff under and officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the NHRC."

A considerable increase in public awareness of the work of the NHRC has been observed. This is reflected in the vast increase in the number of complaints of human rights violations received by the Commission over the years. Many of the cases received by the Commission were of great poignancy, but the Commission, because of Regulation 8 of the NHRC, could not entertain them. The Commission broadly divides cases in these following categories: (1) Custodial deaths; (2) Police excesses (Torture, Illegal detention/ unlawful arrest, false implication etc.; (3) Fake encounters; (4) Cases related to Women and Children; (5) Atrocities against Dalits/Members of Minority community/Disabled (6) Bonded labour (7) Armed forces/ paramilitary forces and (8) other important cases.[93] The Commission, under Article 32 of the Indian Constitution, has filed a writ petition as a public interest petition before the Supreme Court of India. The NHRC filed this petition mainly for the enforcement of fundamental rights of about 65,000 Chakma/ Hajong tribals under Article 21 of the Constitution.[94]

The response of the NHRC on the death of Chander Prakash in judicial custody[95] is important to mention here. The Commission received

[93] http://www.nhrc.nic.in, visited on 24 August 2017.

[94] *National Human Rights Commission of India* v. *State of Arunachal Pradesh*, AIR 1996 SC 1234: (1996) 1 SCC 742.

[95] See Case No. 5237/24/2000-2001-CD.

intimation from the Superintendent of the District Jail, Bareilly about the death of Chander Prakash, aged 25 years, in District Jail Bareilly. The Commission concluded that jail staff had inflicted injuries, which resulted in his death and therefore there was a clear case of a violation of human rights. Accordingly, a notice was issued to the Chief Secretary, Government of UP to show cause as to why immediate interim relief u/s 18 (3) of the Protection of Human Rights Act, be not granted to the next of kin of the deceased. The Commission, therefore, directed the State of UP to pay rupees one lakh as immediate interim relief to the legal heirs of the deceased, and to submit compliance. Similarly, the NHRC took cognizance on the death of Sonali Bose in a shoot out by police in Agra.[96] In this case the Commission took suo-motu cognizance of the news item titled "Again UP cops kill wrong target: student" and "Mistaken identity: Police shoots girl" which appeared in The Indian Express and the Statesman respectively on 18 July 2002. The Commission held that the grant of Rs. 5.00 lakhs as immediate interim relief under section 18(3) of the Act in the admitted circumstances of the case was neither excessive nor unreasonable. The Commission, therefore, asked the Government to send a report on the action taken to the Commission.

The Commission received a complaint from Shri Bhaskar Mahadeorao bringing to the notice of the Commission a news item published in the "Daily Maharashtra Times" on 8.1.2003. It was reported in the newspaper that one Vikram, a samosa vendor, was pushed from a running train by RPF Police personnel for travelling without a ticket.[97] In view of the prima facie violation of human rights of the boy, the Commission directed the Secretary, Ministry of Railways to show cause as to why the next of kin of the deceased should not be granted immediate interim relief u/s 18(3) of the Protection of Human Rights Act 1993. The Commission therefore directed the Railway Board, Govt. of India to pay a sum of Rs. 50,000/- as immediate interim relief to the next of kin of the deceased.

The Commission took suo-motu cognizance of a newspaper report which indicated that on 4 May 2003 on the occasion of 'Akti' or Akshaya

[96] See Case No. 13664/24/2002/2003-FC.

[97] Case No. 21/1/2003-2004.

Tritya', a festival for marrying dolls celebrated all over Chhattisgarh every year, weddings of hundreds of under-age or very young children were preformed, despite the Government's preventive efforts.[98] The Commission was of the considered opinion that taking appropriate steps for education of the girl child would also be helpful in eradicating the evil of child marriage. The Chief Secretary, Government of Chhattisgarh was requested to personally look into the matter for providing education to girl children in all the districts and, more particularly, in the districts where the practice of child marriage was rampant.

The Commission received a complaint dated 21 June 2002 concerning Desh Raj, an orthopedically challenged person with more than 50% disability of the lower limbs, residing in Mandawali-Fazalpur, Delhi, stating that he had appeared in the Medical entrance examination 2002 conducted by the University of Delhi. He alleged that there was no provision of reservation for candidates who were physically handicapped and that the result of the entrance examination for admission in MBBS/BDS Course 2002 announced by the University also did not display any separate merit list of candidates who were handicapped.[99] The Commission directed that a provision of reservation of 3% seats be reserved in all medical courses for physically handicapped candidates in accordance with Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and the complainant Desh Raj, Son of Ratti Ram was to be admitted to the MBBS course of the University.

Conclusion

Over time, especially after World War II, the concept of human rights has been expanded and categorised into different classes/generations for preferential purposes. So far as the implementation and enforcement of human rights are concerned, the National Human Rights Commission is playing an important role. But this is not enough, hence under Sections 21 to 29 of the Protection of Human Rights Act provides for the setting up of State Human Rights Commission in various States[100] by the State

[98] Case No.56/33/2003-2004.

[99] Case No.1023/30/2002-2003.

[100] At present there are 25 State Human Rights Commissions are working in different States in

Governments. These bodies must consist of:[101] (i) a Chairperson who has been a Chief Justice of a High Court, one member who is, or has been, a Judge of a High Court;(ii) one Member who is, or has been, a Judge of a High Court or District Judge in the State with a minimum of seven years experience as District Judge; (iii) one Member to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.[102] There shall be a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.[103] The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.[104] A State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution of India.[105]

The Governor shall appoint the Chairperson and other members of the Commission. These appointments shall be made after obtaining the recommendation of a Committee consisting of

(i) The Chief Minister as Chairperson; (ii) Speaker of the Legislative Assembly as Member; (iii) Minister in-charge of the Department of Home, in that State as Member; (iv) Leader of the Opposition in the Legislative Assembly as Member.[106] A person appointed as Chairperson or as Member of the State Commission shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. However, a Member shall be eligible for re-appointment for another term of five years but in no circumstances

India as on 25.07.2018. They are: Assam, Andhra Pradesh, Bihar, Chhattisgarh, Gujarat, Goa, Himachal Pradesh, Jammu and Kashmir, Kerala, Karnataka, Madhya Pradesh, Maharashtra, Manipur, Odisha, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal, Jharkhand, Sikkim, Uttarakhand, HaryanaTripura, and Meghalaya. Still a few States like Arunachal Pradesh, Delhi, Mizoram, and Nagaland have yet to establish State Human Rights Commissions in India.

[101] Section 21(2) of the Protection of Human Rights Act, 1993.

[102] Substituted by the Protection of Human Rights (Amendment) Act, 2006.

[103] Section 21(3) of the Protection of Human Rights Act, 1993.

[104] Section 21(4); Ibid.

[105] Section 21(5); Ibid.

[106] Section 22; Ibid.

a Member shall hold office after he has attained the age of seventy years. On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.[107] In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Governor may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such a vacancy.[108] Like the National Commission, the State Commissions are given similar powers and vested upon similar functions under Section 29 read with Section 12. While the National Commission has nationwide jurisdiction, the State Commissions are given power within their respective States. Under Section 12(f) of the Act, the National Commission has the power to study treaties and other international instruments on human rights and make recommendations for their effective implementation, but the power of the State Commissions in this respect is omitted under Section 29(c) of the Act. Section 23 of the Act provides provisions for resignation and removal of the Chairperson or a Member of the State Commissions. The Supreme Court in *K. Saravanan Karuppasamy* v. *State of Tamilnadu*,[109] summarised the constitution, power and function of the State Human Rights Commission thus:

Chapter V of the Act consisting of Sections 21 to 29 deals with the constitution of a State Human Rights Commission and its functions thereto. A State Commission consists of a Chairperson who has been a Chief Justice of a High Court and four Members. The Act has put in place various remedial measures for prevention of any human rights violations and confers power upon the NHRC/SHRC to inquire *suo-motu* or on a petition not only of violations of human rights or abetment thereof or even negligence exhibited by a public servant in preventing such violations. The statute has conferred wide range powers upon NHRC/SHRC. The Commission is therefore required to be constituted with persons who have held very high constitutional offices earlier so that all aspects of good and adjudicatory procedures would be familiar to them. Having regard to the

[107] Section 24; Ibid.

[108] Section 25; Ibid.

[109] AIR 2015 SC 214: (2014) 10 SCC 406.

benevolent objects of the Act and the effective mechanism for redressal of grievances of the citizens against human rights violations, the office of Chairperson of SHRC cannot be allowed to remain vacant for a long time.

In *Dilip K. Basu* v. *State of West Bengal*,[110] the amicus in a criminal appeal filed a summary of recommendations, sought suitable directions for the setting-up of State Human Rights Commissions in the States of Delhi, Arunachal Pradesh, Mizoram, Meghalaya, Tripura and Nagaland, where such Commissions have not been setup. These States not only had failed to set-up Human Rights Commissions but also had not offered a justification for their omission. In contrast it was contended by the States that the establishment of a Commission was not mandatory in terms of Section 21 of the Protection of Human Rights Act, 1993. In the absence of any mandatory requirement under the Act the constitution of a State Human Rights Commission cannot be required. Rejecting the contentions of the States the Supreme Court held that the use of word "may" in Section 21 of the Act, 1993 is not by itself determinative of the true nature of the power or the obligation conferred or created under a provision. The use of word "may" does not always mean that the authority upon which the power is vested may or may not exercise that power. Whether or not the word "may" should be construed as mandatory and equivalent to the word "shall" would depend upon the object and the purpose of the enactment under which the said power is conferred as also related provisions made in the enactment. The word "may" has been often read as "shall" or "must" when there is something in the nature of the thing to be done which must compel such a reading. The decision in *Bachahan* v. *Nagar Nigam, Gorakhpur*,[111] dispels the impression that if Parliament has used the words "may" and "shall" at the places in the same provision, it means that the intention was to make a distinction in as much as one was intended to be discretionary while the other mandatory. Even when the two words are used in the same provision the Court's power to discover the true intention of the legislature remains unaffected. The functions of receiving cases from the National Human Rights Commission, spreading human rights literacy and the protection of human rights are critical for the

[110] AIR 2015 SC 2887: (2015) 8 SCC 744.

[111] AIR 2008 SC 1282: (2008) 12 SCC 372.

promotion and protection of human rights at the State level. A contention that State Human Rights Commissions were not to be mandatorily set up would be destructive of the scheme of the Act, 1993. The States of Delhi, Himachal Pradesh, Mizoram, Arunachal Pradesh, Meghalaya, Tripura and Nagaland shall within a period of six months from today set up State Human Rights Commissions for their respective territories with or without resort to provisions of Section 21(6) of the Act, 1993. Similarly, in *Joint Secretary, Political Department, Government of Meghalaya* v. *High Court of Meghalaya,*[112] the Supreme Court directed that State Human Rights Commission shall become functional by end of June, 2016 in the State of Meghalaya. Thus, it is expected that in future National Human Rights Commission will work in collaboration with State Human Rights Commissions to protect human rights throughout India.

[112] 2016 (3) SCALE 351.

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Right to Health in Contemporary India

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Abstract

The Right to Health is a modern concept that is recognized as a human right at the international, as well as the national level. In India the framer of the Constitution incorporated various issues related to health as part of the directive principles of state policy (DPSP) but failed to recognize it as a fundamental right. However, the Indian judiciary has cured this drawback of the Indian Constitutional framework, in respect of modern health jurisprudence. The Supreme Court and various High Courts have successfully interpreted health rights as an integral part of the "Right to Life". In various recent cases the Indian judiciary has noticed modern aspects of the Right to Health and issues related to it. This paper critically examines this right, its related issues and their recognition in the Indian Constitutional framework, and the effort of the Indian judiciary in doing so.

Introduction

The concept of Right to Health has given birth to a large debate in the contemporary era regarding its nature, scope and extension into the international arena as well as in the Indian scenario. At the international level the Right to Health was recognized as one of the basic human rights required for human existence after its adoption in the 1945 United

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Nations Charter[1] and the 1948 Universal Declaration of Human Rights[2]. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination[3] and the 1966 International Covenant on Economic, Social and Cultural Rights[4] gave a strong footing to the Right to Health as a human right. Other conventions of United Nations including the 1978 Alma Ata Declaration, the 1979 Convention on the Elimination of All Forms of Discrimination against Women,[5] the 1989 Convention on the Rights of the Child[6], the 2000 United Nations Millennium Development Goals[7] and various multi-lateral or by-lateral treaties between various nations, also played important roles in recognizing the Right to Health in the international legal system. In India, though there is no such specific statute regarding the Right to Health, several issues related to it have been adopted under various parts of the Constitution and in other legislations. Several international instruments express the need to evolve legal principles, making the Right to Health a fundamental right, and India was party to most of those international instruments, but to date India has not yet recognized the Right to Health explicitly as a fundamental right in its Constitution or in any other statute. This lacuna has been cured by the explicit interpretation of various Articles of the Constitution and by the Indian judiciary expanding the scope and ambit of those Articles. Over time the judiciary has tried to include new international concepts within the Indian legal system to provide a detail scheme with regard to the concept of the Right to Health. In the following pages an attempt has been made to demonstrate the meaning and scope of the Right to Health, constitutional recognition of the same and the efforts of the Judiciary in expanding the scope and ambit of the Right to Health in regards to the Indian legal scenario.

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[1] United Nations Charter, 1945.

[2] Article 25, Universal Declaration of Human Rights, United Nations, 1948.

[3] Article 5(e)(iv), International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, 1965.

[4] Article 12 International Covenant on Economic, Social and Cultural Rights, 1966.

[5] Article 12, Convention on the Elimination of All Forms of Discrimination against Women, 1979.

[6] Article 24, Convention on the Rights of the Child, United Nations, 1989.

[7] Goals 4,5 and 6, United Nations Millennium Development Goals, 2000.

Meaning and Scope of The Right to Health

The "Right" approach to health issues is a common and convincing approach in international legal norms. The World Health Organization (WHO) defines health broadly as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[8] Before the adoption of Constitution of WHO in 1946, there were certain international conferences related to the control of disease and health in general, such as, the International Sanitary Conferences (1851-1938) and the International Conferences of Hygiene and Demography (1878-1912), which was held in various part of the world and where a few international organizations evolved, such as The Pan American Sanitary Bureau,[9] the International Office of Public Hygiene,[10] and The Health Organization of League of Nations, but none of these achieved their desired goal. Under the Constitution of WHO, for the first time, health has been recognized as a 'right'. This is evident from the WHO's Constitution, which states that "The health of all peoples is fundamental to the attainment of peace and security and it is dependent upon the fullest co-operation of individuals and States" and "The achievement of any State in the promotion and protection of health is of value to all."[11]

Article 25 of the 1948 Universal Declaration of Human Rights mentions health as an integral part of the right to an adequate standard of living.[12]The Right to Health was most explicitly recognized as a human right in 1966 in the International Covenant on Economic, Social and Cultural Rights. In Article 12 of the said Covenant it is stated that the States party to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[13] The covenant

[8] See L. Breslow, "A Health Promotion Primer for the 1990s," 9 *Health Affairs* (1990) pp. 6-21.

[9] For detail discussion see J.L. Gutiérrez, "Health Planning in Latin America," 65(10) *American Journal of Public Health* (1975) pp. 1047-1049.

[10] See Lawrence O. Gostin and Rebecca Katz, "The International Health Regulations: The Governing Framework for Global Health Security," 94(2) *Milbank Quarterly* (2016) pp.264-313.

[11] Preamble, Constitution of the World Health Organization.

[12] See Alicia Ely Yamin, "The Right to Health under International Law and Its Relevance to the United States,"95(7) *American Journal of Public Health* (2005) pp. 1156-1161.

[13] See Eleanor D. Kinney, "The International Human Right to Health: What Does This Mean for Our Nation and World? 34 *Indiana Law Review* (2001) pp. 1457-1475.

also specifies the steps required to be taken by State parties to achieve the full realization of this right, such as: (a) reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) improvement of all aspects of environmental and industrial hygiene; (c) prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) creation of conditions which would assure to all medical service and medical attention in the event of sickness. However, it is important to note that General Comment Number 14[14] of the CESCR Committee has revised Article 12 of the1966 ICESCR in the context of changes happened in the various issues related to the right to health and admitted that:

Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences.

Thus, the modern concept of the right to health includes both the preventive and curative approach within its ambit.[15] By considering all the International documents related to health in totality it can be summarized that a health right has four aspects: (i) Availability, (ii) Accessibility, (iii) Acceptability and (iv) Quality.[16]

Right to Health under the Indian Constitution

In India, though there is no such specific statute regarding the Right to Health, various issues related to it have been adopted under various parts of the Constitution of India. Article 39 (e) to (f) of Part IV of the Constitution, specifically requires the State to direct its policy towards securing the principles to protect health and strength of workers and tender

[14] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12). Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000.

[15] See Eleanor D. Kinney, "The International Human Right to Health: What Does This Mean for Our Nation and World?," 34(1457) *Indiana Law Review* (2001) pp. 1457-1475.

[16] Sougata Talukdar, "Right to Health, Consumer Protection and Challenges in Health Care Services in India," 2(9) *Journal on Contemporary Issues of Law* (2016) pp. 1-9.

age children.[17] Whereas Article 41 states that:

> *The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*

Article 42 casts a duty upon the State to make provisions for securing just and humane conditions of work and maternity relief.[18] Article 47 enumerates that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and the State shall endeavour to bring about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health in particular.[19] Article 48-A requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51- A (g) of Part- IV-A (Fundamental duties) of the Indian Constitution states that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures, which is closely related to public health.

It is clear that there are various Articles in the Constitution of India that are directly connected to issues related to the Right to Health of the individual as well as to public health. The Constitution framers imposed various duties upon the state to protect the health of its citizens and to provide a proper health care system, by adopting issues related to health in various Articles under Directive Principles of State Policy. Thus in *Bangalore Turf Club Ltd.* v. *Regional Director, Employees State Insurance Corporation*,[20] the Supreme Court observed that :

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[17] J.N. Pandey, "*The Constitutional Law of India*" (Central Law Agency, Allahabad, 2008) at p. 387

[18] M. P. Jain, "*Indian Constitutional law*" (Lexis Nexis Butterworths Wadhwa, Nagpur, 2010) at.p. 1383.

[19] P. M. Bakshi, "*The Constitution of India*" (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2009) at p. 90.

[20] AIR 2015 SC 221.

"The State is enjoined Under Article 39(e) to protect the health of workers, under Article 41 to secure sickness and disablement benefits and Article 43 accords decent standard of life. Right to medical and disability benefits are fundamental human rights under Article 25(2) of the Universal Declaration of Human Rights and Article 7 (b) of the International Convention on Economic, Social and Cultural Rights. Right to health, a fundamental human right stands enshrined in socioeconomic justice of our Constitution and the Universal Declaration of Human Rights. Concomitantly right to medical benefit to a workman is his or her fundamental right. Except these directive principles in the various Entries of Seventh Schedule certain health related issues have recognized by the framers of the Constitution. Through Entry 6 (public health and sanitation; hospitals and dispensaries), Entry 8 (intoxicating liquors) of the State List, the State legislatures derives their power to enact laws relating to those.[21] *Whereas, through Entry 16 (lunacy and mental deficiency), Entry 18 (adulteration of food staffs), Entry 19 (drugs and poisons), Entry 23 (social security and social insurance) of the Concurrent list, both the State as well as the Union legislature derives the power to make laws."*[22]

The Role of the Indian Judiciary in Expanding the Scope of Right to Health

In the Indian scenario health related issues are expressly recognized in various Articles of the directive principles of state policy in the Constitution of India. The State has a duty to provide health care facilities.[23] But literally, under the Constitution of India there is no remedy available if the state fails to perform its obligations, as according to Article 37, directive principles

[21] S.S. Girisankar, "Constitution and Regulation of Economy," 22 *Academy Law Review* (1998) pp. 23- 54.

[22] For discussion see H. G. Kulkarni, "The Right to Health under the Constitution of India," 101 *All India Reporter* (2014) pp. Jour 201-Jour208.

[23] *Vincent* v. *Union of India*, AIR 2000 SC 3751.

are not enforceable in the court.[24] But as health care is the basic need of human being and cases of medical negligence are coming to the forefront, there is a need to expand the ambit of health rights and jurisprudence in India.

Right to Health: A Fundamental Right

From the documents of various international covenants, conventions and treaties it is very clear that those party to them were willing to treat the Right to Health as a fundamental right, but the framers of the Constitution and later the legislatures failed to recognize issues related to health under the ambit of fundamental rights in Part III of the Constitution of India. In this regard, the Judiciary, mainly the Supreme Court of India and other High Courts, played the most important role.

Article 21 of Part III of the Constitution of India states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."[25] Article 21 can be regarded as the heart of fundamental rights.[26] The Right to Life means a right to live with human dignity and all that goes with it, namely the necessities of life such as nutrition, shelter and medical care.[27] Post-Maneka Gandhi, judicial activism has responded to health issues such as prohibition of injurious drugs, availability of fair priced medicine, prompt medical treatment in case of emergencies, clean and safe condition in hospitals, bio-medical waste management and the rights of mentally ill persons etc.[28] The Supreme Court and High Courts have interpreted Article 21 in the light of various international instruments in numerous cases with a view to expanding the scope and ambit of the Article 21. The courts have also tried to include the concept of the Right to

[24] *Minerva Mills Ltd.* v. *Union of India*, AIR 1980 SC 1789; *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180.

[25] See Durga Das Basu, "*Indian Constitutional Law*" (Kamal Law House, Kolkata, 2011) at p. 262.

[26] *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, AIR 2011 SC 312; *Tirupur Dyeing Factory Owners Association* v. *Noyyal River Ayacutdars Protection Association*, AIR 2010 SC 3645.

[27] See Mallika Ramachandran, "The Right to Health and The Indian Constitution,"1 *Delhi Law Review* (2004) pp. 1-13.

[28] See P. Ishwara Bhat, "*Fundamental Rights- A study of Their interrelationship*" (Eastern Law House, Kolkata, 2004) at p.293

Health within this Article as a necessary component of the Right to life.[29] In *Associated Managements of Primary and Secondary Schools in Karnataka* v. *State of Karnataka*[30] the Court held that several un-enumerated rights including the right to health fall within the ambit of Article 21, since the word "life" should be understood in its widest amplitude. In the process of inclusion of these un-enumerated rights, the Supreme Court and High Courts have adopted and recognized various issues related to health as a fundamental right available to every human being in India.[31]

In the landmark judgment of *Consumer Education and Research Centre* v. *Union of India*,[32] it has been held by the Supreme Court that the Right to Health, medical aid to protect the health and vigour to a worker while in service or post retirement, is a fundamental right under Article 21, read with Articles 39 (e), 41, 43, 48A and all related Articles and fundamental human rights law, to make the life of the worker meaningful and significant enough for society. Further, in *State of Punjab* v. *Mohinder Singh*[33] the Supreme Court upheld the above view again and observed that it is now a settled law that the Right to Health is an integral part of the Right to Life.

In *Mahendra Pratap Singh* v. *State of Orissa*,[34] the Supreme Court held that the government is required to assist people to access medical treatment and to enable them to lead a healthy life. A healthy society is a collective gain and the Government should not make any interference in this regard. Technical fetters should not hinder the establishment of primary health centres. Thereby, there is an implication that enforcing the Right to Life is a duty of the state, and that this duty covers the very act of providing primary health care.

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[29] *People's Union for Civil Liberties* v. *Union of India* (1997) 1 SCC 301; See also K. Mathiharan, "The Fundamental Right to Health Care," 11(4) *Indian Journal of Medical Ethics* (2003) at p. 123.

[30] ILR 2008 Karnataka 2895.

[31] See Bismi Gopalakrishnan,"Constitutional Perspective of Right to Health: A Comparative Overview," 30(1 and 2) *The Academy Law Review* (2006) pp. 159-186.

[32] AIR 1995 SC 922.

[33] AIR 1997 SC 1225.

[34] AIR 1997 Ori 37.

In *Bandhua Mukti Morcha*v. *Union of India*,[35] the Supreme Court observed:

> *It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court ……to live with human dignity, free from exploitation. This Right to Live with human dignity enshrined in Article 21 derives its life breath from the directive principles of state policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just as humane conditions of work and maternity relief. These are the minimum requirements, which must exist in order to enable a person to live with human dignity, and no State neither the Central Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials.*

Further, in *Burrabazar Fire Works Dealers Association* v. *Commissioner of Police, Calcutta*,[36] the Supreme Court held that the Article 19 (1) (g) does not guarantee the freedom, which takes away the safety of the community, health and peace. One must therefore consider public health as pertinent while enjoying the freedoms enshrined in the Constitution. From the above mentioned cases it is quite clear that it is the duty of the State to provide a suitable environment for the proper development and health of an individual as well as of the public at large in addition to providing primary health care to the general public. But if the State fails to perform these duties an individual or an organization can move to the Supreme Court under writ jurisdiction to receive a proper remedy. So it can be interpreted likewise that, though these duties of the State are determined by the Constitution under Part IV i.e. under the directive principle of state policy, the Supreme Court is of the opinion that

[35] (1984) 3 SCC 161.

[36] AIR 1998 Cal. 121; See also *Nashirwar* v. *State of M.P.*, AIR 1975 SC 360.

the basic components of health and medical care should be included in the Part III of the constitution.[37]

In *Rajasthan Pradesh Vaidya Samiti, Sardarshahar* v. *Union of India*[38], the Court held that citizens of India have a right under Article 21 of the Constitution, which includes protection and safeguarding of the health and life of the public from mal-medical treatment. Thus an individual can move to the Supreme Court for proper redress if the State fails to perform its duty as imposed by the Constitution.

Right to Prompt Medical Treatment

In *Parmanand Katara* v. *Union of India*,[39] the Supreme Court has considered a very serious problem existing in medico-legal field such as cases of accidents in which doctors usually refuse to give immediate medical aid to the victim until legal formalities are completed. The court observed that:

> *Article 21 of the Constitution casts the obligation on the State to preserve life…….. A doctor at the Government hospital positioned to meet this State obligation and he is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.*

Moreover, in *Martin F. D'Souza* v. *Mohd. Ishfaq*,[40] the Supreme Court held that it is the duty of the doctor in an emergency to begin treatment of

[37] See J.K. Das, "Investigation Techniques in Criminal Cases and the Right to Health in India," 12(1) *Asia Pacific Journal on Human Rights and the Law* (2011) pp. 56-80.

[38] AIR 2010 SC 2221; *Centre for Public Interest Litigation* v. *Union of India* (2013) 9 SCR 1103.

[39] AIR 1989 SC 2039.

[40] (2009) 3 SCC 1.

the patient and he should not await the arrival of the police or to complete the legal formalities. The life of a person is far more important than legal formalities.

Right to Health and Government Hospitals Liability

Right related to heath is highly influenced by health care facility available to the population of a country.[41] In *Thangapandi* v. *Director of Primary Health Services, DMS Teynampet*[42] the Madras High Court highlighted that the Constitution envisages the establishment of a welfare state at the federal level as well as the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities is an essential part of the obligations undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centres, which provide medical care to persons seeking to avail those facilities. Moreover, recently in *Modern Dental College and Research Centre* v. *State of Madhya Pradesh*[43], the Supreme Court held that under the Constitution, the State has obligation to ensure the creation of conditions necessary for good health including provisions for basic curative and preventive health services and assurance of healthy living and working conditions.

In *Paschim Banga Khet Mazoor Samity* v. *State of West Bengal*[44] the only question that needs to be considered is whether the non-availability of facilities for treatment in various Government hospitals has resulted in the denial of fundamental right guaranteed under Article 21 of the Constitution. The Supreme Court observed that:

Article 21 imposes an obligation on the State to safeguard the Right to Life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to

[41] P. K. Rana, "Right to Health Care for All- Is it a Distant Dream in India," 12(1) *Nyaya Deep* (2011) pp. 55-68.

[42] MANU/TN/3950/2010; *State of Punjab* v. *Ram Lubhaya Bagga* (1998) 4 SCC 117.

[43] AIR 2016 SC 2601.

[44] (1996) 4 SCC 37.

provide timely medical treatment to a person in need of such treatment results in violation of his Right to Life guaranteed under Article 21.

In *State of Punjab* v. *M.S. Chawla*,[45] the Supreme Court has observed that Right to Health is integral to the Right to Life. The government has a constitutional obligation to provide health facilities. Expenditure incurred by a government servant for treatment at a specialised approved hospital is to be reimbursed by the state to the employee.

In *Achutrao Haribhaukhodwa* v. *State of Maharashtra*,[46] the Supreme Court has to consider whether the state Government could be held liable for a negligent act committed in a hospital maintained by it. The Court held that the running of hospitals by the Government was a welfare activity and not a function carried out in exercise of its sovereign power.[47] The Court then referred to *Bolam* v. *Feiern Hospital Management Committee*,[48] where the English Court had laid down the test that a doctor was not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men. The Court further observed that despite difference in medical opinions regarding the course of action to be adopted as long as a doctor acted in a manner acceptable to the medical profession and exercised due care, skill and diligence, he could not be held negligent irrespective of the result.[49] The Court, however, held that in this case, the doctrine of res ipsa loquitur was applicable and if a doctor who is employed by the government is negligent in his act, the state will be liable for the same. The State cannot ignore its liability under Law of Torts on the grounds that it acted under sovereign authority.

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[45] (1997) 2 SCC 83.

[46] (1996) 2 SSC 634.

[47] See *State of Rajasthan* v.*Vidhyawati*, AIR 1963 SC 933; *N. Nagendra Rao and Co.* v. *Slate of A.P.*, (1994) 6 SCC 205; *State of Maharashtra* v. *Kanchanmala Vijaysing Shirke*, (1995) 5 SCC 659.

[48] (1957) 2 All ER 118; See also *Sidaway* v. *Board of governors of Bethlem Royal hospital*, (1985) I All ER 643.

[49] See *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole*, (l969) 1 SCR 206; *A. S. Mittal* v. *State of U.P.* (1989) 3 SCC 223; *India Medical Association* v. *V.P. Shantaha*, (1995) 6 SCC 651.

Right to Health and Supply of Essential Medicines

Equitable access to safe and affordable medicines is crucial to health and wellbeing, especially in a developing country like India. In spite of developments made in the areas of public health, medicines remain a vital factor in the maintenance of health and treatment of diseases in many parts of the world.[50] In *Vincent Panikurlangara* v. *Union of India*,[51] the Supreme Court, while laying the guidelines, held that Central Government should take necessary steps for the total elimination of injurious drugs from the market. The court also held that such drugs as are found necessary should be manufactured in abundance and made sufficiently available to satisfy every demand. Undue competition in the production of drugs, caused by allowing too many substitutes, should be reduced, as it introduces unhealthy practices and ultimately tends to affect quality. The State's obligation to enforce the production of good quality drugs and the elimination of injurious ones from the market must take within its sweep an obligation to make useful drugs available at reasonable prices so as to be within the common man's reach. This would involve regulating the price. It may be that there may be an improved quality of a particular medicine, which on account of its cost of production will have to sell at a higher price, but for every illness that can be cured by treatment, the patient must be in a position to acquire medicine. In *Union of India* v. *Mool Chand Khairati Ram Trust*,[52] the Supreme Court observed that it is an obligation of the government to provide life-saving drugs to have-nots at affordable prices so as to save their lives, which is part of Article 21 of the Constitution of India.

Right to Health and Consumer Protection Act, 1986

In case of any kinds of deficiency in service, the consumer may move to the appropriate Consumer Forum under the Consumer Protection Act, 1986. Now the question arises of whether a medical practitioner could

[50] Edmund Mohammed Nyanwura and Reuben K. Esena, "Essential Medicines Availability and Affordability: A Case Study of the Top Ten Registered Diseases in Builsa District of Ghana," 2(8) *International Journal of Scientific and Technology Research* (2013) pp. 208-219.

[51] AIR 1987 SC 990.

[52] 2018 (8) SCALE 648.

be regard as rendering "service" under Section 2(1)(0) of the Consumer Protection Act,1986? In *Indian Medical Association* v. *V.P. Shanta*,[53] a three-Judge bench of the Supreme Court considered this important question. Relying upon it decision in *Lucknow Development Authority* v. *M.K. Gupta*,[54] the Court affirmed that 'occupation' and 'profession' are both covered by the term 'service' and, therefore, services rendered by medical practitioners are not outside the purview of Section 2(1)(o).The Supreme Court also held that Consumer Forums are well equipped to appreciate complex issues that might arise in cases of medical negligence, and observed that these Forums were presided over by Judges or retired Judges who are well versed in law. The combination of members with knowledge and experience in various fields, the constitution of the Forum is adequate to deal with cases of medical negligence. Further, the safeguard of appeal against the orders of the Forums is available. The Court also did not agree that the summary procedure provided for in the Act was not sufficient to deal with such cases. It also noted that very few cases of medical malpractice had been filed until 1985, one of the reasons for this was the court fee payable in an action for damages, whereas no court fee was required to be paid under this Act. In *Poonam Verma* v. *Ashwin Patel and Others*,[55] The Supreme Court reaffirmed its above-mentioned view and clearly stated that medical practitioners were covered under the Consumer Protection Act.

Right to Health and Medical Negligence

Negligence as a tort was the breach of a duty caused by omission to do something that a reasonable man would do or doing something that a prudent and reasonable man would not do. In case of any deficiency in providing medical treatment, doctors may be held liable under both criminal law and civil law. Hospitals, clinics and nursing homes may also be held liable under civil laws. Healthcare institutions liability with respect

[53] (1999) 5 SCC 651; See also Yetukuri Venkateswra Rao, "Supreme Court in Protecting the Consumer under the Consumer Protection Act, 1986," 2(6) *Consumer Protection Judgements* (2011) at p. 11.

[54] (1994) 1 SCC 243

[55] (1996) 4 SCC 332; See also *Spring Meadows Hospital* v. *Harjol Ahluwalia through K.S. Ahluwalia*,(1998) 4 SCC 39.

to medical negligence can be divided into two parts (i) direct liability, (ii) vicarious liability. Both these types of liability depend upon the manner of deficiency and the person who is liable for that. Direct liability refers to the deficiency on the part of the healthcare institutions' management whereas, vicarious liability refers to a deficiency on the part of the employees of the healthcare institutions and the liability of the institutions for that employee's negligence.[56]

In *Tarun Thakore* v. *Dr. Noshir M. Shroff*[57] the National Consumer Redressal Commission stated that one of the duties of a doctor towards his or her patient is a duty of care in deciding what treatment is to be given, in addition to a duty to take care in the administration of the treatment. A breach of any of those duties may lead to an action for negligence by the patient. In *Jacob Mathew* v. *State of Punjab*,[58] the Supreme Court laid down the general directions regarding medical negligence. In *Jugganknan* v. *State of Madhya Pradesh*,[59] the appellant administered twenty-four drops of mother tincture stramonium and a leaf of dhatura. However, soon after taking the medicine, the patient felt restless and ill and despite the administration of antidotes, she died on the same evening. The appellant was tried and convicted for murder under Section 302 of the Indian Penal Code (IPC). The Supreme Court held that an act to prescribe poisonous medicines without studying their probable effect is a rash and negligent act. The Court also held that care should be taken before imputing criminal negligence to a professional man acting in the course of his profession[60]. Even so it was clear that the appellant was guilty of a rash and negligent act and hence liable for conviction under Section 304A, IPC.

The Consumer Protection Act has also played an important role in this regard. In *Pravat Kumar Mukherjee* v. *Ruby General Hospital*,[61] the National Commission held that it would be treated as medical negligence

[56] Sougata Talukdar, "Medical Negligence through the Mirror of Healthcare Institutions: A Critical Study," 3(3) *International Journal of Legal Research* (2017) pp. 76-87.

[57] 2003 (1) CLD 62 (NCDRC).

[58] (2005) 6 SCC 1.

[59] (1965)1 SCR 14.

[60] *John Oni* v. *King*, AIR 1943 PC 72.

[61] (2005) 2 CPJ 352; See also *Dr. S. S. Prasad* v. *Sumitra Devi*, 2006 (1) ALJ 895.

if the death of a patient occurs due to denial of treatment only for the reason of delay in arrangement of money charged by the nursing home. In *Tarun Thakore* v. *Noshir M. Shroff*,[62] the National Commission held that it is a duty of doctor to take care in deciding the process of treatment and in admission of the treatment.

Right to Health and Right to Equality

Even the Right to Equality under Article 14 of the Constitution encompasses within itself the right of a poor patient to get adequate treatment and medicines from the State, irrespective of their costs. Citizens have a right to a quality health care system, treatment and medication regardless of race, religion, sex, social status and ability to pay. The duties of the State can be enforced through the Courts whenever a breach occurs. It is in the enforcement of these obligations of the State and local authorities that the Courts can play an effective role in safeguarding the rights of the citizen to prevention and cure of diseases, and to enforce the duty of the welfare state imposed by the Constitution.

Right to Health and Environment Aspects

The right to enjoy clean, hygiene environment is a right under Article 21 of the Constitution with is a prerequisite of enjoyment of right to health. In *N.D. Jayal* v. *Union of India*,[63] the Supreme Court observed that the right to health is a fundamental right under Article 21. Protection of this is inextricably linked with a clean and healthy environment, itself a fundamental right. In *M.C. Mehta* v. *Union of India*,[64] the Supreme Court held that, Article 39 (a), 47 and 48-A of the constitution of India collectively casts a duty on the State to secure the health of the people, improve public health and protect and improve the environment. With regard to maintaining a clean environment, which is critical to a person's health, there are many cases where the Courts have expressed their opinions. For example in *Municipal Council*, *Ratnam* v *Shri Vardichan*,[65] the Supreme Court was called upon to decide whether municipalities are obligated to

[62] 2003 (1) CLD 62.

[63] (2004) 9 SCC 362.

[64] JT 2002 (3) SC 527.

[65] (1980) 4 SCC 162.

maintain certain conditions to ensure public health. It was held by the Court that a public body, constituted for the principal statutory duty of ensuring sanitation and health, is not entitled to immunity on breach of this duty.

Also in *Santosh Kumar Gupta* v *Secretary, Ministry of Environment, New Delhi*,[66] the Madhya Pradesh High Court contended that the policy, controls or regulations relating to environmental protection and their implementations are inadequate and thereby causing health hazards. In its judgments, the High Court - has laid down that pollution from cars poses a health hazard to people and that the State must ensure that emission standards are implemented and maintained.

Right to Health and Child Health

While, the right to health is regarded as part of human rights and applicable to all, children constitute the most neglected part of society having been denied adequate realization of the right to health. In *Lakshami Kant Pandey* v. *Union of India*,[67] the Supreme Court was of the opinion that in civilised society the importance of child welfare cannot be denied, because the welfare of the entire community, its growth and development depends upon the health and wellbeing of its children. Children are a supremely important national asset and the future wellbeing of the nation depends on how its children grow and develop. Further, in *Sheela Barse* v. *Union of India*,[68] the Supreme Court has held that a child is a national asset and therefore, it is the duty of the state to look after the child, with a view to ensuring full development of its personality.

Conclusion

Health as a basic Human Right should be viewed holistically and from its positive aspect. Wellbeing should be acknowledged as leading to the achievement of a socially and economically productive life. Although the term Right to Health is nowhere explicitly mentioned in the Constitution of India the judiciary has interpreted it as a fundamental right under Article 21 as part and parcel of the Right to life and personal liberty. Apart from

[66] AIR 1998 MP 43.

[67] AIR 1984 SC 469.

[68] AIR 1986 SC 1786-.

above mentioned issues related to health, other issues such as inhuman conditions in after-care homes,[69] health rights of mentally ill patient,[70] rights of patients in cataract surgery camps,[71] conditions in tuberculosis hospitals, occupational health hazards, regulation of blood banks and availability of blood products, on passive smoking in public places and the rights of HIV/AIDS patients[72] have also been noticed by the judiciary and effort have been made to remind the government of its duty to secure them all. However, it is important to note that for proper realization of the Right to Heath, there is a need for harmonious construction of Article 21 on fundamental rights along with Article 39 (e) to (f), 41, 42, 47 and 48A directive principles. Only then the object socio-economic justice enshrined in the Preamble of the Constitution can be achieved. Thus, for the enjoyment of civil and political rights, ensuring the right to health is imperative.[73]

The developments in the legal framework through precedents set by the Indian judiciary in widening the interpretation of various existing laws, and with the enactment of various new statutes by the Union as well as State Legislatures, the very concept of the Right to Health and its related issues are getting a stronger footing within the Indian legal system day by day. As a result, health care systems in Indian society are also developing. An increasing number of people are coming within the ambit of the health care system. Precisely in this way the Courts of India have played a pivotal role by imposing positive obligations on authorities to maintain and improve the health of an individual at the microcosmic level and the public health as a matter of right at the macrocosmic level.

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[69] *Vikram* v. *State of Bihar,* AIR (1988) SC 1782.

70 *Chitta Ranjan Bhattacharjee* v. *State of Tripura,*(2010) 3 GLR 812; *Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu In Re* v. *Union of India,* (2002) 3 SCC 31.

[71] *S. Mittal* v. *State of Uttar Pradesh,* AIR 1989 SC 1570.

[72] *P.N. Swamy* v. *SHO, Hyderabad,* 1998 (1) ALD 75.

[73] M. P. Chengappa, "Right to Health – Constitutional Perspective of India and South Africa," 6 *CPJ Law Journal* (2016) pp. 102-112.

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Legal Aid: The First Line of Defence at Police Stations

Raja Bagga & Pavani Nagaraja*

Abstract

The early stages of the criminal justice process, the first hours or days of police custody or detention, are crucial for those who have been arrested or detained in respect of a criminal offence.[1] This period is critical because the police must begin their investigation and ensure the numerous constitutional, jurisprudential and statutory safeguards on arrest are upheld for every arrested person. In India, those first 24 hours are capped off by the arrested person being produced before a judicial magistrate; a "check and balance" procedure all on its own. Subsequently, if the person is kept in police custody, several safeguards are to be guaranteed for the duration of his/her time in custody. These protections are designed to ensure the physical and psychological well being of every arrested person and in parallel guarantee due process rights from the time of arrest. Unfortunately, the first guardians of these safeguards, the police, are often their main violators. These illegalities and malpractices impinge on the constitutional provisions of a fair trial and the right to life with dignity.

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[1]UNODC Handbook on Early Access to Legal Aid; http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf.

In India, the right to a lawyer at the police station, though a constitutional right[2], has not been actualized in practice. This paper makes the case that a lawyer can play a central role in safeguarding the rights of arrested persons in these first hours and days in custody. It seeks to demonstrate how bodily integrity and the upholding of fair trial safeguards at the police station can be facilitated and better guaranteed by the presence of a lawyer. This argument is supported by policies and practices in various countries and systems provided by international institutions. It goes further to advocate for strengthened access to legal aid lawyers, recognizing that most persons in custody in India lack the socio-economic means to hire a lawyer of their own. Even those with the resources are often unable to use the services of a lawyer due to lack of opportunity to contact them in a custodial setup.

The paper is divided into four segments. The first addresses the right to a lawyer and legal aid at police station as a crucial safeguard. The second deals with the role of lawyers in guaranteeing constitutional and legislative safeguards during arrest and detention. The third looks at the framework of legal aid delivery at police station in different countries. Finally, the paper recommends a framework for legal aid at police stations in India to enable coordination between the police station and legal aid authorities to ensure prompt and effective access to legal representation. This is guided by the experience in working with the police, prison and legal aid systems.

The right to a lawyer and legal aid at the police station

Access to a lawyer right at the outset would go a long way in reducing the possibility of any bodily violation and ensuring that fair trial rights are safeguarded. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, states "*The possibility for persons taken into police custody to have access to a lawyer during [the period immediately following deprivation of liberty] is a fundamental*

[2] Article 22 (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice be defended by, a legal practitioner of his choice.

safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs."

This right should begin the moment a person comes in contact with the criminal justice system. Article 22(1) of the Indian Constitution allows an arrestee to consult and be defended by a lawyer. In *Nandini Sathpathy*, the Supreme Court liberally interpreted Article 22 to mean "*The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right.*" Giving it statutory recognition, Section 41D of the Code of Criminal Procedure (CrPC), 1973 guarantees to an arrestee, the right to meet an advocate of his choice during interrogation, though not throughout interrogation. Therefore, the right to a lawyer unambiguously applies to anyone in police custody. This includes two categories of persons. The first are those who have been arrested by the police. The second are suspects who have not been arrested but called by the police at the police station for questioning by giving notice of appearance as per Section 41 and Section 41A of the CrPC.

The right to legal aid should be contemporaneous with the right to legal representation. However, the Supreme Court in the *Kasab*[3] judgment held that the right to legal aid starts when the person is first produced before the magistrate. This goes against the Constitutional mandate. Article 39A of the Constitution ensures that the protection is guaranteed to those who cannot afford a lawyer. With the objective to promote justice on the basis of principle of 'equal opportunity,' Article 39A categorically lays down that the state must ensure that citizens are 'not denied opportunities to secure justice' due to economic or other disabilities. In fact, Section 12 (g) of the Legal Services Act enlists "persons in custody" as intended beneficiaries of legal aid.

Looking at international standards, the UN Principles and Guidelines

[3] *Mohd. Ajmal Amir Kasab v. State of Maharashtra,* (2012) 9 SCC 1.

on Access to Legal Aid in Criminal Justice Systems (UNPGLA)[4] and UN Model Law in Criminal Justice Systems[5] clearly state that the right to legal aid arises from the moment a person is made aware that he is the subject of an investigation. The right exists not only while the person is being questioned but even prior to questioning. Article 4, 6 and 12 of the UN Model Law reiterate the same. Therefore, a plain reading of the Constitutional provisions, the statutory mandate, and the Supreme Court's decisions in *Sheela Barse* and *Nandani Satpathy* suggest that in principle, in India, the right to legal aid commences the time the person comes in contact with the police.

To provide legal aid at police station, a mechanism needs to be devised to ensure that at the time of interrogation, the legal aid lawyer is present. It should be the responsibility of the police department or the legal aid institution to ensure this. The Supreme Court directed in *Sheela Barse*[6] in 1983 that the police must inform the nearest Legal Aid Committee as soon as a person is arrested and taken to the lock-up. The Legal Aid Committee should take immediate steps to provide legal assistance to the arrested person, at the cost of State, provided such person is willing to accept legal assistance.

Later, in Sandhu,[7] in 2005, the Supreme Court held that, *'If the person in custody is not in a position to get the services of a legal practitioner by himself, such person is very well entitled to seek free legal aid either by applying to the Court through the police or the concerned Legal Services Authority, which is a statutory body.'* Article 19 and 30 of the UN Model Law also enlist the obligation of the State to safeguard the right to legal aid at the police station.

Furthermore, the UNPGLA also calls member states to take measures to '*ensure that police and judicial authorities do not arbitrarily restrict the*

[4] Principle 3 & Guideline 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

[5] Article 8 of the Model Law on Legal Aid in Criminal Justice Systems, available at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf

[6] *Sheela Barse v State of Maharashtra,* AIR 1983 SC 378.

[7] *State v. Navjot Sandhu alias Afsan Guru* (2005)11 SCC 600.

right or access to legal aid for persons detained…' and more importantly '*to facilitate access for legal aid providers assigned to provide assistance to detained persons in police stations..*'

The Constitution, the legislative framework and jurisprudence provide multiple safeguards at arrest. The next section discusses the role of the lawyer to guarantee each of these safeguards.

Safeguards during arrest and detention

Any person in custody is vulnerable to violations of their legal rights and physical well-being. To guard against these violations the law prescribes safeguards, but these are often violated in the absence of awareness of rights and lack of any oversight mechanisms. With the assistance of a lawyer, a person would be would be better informed of their rights and in a better position to demand these safeguards. Also the presence of a lawyer would signal to the police that the person is not vulnerable and on his or her own but has someone to defend them. This section will address the crucial safeguards to be mandatorily followed to prevent custodial torture and protect rights of persons in police custody and the role of the lawyer thereof.

Right to Information

Arrested persons are entitled to three kinds of information at the early stage of the criminal process; these are procedural rights, the reasons for arrest and/or detention, and the particulars of the alleged offence (s). The provision of this information helps the person prepare his/her defence. In some countries in Europe, information on procedural rights is included in the Letter of Rights given to every arrested person.

Procedural rights consist of: compulsory medical examination, access to a lawyer, to be informed of the reason for arrest, to have a family/respectable member of the locality informed, to be produced before the Magistrate within 24 hours of arrest, the right to silence and the right against self-incrimination and others. The CrPC and judicial decisions clearly state that the police should inform the arrested person of these rights immediately on arrest. The judicial magistrate also has the duty to inform and verify that the arrested person is aware of this. The lawyer can

act as an extra pressure point on the police to ensure that the arrested person has been given all the information s/he is entitled to.

By interacting with the arrested person, the lawyer can find out if the arrested person has been sufficiently and fully informed, and also address the question of whether the person needs a language translator. A proactive lawyer can go the extra stretch to explain complex legal concepts, such as the right to silence and against self-incrimination in simple language to the arrested person. In effect, the lawyer can step in where the police fail in their duties to properly inform.

Right to be produced before a judicial magistrate within 24 hours

Under Article 22(2)[8] of the Constitution, every arrested person must be produced before a Judicial Magistrate within 24 hours of his/her arrest. Further, Section 57 of the CrPC states that the police cannot detain a person for an unreasonable period, which should not exceed 24 hours. The court in the Chiguluri Krishna case[9] noted that, in practice, most arrested persons are produced at the end of 24 hours. This must not be done, it said. Various High Courts have held that difficulties faced by the police or Magistrate, or the lack of infrastructure cannot be reasons for violating this Constitutional clause.[10]

Judicial scrutiny at this stage ensures that the police have complied with procedural safeguards on arrest and the arrested person's rights have been protected. It is the duty of the Magistrate to examine the circumstances of arrest and the necessity of arrest[11] as per Section 41 of

[8] Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

[9] Chiguluri Krishna Rao, President, the Bezwada Bar Association vs. Station House Officer, II Town Police Station and Ors. 2006 1 ALT 259.

[10] Ibid.

[11] In Joginder Kumar vs. State of Uttar Pradesh and Ors (AIR 2014 SC 2756) the Court held that the arresting officer must justify the need for arrest on the basis of some preliminary investigation. In Arnesh Kumar vs. State of Bihar, the Court held that judicial scrutiny of a Magistrate begins when a suspect is arrested and produced for authorising detention. The Magistrate must firstly address whether specific reasons have been recorded for arrest and whether the reasons are relevant. Secondly, the Magistrate must determine whether a reasonable conclusion could be reached that the reasons specified for the arrest can be attracted in the given case.

the CrPC. These include informing the family, preparing an arrest memo and conducting a medical examination among others. First production is also crucial in determining whether the arrested person needs to be further detained in police/judicial custody or can be released on bail/personal bond. The Court is responsible for ensuring the person's physical safety. Unfortunately, all these important safeguards at the first production are often not met.

The role of a lawyer at first production is critical to act as a check and ensure that the Magistrate makes all these determinations. The lawyer can oppose unnecessary remand, question the necessity of arrest, move an application for the verification of the age of the accused and ask the court to order for medical examination, especially if violence or force has been used, among other things.

Rights during interrogation

Prohibition of torture

Investigation is a primary job of the police in which interrogation plays an important role. However, at present police training does not adequately police officers with the legal or operational know-how to conduct evidence-based investigations. There is also a dearth of technical equipment for more scientific detection. The harsh reality is that torture, or third-degree methods, become the obvious fall back. While incidents of torture often remain undocumented, the only evidence of custodial violence is the alarming number of deaths. There have been 1467 deaths in police custody in the last 15 years[12]. On average 100 deaths a year, i.e. two deaths a week. In fact, as per recent NHRC data, there have been 56 cases of custodial death just between February and June 2018[13]. Forty percent of the 1467 deaths have occurred in only two states -- Maharashtra and Andhra Pradesh.

In barely half of these custodial deaths (679), cases have been registered against police personnel. Yet, charge sheets have been filed

[12] Crime in India, National Crime Records Bureau (Compiled from Year 2002 to 2016).

[13] NHRC Website: http://nhrc.nic.in/Human_Rights_Cases.html.

against only 286 police officials. Eventually, only 25 policemen were convicted. The statistics are numbing: 1467 deaths in custody, and 1.67% conviction (25 convictions) over 15-years! There were no convictions of policemen in Maharashtra and Andhra Pradesh in this period.

Despite this alarming picture, India has neither ratified the United Nations Convention against Torture (UNCAT)[14] (though it signed the Convention more than 20 years back on 14th October 1997) nor has it enacted a specific legislation that provides holistic redress for custodial torture.

In the midst of the systemic violence in custody and the absence of sufficient and accessible remedies, a lawyer's physical presence alone can act as a deterrent against torture. Early access to a lawyer can either prevent violence, or where violence has taken place, promptly inform the courts to ensure the victim's safety, help them access remedies and account the police for abuse, ill-treatment and worse.

Right to remain silent and against self-incrimination

The right to remain silent and against self-incrimination is one of the important safeguards against violence in custody. Article 20(3) of the Constitution of India states "*No person accused of any offence shall be compelled to be a witness against himself*". The Supreme Court in *Selvi vs. State of Karnataka*,[15] and *Nandini Satpathy vs. P.L. Dani*,[16] have held that use of threat or force by the police to obtain information violates Article 20(3).

Sections 25 and 26 of the Indian Evidence Act, 1872, corresponding to Article 20(3), expressly prohibit the admissibility of confessions made in

[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984, and entered into force on 26 June 1987, in accordance with Article 27(1).

[15] Selvi vs. State of Karnataka (2010) 7 SCC 263.

[16] Nandini Satpathy vs. P.L. Dani (1978) 2 SCC 424. The Court held that "*any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused is strongly suggestive of guilt, becomes compelled testimony, violative of Article 20(3).*"

police custody[17] or to a police officer.[18] However, Section 27, an exception to the general rule, provides that information received from a person in custody is admissible[19] if it results in subsequent discovery of fact. In *Navaneethakrishnan*,[20] in recognition of the misuse of Section 27, the court observed that the police might end up planting evidence to prove discovery of fact. But it held that the confession is admissible as long as it relates to the facts of the case. This problematic view blatantly violates the fundamental rights of the accused person.

Therefore, a lawyer's presence is quintessential to ensure the protection of a person in custody during investigation and interrogation. The lawyer can help the arrested person understand questions put by the police and inform them of the right to choose to answer them. He/she can also ensure that the police do not force the arrested person to sign on blank papers.

Right to medical examination

Medical examination of the suspect is an important safeguard to prevent torture or ill treatment in police custody. Under Section 54 of the CrPC, an arrested person must be medically examined soon after the arrest. Until 2009, this right was available only on the request of the arrested person or the police. It is the duty of the Magistrate to inform the arrested person that he/she is entitled to be medically examined and inquire from the person if he/she has been medically examined.

The guidelines issued in *D.K. Basu vs. State of West Bengal*,[21] also stress the need of conducting medical examination of arrested persons and mandate the medical examination of a detainee every 48 hours by a registered medical practitioner. To actualise this right, the lawyer can check with the arrested person if he has been ill-treated or tortured and

[17] Section 26, The Indian Evidence Act, 1872.

[18] Section 25, The Indian Evidence Act, 1872.

[19] The permissible limits of Section 27 were discussed by the Supreme Court in Madhu vs. State of Kerala, Navaneethakrishnan v The State by Inspector of Police and Selvi vs. State of Karnataka.

[20] Navaneethakrishnan v The State by Inspector of Police, Criminal Appeal No. 1137 of 2013.

[21] D.K. Basu vs. State of West Bengal AIR 1997 SC 610.

insist that the police conduct a medical examination. It can also remind the court to order the medical examination of the accused.

Right to have family informed

An arrested person has a right to have a family member/friend informed about the arrest and place of detention. General Comment 20 of the Human Rights Treaty Bodies provides that informing the family or friend of an arrested/detained person acts as a shield against torture, degrading and ill treatment in custody.[22] This ensures that people are detained at officially recognised places of detention. This procedure was emphasised in *Joginder Kumar vs. State of Uttar Pradesh and Ors.,*[23] where the petitioner was illegally detained for five days. The family of the detainee had no information about his place of detention. Subsequently, in 1997, the Supreme Court included this as one its guidelines in *D.K. Basu vs. State of West Bengal*.[24] Eventually, Section 41B was inserted to the CrPC in 2009 which provides that an arrested person must be informed that he/she has the right to have a family member or a respectable member of the locality to be informed of the arrest. The lawyer can assist in ensuring that provisions of Section 41B are followed. Often police face challenges in communicating with the family. The lawyer can help the police in informing the family about the arrest.

Right against illegal or unnecessary arrest

The power to make arrests is of balancing individual liberties with society's larger interests. Section 41 of the CrPC lays down the principles for determining the necessity of an arrest. The Supreme Court has repeatedly issued guidelines on procedural steps and substantive safeguards to prevent unnecessary and illegal arrest/detention, though more specifically in - *Joginder Kumar vs. State of Uttar Pradesh*,[25] *D.K. Basu vs. State of West Bengal*[26] and *Arnesh Kumar vs. State of Bihar.*[27]Some of these

[22] General Comment 20.11, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 4 September 1992, p. 31.

[23] Joginder Kumar vs. State of Uttar Pradesh and Ors1994 SCC 260.

[24] D.K. Basu vs. State of West Bengal AIR 1997 SC 610.

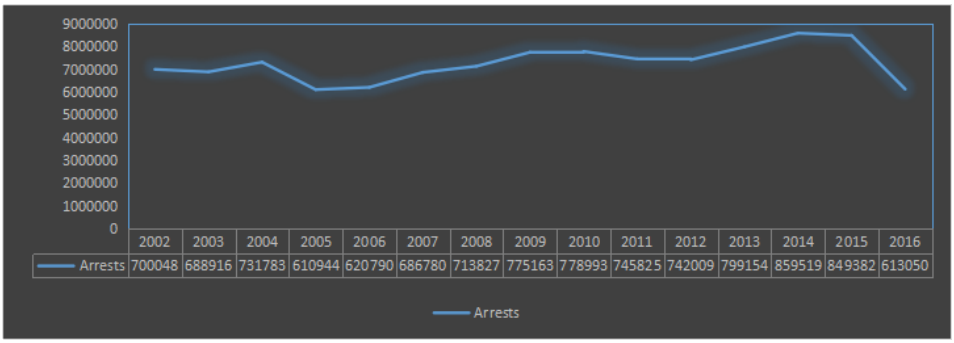
[25] Joginder Kumar vs. State of Uttar Pradesh AIR 1994 SC 1349.

[26] D.K. Basu vs. State of West Bengal AIR 1997 SC 610.

[27] Arnesh Kumar vs. State of Bihar (2014) 8 SCC 273.

standards have been inserted in the CrPC.

Unfortunately, none of this has reduced the quantum of arrests. In the last 15 years, the Indian police have made over ten crore (100 million) arrests[28]. On an average, 70 lakh (7 million) arrests are made every year, or 13 every minute.



The third report of the National Police Commission[29] noted that 60% of the total arrests made by the police are unnecessary. A majority of offences under which arrests are made are bailable and non-cognisable. The 177th report of the Law Commission of India[30] which dealt with the law on arrest stated that "*a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention.*"[31]

The role of the lawyer as a guard against unnecessary arrests therefore becomes crucial. The lawyer, through his/her intervention can question the reasonability of arrests, especially in cases where the corresponding sentence is less than seven years and make the following important checks and bring all of this to the notice of the court to assist it in reviewing cases of unnecessary arrest.

- Have preliminary investigations been made prior to arrest?

[28] Crime in India (2002 to 2016), National Crime Records Bureau .

[29] Third Report of the National Police Commission, 1980, pg. 31.

[30] 177th Report of the Law Commission of India on law relating to arrest, 2001, Available at http://lawcommissionofindia.nic.in/reports/177rptp1.pdf

[31] Ibid, pg. 50.

- Has a notice of appearance been issued?
- Has an arrest memo been filled?

Each of these safeguards requires the lawyer to undertake specific responsibilities. To be able to ensure that legal aid authorities and providers take these responsibilities into account, it is important to review the possible models of legal aid delivery that currently exists. The next section attempts to do that.

Framework for legal aid at police stations

Across the globe, countries follow different models of legal aid delivery, be it the public defender system, the contract service system, the assigned counsel system or hybrid systems. The quality and delivery of legal aid at police station varies depending on the legal framework, needs, resources, political commitment and the legal aid framework. This section looks at certain elements of legal aid delivery from select countries. The elements include the scope of the right to legal aid at police stations and the duty to inform the person in custody about this right.

Further, it also covers the role of legal aid providers at police stations, the conditions under which the right can be waived and the consequences of not providing legal aid or information about it. Lastly, it looks at the communication between lawyer and client in the police station. While looking at these legal aid models, we specifically look at two international instruments, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UNPGLA) and European Union Directive (EU Directive).The UNPGLA was adopted by the United Nations General Assembly in December 2012. The instrument provides detailed guidance about legal aid delivery in criminal justice systems. This includes provision on legal aid for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence. In 2016, the European Union legislated a directive on provision of effective legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

Scope of the right to legal aid at the police station

Early access to legal aid is an important fair trial right. While many countries recognise this right, its scope varies. The UNPGLA and the EU directive have accorded broad scope to this right. According to paragraph 20 of the UNPGLA, "...*anyone who is detained, arrested, suspected*" of an offence is entitled to legal aid. The EU Directive re-iterates the same. Also, both the UNPGLA & Article 6(3)(c) of the European Convention of Human Rights (ECHR) state that legal aid should be provided, *"regardless of the person's means, if the interests of justice so require"*.

The ECHR held that a person is entitled to a lawyer at least from the moment of arrest,[32] and in some circumstances even before arrest, and in any event should be given the opportunity to consult with a lawyer no later than prior to the first interrogation.[33] The provisions in domestic legislations vary. In Ukraine, any detained person has the right to a lawyer. Only in certain categories of suspected crime, legal assistance is mandatory. In Netherlands, a suspect is someone 'in respect of whom, given facts and circumstances, there arises a reasonable suspicion of guilt in relation to a criminal offence'.[34] Therefore, there should be a substantiated and individualised suspicion.[35] In India too, as per Article 22(1) of the Constitution and Section 12(g) of the Legal Services Act 1987, every person in custody is eligible for legal aid.

According to paragraph 20 of UNPGLA, any person charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process. The EU directive applies to offences in which proceedings are before a court having jurisdiction in criminal matters; and when a decision on detention is taken, during detention and at any stage of the proceedings until its conclusion.[36]

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[32] *John Murrary vs. UK,* No. 18731/91, European Court of Human Rights 8 February 1996; Zaichenko vs. Russia, No. 39660/02, European Court of Human Rights, 18 February 2010.

[33] *Salduz vs. Turkey,* No. 36391/02, 27 November 2008, European Court of Human Rights, Grand Chamber.

[34] Article 27(1), CCP.

[35] CPM Cleiren and MJM Verpalen, Tekst en Commentaar Strafvordering, Deventer:Kluwer 2011.

[36] EU Directive, Article 2.

As per paragraph 41 (c) of UNGPLA, preliminary legal aid should be provided at police stations, detention centres or courts while their eligibility is being determined. The EU Directive states that legal aid cost should cover the costs of the defence of suspects, accused and requested persons. The competent authority should however examine whether such persons' capability to bear part of the costs, depending on their financial resources.[37] Legal aid is available at the cost of the State when two conditions are satisfied: the person does not have sufficient means to pay (the means condition) and the interests of justice require that it be provided (the merits condition).[38]

A person held in a police station in the United Kingdom (UK) or France is entitled to legal aid at the cost of the State without any means test. This is true for India too; a means test is not applicable for persons in custody.

Right to information

Providing information about procedural rights and reasons for arrests to persons in custody is the first step towards providing these rights. The content and mode of providing this information varies from state to state. As per paragraph 42 (c) of the UNPGLA, the states should ensure that police officers should inform unrepresented persons of their right to legal aid and of other procedural safeguards. This could be in the form of a letter of rights or in any other official form submitted to the accused. It also mentions that the information should be provided in a manner "*that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand*".

In the UK, the custody officer who authorises detention of an arrested person, or who takes the person to a police station must inform the suspect about the right to legal aid orally and in written form.[39] The Letter of Rights should inform the suspect about the arrangements for obtaining legal advice. The detainee must be given an opportunity to read the notice and shall be asked to sign the custody record to acknowledge

[37] EU Directive, Preamble (8).

[38] EU Directive, Article 4.

[39] Code of Practice C, Police and Criminal Evidence Act 1984 para 3.1.

receipt of the notice. Any refusal to sign must be recorded on the custody record. The Code of Practice also requires that the suspect be cautioned and reminded about the right to free legal advice at the commencement of interrogation. This procedure should be complied with even if the interrogation may be delayed in facilitating this.[40] In France too, suspects must be informed of their rights, including the right to be assisted by a lawyer while in custody, through a Letter of Rights. In the Netherlands, the police and assistant prosecutors must inform suspects of their right to consult a lawyer before the first interrogation.[41] In Nigeria, police officers are responsible for informing the person in custody of his or her right to a lawyer and legal aid[42]. In Italy the arrested person must be provided in writing, information about their right to a lawyer and legal aid. If the same is not done, the arrest is null and void[43]. In Canada[44], the police are mandated to provide an arrested or detained suspect with basic information about how to access free legal services. Where s/he wishes to contact the duty counsel, the police officer shall also provide a telephone number.[45] In India, the Constitution and the CrPC mandate the police officer to inform the arrestee of the reasons for the arrest and of their right to consult a lawyer.

Legal aid providers at police stations

Lawyers and paralegals may provide legal aid at police stations. While paralegals may familiarise the arrested person of his/her basic rights, the lawyer can represent the person during interrogation. According to paragraph 44(f) and 55(e) of UNPGLA, States should take measures to request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular at police stations.

[40] Ibid, 10.1 and 11.2.

[41] HR 30 November 2010, LJN BN8387.

[42] Section 19, Legal Aid Act 2011, Nigeria.

[43] Article 386, Para graph 3 & 7, Code of Criminal Procedure, 1989, Italy.

[44] Section 10(b), Canadian Charter of Rights and Freedoms; R. v. Bartle (1994), 92 C.C.C. (3d) 289; R. v. Harper (1994), 92 C.C.C. (3d) 423;R. v. Pozniak (1994), 92 C.C.C. (3d) 472; Supreme Court, Canada.

[45] R. v. Feeney (1997), 115 C.C.C. (3d) 129; Supreme Court, Canada.

In France, there is no special certification requirement or qualification required for legal aid lawyers except a valid bar licence; legal assistance in police custody is predominantly provided by inexperienced non-criminal law specialists. In the Netherlands, there is a duty lawyer scheme to provide legal assistance during police interrogation organised by the Legal Aid Board, which manages the list of lawyers registered for the scheme. It runs the roster of on-duty lawyers in each police district, organises the appointment of lawyers by a service-created for the purpose *'piketcentrale'*. The requirements for appointment are minimal, giving opportunities to non-specialist lawyers to be widely represented on the list.[46]

In India, three years of court practice is mandatory to be empanelled as a legal aid lawyer.

Waiver/temporary derogations of the right

The right to legal aid at police station may be waived in particular circumstances. However, given the possibility of violations, waiver of this right requires careful consideration. According to paragraph 43(b) of UNPGLA, the person may give his or her "*informed and voluntary consent*" to waive a lawyer's presence. However there needs to be a mechanism to verify the voluntary nature of the consent. The provisions[47] also state that the person should be advised of the implications of waiving the right and ensure that the person understands the same. The Preamble to the EU Directive states that the rules under it are inapplicable if the accused/ requested persons waived their right of access to a lawyer[48].

While access to a lawyer is immediate in most cases in the UK, there are offences, where this right is delayed when it is authorised by an officer of the rank of Superintendent and above. Suspects detained for indictable[49] offences can be delayed access to a solicitor for up to 36 hours if there are reasonable grounds to believe that contact with the lawyer will interfere with or harm the evidence or alert other suspects. In the UK, the

[46] As per the rules established by the Regulations of Duty Services issued by Legal Aid Boards. Article 9, Regelingpiketorganisatie.

[47] Paragraph 43(i) of the UNPGLA.

[48] Waived as per Articles 9 or 10(3) of Directive 2013/48/EU.

[49] Offences to be tried in the Crown Court.

law obligates the custody officer to ask the suspect to sign the custody record to indicate whether they want legal advice through telephonic conversation or by meeting the solicitor in person.[50] Only then can the right to legal advice be waived. This should be recorded by the police officer with reasons given.

In France, in cases of drug trafficking or terrorism, the presence of a lawyer during interrogation can be denied for up to 48 or 72 hours. However, the suspect must be allowed to consult the lawyer for 30 minutes at the beginning of police custody. A waiver/renunciation of the rights of access to a lawyer must be explicit and unequivocal, given with the full knowledge of the causes and consequences of refusal. This is recorded during the interrogation and signed by the suspect.[51]

Communication between the lawyer and the client in the police station

According to paragraph 43(d) of the UNPGLA, States should take measures to ensure that promptly after arrest, lawyer can communicate with the person in custody with full confidentiality.

In 2000, France amended its law to make the right to consult a lawyer available at the start of detention. Earlier, suspects were allowed to consult with the lawyer for 30 minutes only after 20 hours of detention. In 2010, it was held that the absence of the lawyer during police interrogation would abrogate fair trial rights.[52] In 2011, suspects were allowed a lawyer throughout police detention, including during interrogation.[53] Further, the police must wait two hours for the lawyer to arrive before starting the interrogation.[54] However, this mandatory waiting period only applies to the first interrogation of the suspect. Similarly, in the Netherlands, the police have to wait for two hours for the lawyer arrive at the police station. Thereafter, the suspect can consult the lawyer for 30 minutes. The police

[50] PACE 1984 CODE C Police and Criminal Evidence Act 1984 para. 3.5.

[51] Article 63-1, CPP.

[52] Brusco vs. France, European Court of Human Rights, No. 1466/07, 14 October 2010.

[53] Article 63, CPP.

[54] Articles 64-1, 64-3 of Loi 91-647 of 17 July 1991 relative al'aidejuridique.

must ensure that the consultation is confidential.[55]

In India, under Section 41D of the CrPC, a lawyer is allowed to be present during interrogation but not for the entire duration. There is however, no provision concerning the confidentiality of the consultation or about any waiting time for the lawyer before initiating interrogation.

Consequences of not informing/providing/facilitating legal aid

An important element of legal aid delivery is to ensure consequences for not providing information about legal aid, not providing legal aid or obstructing its delivery. Unfortunately, this provision is missing in most jurisdictions. The UNPGLA does not lay down consequences for not providing or informing the defendant about their right to legal aid, but paragraph 31 suggests that States should establish effective remedies "*if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.*"

In Moldova, if the right to a lawyer is breached, the laws provide for the imposition of sanctions. In France, denial of access to legal assistance during police detention may lead to the release of the suspect from police detention or to the denial of an application for pre-trial detention.[56] Courts can reduce the sentence; exclude the evidence obtained in breach of the procedural rules; declare that the prosecution is non-admissible; or simply declare the violation, without imposing a sanction.[57]

There appears to be a commonality in the elements of legal aid delivery at police station in different parts of the world. While some have detailed legislations, others have recognised the right without detailing the procedures to be followed. In India, in principle, the system recognises the right to legal aid in police custody but the framework to operationalize it is missing.

The next section suggests elements of legal aid delivery at police stations in India that can be developed into an effective legal aid model at police stations.

[55] Inside Police Custody, pg. 117.

[56] Rechtbank Amsterdam 26 June 2009, ECLI:NL:RBAMS:2009:BJ4881.

[57] Article 359a, CCP; HR 30 March 2004, NJ 2004, 376.

Framework for legal aid at police stations in India

To safeguard all the rights of an arrested person, access to legal representation at the earliest becomes crucial. Constitutional provisions and legislative framework clearly establish the right to legal aid at police station. However, the right can only be guaranteed if appropriate mechanisms are in place. The National Legal Services Authority (NALSA) has not provided any mechanism for providing legal aid lawyers at police stations. NALSA has only assigned paralegals[58] to provide legal representation at police stations and even their role is limited. They are supposed to act "when the PLV receives information about the arrest of a person in the locality". There is no mechanism for informing the paralegal when arrests are made. Moreover, the authority has not developed any mechanism through which police stations can communicate directly with legal aid institutions or paralegals. Recently, in furtherance of a 2018 MHA letter, NALSA has written to all the State Legal Service Authorities (SLSAs) to explore possibilities of providing legal aid at police station. This article recommends a framework for legal aid at police station in India. The elements of the framework are discussed below:

Legal Aid Providers: The legal aid authorities have a huge army of legal aid providers including 61,593 panel lawyers, 9563 remand lawyers and 67,844 trained paralegal volunteers.[59] The panel lawyers and especially the paralegal volunteers are under-utilised. If used well, they can provide legal aid at police station. Remand lawyers, on rotation, can be assigned to police stations on call as well. As their primary task is to oppose remand and seek bail, their communication with the suspect right from the outset would be most appropriate. Also, paralegals can be utilised for providing basic legal advice to persons in custody, but during

[58] "When the PLV receives information about the arrest of a person in the locality, the PLV shall visit the Police Station and ensure that the arrested person gets legal assistance, if necessary, through the nearest legal services institutions." Page 7, NALSA Scheme for Para-Legal Volunteers (Revised), available at https://nalsa.gov.in/sites/default/files/scheme/Scheme_%28Para_Legal_Volunteers%29.PDF.

[59] This is in response to a question asked to the Ministry of Home Affairs in the Rajya Sabha answered on 07th March 2018; available at http://164.100.47.5/qsearch/QResult.aspx.

interrogation the lawyer may be called.

One of the challenges of the existing legal aid system is the disproportionate allocation of legal aid providers among and within states. It would be important to evaluate the anticipated need for legal representation based on the average caseload of the police stations before assigning legal aid providers. Another concern is the lack of alternate/ backup arrangements in case the legal aid provider is unavailable. Suitable alternate arrangements need to be made as part of the framework to ensure that no one is left unrepresented. Another aspect that needs attention is the eligibility of lawyers to provide legal aid at police stations. Under NALSA's provisions, panel lawyers require three years of practice to be eligible. The same should be kept for police station legal aid lawyers. The paralegals assigned to police stations should be trained in laws relating to arrest and trial beyond what they are usually taught.

Allocation of legal aid providers to police stations: One of the biggest hurdles cited in the formulation of legal aid mechanisms at the police station is lack of resources. There are more than 20,000 police stations in India. To be able to service each of them is a serious challenge. However, to determine the need for legal aid providers, further evaluation of the work of police stations is required. On average, there are seven million arrests in the country every year. These arrests are distributed un-evenly across the 20,000 police stations. In 2013, in 82% (11651 of 14,155) of police stations there were, on average, one or less than one case per day. With the same proportion[60], in 2018, in 17,945 (out of total 21,802) police stations, on average one, or less than one case per day would be registered. This means the need for legal aid providers in the majority of the police stations would be minimal. For the remaining 3,857 police stations, which reported a heavier burden of cases, more legal aid providers would be required.

[60] The NCRB discontinued publishing this data post 2013.

CASES TAKEN UP BY POLICE STATIONS (SOURCE CRIME IN INDIA, 2013, NCRB)									
Number of Cases taken up (Work Load)	**0-60**	**61-100**	**101-200**	**201-300**	**301-400**	**401-500**	**501-1000**	**1001 and above**	**Total**
Number of Police Stations (2013)	2396	2063	3727	2195	1270	846	1101	557	14155
Percentage of Police Stations	16.9	14.6	26.3	15.5	9.0	6.0	7.8	3.9	100.0
Distribution of Work Load with the Current Number of PS (2018)	3690	3178	5740	3381	1956	1303	1696	858	21802

NO. OF LEGAL AID PROVIDERS/CASE LOAD IN EACH POLICE STATION									
Work Load (Cases)	**0-60**	**61-100**	**101-200**	**201-300**	**301-400**	**401-500**	**501-1000**	**1001 and above**	Total
Paralegal Assigned per PS	1					2	2	3	
Lawyer Assigned per PS	1					1	2	2	
Percentage of Police Stations	82% Police Stations					6%	8 %	4 %	100 %
Number of Police Stations (2018)	17945					1303	1696	858	21802
Number of Paralegals Required	17945					2606	3392	2574	26517
Number of Lawyers Required	17945					1303	3392	1716	24356

The allocation of legal aid providers therefore should be based on need in each police station. Lawyers and paralegals assigned at the police station can be assigned based on the parameters suggested below.

Co-ordination between the Police and Legal Aid Authority: The Supreme Court directed in *Sheela Barse*[61] that the police must inform the nearest Legal Aid Committee as soon as a person is arrested and taken to the lock-up. However, currently no mechanism for communication between the police and the legal aid authorities exists. To be able to provide legal aid at police stations, either the provider needs to be stationed at the police station or the police needs to inform the legal service institution or the provider every time a person is brought into custody and requires legal representation. There can be a hybrid model as well, where one legal aid provider (paralegal) is stationed at a police station and the other (lawyer) is available over phone, as well as in person when required.

One of the serious drawbacks of the existing legal aid mechanism is the lack of documentation of the delivery. Where it exists, monitoring is challenging because documentation is neither standard nor periodic. For any of these arrangements to work, documentation must be made in a dedicated register, of arrests, information given of the right to legal aid, the desire to seek legal aid, calls made to legal aid institutions. In addition, periodic meetings between the police and legal aid authorities would assist in resolving any procedural gaps. It would also assist in defining and calibrating the role of police officials and legal aid providers inside police stations.

Relationship between lawyers and the police and the possibility of nexus: While there appears to be clear absence of any coordination between the police and legal aid authorities, communication between the police and lawyers (usually known as police station lawyers) is quite smooth. The practice of police officials referring all arrestees to specific private lawyers is common. Given their arrangement with the police, these lawyers also refrain from questioning any illegalities committed by the police. Assigning legal aid lawyers to the police station can lead to such issues. To avoid this, the tenure of the lawyers should be short and they should be frequently rotated. The presence of a paralegal can also act as a check against any inappropriate arrangements. Proper documentation of arrest and post arrest procedures would also keep a check on any

[61] Sheela Barse v State of Maharashtra AIR 1983 SC 378.

violations. The legal service institutions have to play a pro-active role too.

Monitoring of legal aid lawyers is a serious challenge in the current legal aid practice. While a monitoring committee exists on paper, its implementation is far from desirable. The legal service institutions need to divert resources in strengthening the monitoring committees, which may also monitor the work of legal aid lawyers assigned to the police station. They should also conduct periodic training and orient lawyers and paralegals and caution against any such practices. Also, consequences on detection of any such arrangement must be clearly laid out.

Training and Orientation of Legal Aid Providers: Providing legal aid service at police station is very different from rendering legal aid services in court. The role involves identifying the need of the person, safeguarding their rights and the same time co-ordinating with the police authorities and functioning inside the police station. With the myriad activities continually going on inside a police station, the legal aid providers must be careful to not interfere in the investigation process, but at the same time be sensitive to any illegality or irregularity and report the same to the legal service institutions. Training of legal aid providers would assist them in performing their duties efficiently.

One of the primary challenges with the current legal aid setup is the lack of awareness and clarity of legal aid providers with respect to their roles. They are expected to carry out multitudes of tasks with minimum direction, control and monitoring. To ensure that these issues do not creep up with legal aid providers at police station, detailed duty notes must be prepared and provided to them along with their appointment letter. These duty notes should also include reporting formats, which would make the providers accountable and delivery more efficient.

Communication between the lawyer and the person in custody: The framework must ensure that consultation between suspect and legal aid provider is confidential. A place should be designated for this so that the consultation is in sight but out of the earshot of police. This would allow the person in custody to communicate freely about the case and seek advice from the lawyer.

In the existing setup, while lawyers occasionally communicate with their client prior to proceedings in court, they do not visit them in prison. Therefore, there is no opportunity for any confidential consultation between the lawyer and his/her client. The legal aid framework does not have provision to ensure lawyer client interaction, and the lack of any dedicated place in prison for the consultation takes away any opportunity. Without information and instruction from the client, representation is far from effective. Therefore, the framework must incorporate provisions to ensure confidential consultation.

Presence of the lawyer during interrogation: Section 41D of the CrPC allows the presence of the lawyer during interrogation but not throughout the interrogation. It is important to specify the following: the basis on which the police can decide on the presence/absence of the lawyer; whether the interrogation should be on hold until the lawyer is present or can be initiated in his/her absence; and the amount of time (reasonably defined) that the police should wait for the lawyer before beginning the interrogation.

Conclusion

The need for effective representation begins when any person, suspect or accused first comes into contact with the police. From this stage on, the lawyer has a key role in protecting the bundle of rights available to persons in custody. The legal aid system must ensure that persons in custody receive effective representation, irrespective of their socio-economic capabilities. The law, both nationally and globally, recognises this.

India's legal aid delivery framework is quite elaborate, both in terms of its geographical outreach and in the multitude of services it provides. But the absence of robust monitoring mechanisms seriously affects the quality of services. Consequently, the essential fair trial rights to legal representation and a fair trial itself, are abrogated.

There is an urgent need to provide legal aid at the police station and especially before and at the time of interrogation. But the framework needs to be formulated in such a manner that it does not get entangled with the

issues with which the current model is grappling. Provision of legal aid at a police station comes with its own sets of systemic challenges, including the reluctance of the police to share territory, co-ordination between the police and the legal aid authority, the need to be available anytime during the day and not just during court hours and the possible nexus between the lawyer and the police.

Lawmakers must foresee these potential challenges and address them while framing the policy to be able to provide effective legal representation. To achieve this, the legal aid framework must assign specific rights and duties to the suspect, police, paralegals, lawyers, the Legal Services Institution and the Magistrate. It must also lay down methods of monitoring the delivery of this essential service by involving all these functionaries. This will safeguard fair trial rights at one of the most crucial stages of the criminal justice process.

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