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Preface

It is with great pleasure that the NHRC presents the sixteenth volume of its annual English Journal on the occasion of International Human Rights Day, on 10 December 2017; the sixty-ninth anniversary of the day the United Nations General Assembly adopted the Universal Declaration of Human Rights, in 1948.

The English Journal was envisioned and founded to satisfy the growing need for increasing knowledge and awareness about protection and promotion of human rights and, of human dignity, which is the quintessence of human rights. The Journal is devoted to covering the gamut of human rights issues, from the legal-theoretical perspectives to on-the-ground realities. In this way it has carved a niche for itself over the years for stimulating thinking on human rights and dignity. It is, indeed, one of the most prestigious publications of the NHRC India.

I hope that this edition of the Journal, which contains a fine collection of articles will be a valuable resource for policy makers, administrators, legal fraternity, human rights institutions and defenders, research scholars, members of civil society organizations, students and others. I hope also that it will be put to use by them, provide new insight and update them on a range of human rights issues and the latest developments in the field.

I am grateful to the authors, all of whom are eminent experts and academicians, for contributing their valuable articles to this Journal. I would also like to express my sincere thanks to members of the Editorial Board, as this issue would not have been possible without their support.

New Delhi
10 December 2017

(H. L. Dattu)

Volume-16, 2017

SECRETARY GENERAL
NHRC

From the Editor's Desk

The annual English Journal of the National Human Rights Commission has been published by the Commission since 2002. It is an important tool for spreading human rights literacy, knowledge and experience on diverse human rights issues, in addition to facilitating the advancement of a human rights culture and good governance in the country. Over the years the Journal has been recognised across India as promoting quality scholarship on human rights, providing an important platform for erudite work on human rights and bringing together the fraternity of human rights scholars to deliberate on note-worthy, present-day issues.

Articles in this Journal have been written by learned expert academicians, jurists and members of civil society. They bring into focus human rights perspectives while covering important thematic issues, including child rights, primary education, migration, law and culture, secularism and minority rights, good governance, climate change, and international relations between countries impacting human rights. The Journal also contains reviews of two recently published books, "Human Values and Human Rights" and "The Twilight of Human Rights Law".

The International Section of the Journal carries an article on the Role of the Asia Pacific Forum of National Human Rights Institutions, and The Universal Periodic Review (3rd) of India, which includes the recommendations of the United Nations Human Rights Council 2017, duly accepted by the

Government of India. Other sections cover important recommendations of the Commission emanating from the Core Group meetings, workshops, seminars and conferences organized by the Commission. An account of major activities of the Commission undertaken during 2017 has also been included.

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

I am also 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, 2017.

New Delhi
10 December 2017

(Ambuj Sharma)

Volume-16, 2017

Compulsory Primary Education as a Human Right: Prospects and Challenges

*N. Jayaram**

Abstract

With the enactment of The Right of Children to Free and Compulsory Education Act, 2009 India has joined the host of countries that provide constitutional guarantee to free and compulsory education. This paper reviews the achievements made since it came into effect on 1 April 2010 and the challenges that lie ahead in securing this right. It traces the long and chequered history of the political construction of free and compulsory primary education as a right; explains the salient features of the provisions of the Act and the promise it holds; examines the reality of primary education since the Act came into effect; analyses the challenges confronting the objectives of the Act, especially in terms of underutilisation of financial allocation, teacher shortage and deficient professional preparation, and the role of private schools and social exclusion; and concludes by emphasising the importance of strengthening the Act and improving the efficiency of its implementation.

Education is the key to a better life for every child and the foundation of every strong society, but far too many children are still being left behind. To realize all our development goals, we need every child in school and learning.

Anthony Lake[1]

* Prof. N. Jayaram is a former Faculty of Tata Institute of Social Sciences, Mumbai.

1 Statement made by Anthony Lake, Executive Director, UNICEF as part of the Incheon Declaration at the World Education Forum 2015 in Incheon, Republic of Korea, 19–22 May 2015.

Introduction

The Incheon Declaration adopted by 184 UNESCO member states, including India, at the World Education Forum in Incheon, South Korea on 21 May 2015 and the subsequent Education 2030: Framework for Action adopted by these states on 4 November 2015 in Paris to realise the SDG 4 [Sustainable Development Goal 4] (UNO 2015), had a noble objective: 'Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all' (UNESCO 2015: 20). The subsections of this goal emphasised that 'By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes' (4.1, ibid.: 20) and 'Build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all' (4.a, ibid.: 21).

The Incheon Declaration and the Framework for Action are an admission that the six Education for All goals, adopted at the World Education Forum in Dakar, Senegal in April 2000 and the Millennium Declaration (popularly known as the Millennium Development Goals] adopted by the UNO in September 2000, were not achieved by the 2015 deadline and that continued action is needed to complete the unfinished agenda. Based on a review of the progress made since 2002, SDG 4 – Education 2030 and its associated targets (ibid.: 20–21) would appear to be a more ambitious universal education agenda for the period 2015–2030.

What is noteworthy about SDG 4 – Education 2030 is its underlying principles,[2] which include,

- Education is a fundamental human right and an enabling right. To fulfil this right, countries must ensure universal equal access to inclusive and equitable quality education and learning, which should be free and compulsory, leaving no one behind. Education shall aim at the full development of the human personality and promote mutual understanding, tolerance, friendship and peace.
- Education is a public good, of which the state is the duty bearer.

2 These principles are drawn from and in consonance with such international declarations and conventions as the Universal Declaration of Human Rights; the Convention against Discrimination in Education; the Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; the UN Convention on the Rights of Persons with Disabilities; and the Convention on the Elimination of All Forms of Discrimination against Women.

Education is a shared societal endeavour, which implies an inclusive process of public policy formulation and implementation. Civil society, teachers and educators, the private sector, communities, families, youth and children all have important roles in realizing the right to quality education. The role of the state is essential in setting and regulating standards and norms.

- Gender equality is inextricably linked to the right to education for all. Achieving gender equality requires a rights-based approach that ensures that girls and boys, women and men not only gain access to and complete education cycles, but are empowered equally in and through education (ibid.: 28; emphasis in original).

India is a signatory to three international instruments, The Universal Declaration of Human Rights (1948); The International Covenant on Economic, Social, and Cultural Rights (1966); and The Convention on the Rights of the Child (1989), each of which have enshrined within them the right to elementary education.[3] Albeit after fifty-five years of independence, India has joined the host of countries that provide constitutional guarantees to free and compulsory education (Niranjanaradhya and Kashyap 2006: 1). Thus, it is appropriate to review how India has fared in extending this right to its children. This paper attempts such a review by focusing on the achievements made so far and the challenges that lie ahead in securing this right.

The Political Construction of a Right

It is universally accepted that primary education is a sine qua non of personal and social development. In most developed countries, primary education is free and compulsory, and it is constitutionally guaranteed as a right to all children. In India, the political construction of free and compulsory primary education as a fundamental right has a long and chequered history. This history is meaningful in the light of the destruction of the indigenous system of education in the country by the British colonial administration and its neglect of the modern system of primary education (Jayaram 2015: 64–68).[4]

3 Elementary education encompasses both 'lower primary' (I to V Standards) and 'upper primary' (VI to VIII Standards).

4 No wonder, only 12.2 per cent of the population of British India was literate in 1941 (Jayaram 2017: 66).

The demand for free and compulsory education in India can be traced to the early stages of the freedom struggle.[5] In their evidence before the Indian Education Commission (Hunter Commission [1882–83]), Dadabhai Naoroji and Jyotirao Govindrao Phule from the Bombay Presidency made an emphatic demand for four years of compulsory primary education. On 16 March 1911, Gopal Krishna Gokhale moved, in vain, a Bill in the Imperial Legislative Council to make 'elementary education free and compulsory throughout the country'. In 1917, Vithalbhai Patel successfully got the first law on Compulsory Primary Education in India passed by the Bombay Legislative Council. By 1930, all provinces of British India had a law on primary education. Among the princely states, Baroda was the first to pass an Act in 1906 for compulsory education of boys (7–12 years of age) and girls (7–10 years of age). The credit for the first documented use of the word 'right' in the context of primary education goes to Rabindranath Tagore who in a letter to the International League for the Rational Education of Children in 1908 alluded to it (cited in Niranjanaradhya and Kashyap 2006: 4).

Due to the determined efforts of the leaders of the freedom struggle, by the early 1940s, the provision of free and compulsory education to all children until they reached the age of 14 years, came to be accepted as the responsibility of the State. In 1944, the Central Advisory Board on Education, set up by the then Government of India, submitted a comprehensive report[6] that recommended a system of universal, compulsory, and free education for boys and girls between the ages of 6 and 14, in a phased programme spread over a period of forty years, that is, by 1984 (Government of India 1993: 15–16).

Thus, there was a consistent demand for free and compulsory education in the run up to independence in 1947. However, in the Constituent Assembly there was no unanimity about making a provision for this as a right, let alone a fundamental right. After considerable debate, in which an amendment was moved to remove the term, entitled, in the draft Article relating to free and compulsory education to ensure that it was merely a non-justiciable policy directive in the Constitution (Niranjanaradhya and Kashyap 2006: 5–6 and Endnote 29), it was passed.

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5 The following highlights of the demand for free and compulsory education in India during the freedom struggle are drawn from the *Report of National Development Council Committee on Literacy* (GoI 1993: 12–15).

6 This report is popularly known as the Sargent Report, after Sir John Sargent, Educational Advisor to the Government of India. It is also referred to as 'The Report on the Post-War Educational Development (1944)'.

The provision of free and compulsory education for all children until they complete the age of fourteen years was originally included in the Constitution of India as one of the Directive Principles of State Policy (GoI2007: Part IV, Article 45, p. 23).[7] Under Article 45, the State was enjoined to meet this provision 'within a period of ten years from the commencement of [the] Constitution' (ibid.), that is, by January 1960. The telescoping of the target from forty years that was suggested by the Sargent Report in 1944 was based on the recommendation of a committee under the chairmanship of B. G. Kher.

The Education Commission (1964–66),[8] which reviewed the educational scenario in the mid-1960s, noted with concern that 'adequate progress in primary education' had not been made and 'the Constitutional Directive has remained unfulfilled' (NCERT 1971: 267). Among 'the immense difficulties involved' in this regard, the Commission identified 'lack of adequate resources, tremendous increase in population, resistance to the education of girls, large numbers of children of the backward classes, general poverty of the people and the illiteracy and apathy of parents' (ibid.). What the Commission did not doubt was the government's sincerity of purpose or its political will to take the necessary action on a war footing. Accordingly, the Commission went on to suggest the best strategy to be adopted for fulfilling the Constitutional Directive (ibid.: 267–89).

Article 45, sans the deadline, came to be reiterated in the National Policy on Education (see NCERT 1971: xvi),[9] substantiating the Government's commitment towards primary education. More important, following the Education Commission's recommendation, 'to promote social cohesion and national integration', it advocated a common school system' and providing 'a prescribed proportion of free-studentships to prevent segregation of social classes' (ibid.: xviii). To avoid any legal issues, the Commission clarified that this will not infringe 'the rights of the minorities under Article 30 of the Constitution' (ibid.).

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7 Article 45 now stands substituted by the Constitution (Eighty-sixth Amendment) Act, 2002, Section 3. It is titled 'Provision for early childhood care and education to children below the age of six years' and reads 'The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years' (GoI 2002).

8 Popularly known as the Kothari Commission after its chairman Dr. Daulat Singh Kothari, then chairman of the University Grants Commission.

9 The full text of the National Policy on Education (The Resolution issued by the Government of India on the Report of the Education Commission) is reproduced in the reprint edition of *Education and Development: Report of the Education Commission* (1964–66) (NCERT 1971: xv–xxii).

The tardy progress made in universalising education is revealed in the pathetic literacy rate, which had only increased from 16.67 per cent in 1951 to 36.23 in 1981; the number of illiterates had shot up from approximately 300 million to 437 million in the same period (Jayaram 2015: 335). Admitting the failures on several fronts and acknowledging the innumerable mistakes, in 1985, the Congress government led by Rajiv Gandhi, embarked on the complex task of restructuring the system of education (MoE 1985). The National Policy on Education adopted by Parliament in May 1986 (MHRD 1986), reaffirmed the goal of universalization of elementary education, but did not recognise the right to education. The Acharya Ramamurti Committee reviewed the programme of action of this policy in 1990, resulting in the revised National Policy on Education – 1992. This Committee recommended the inclusion of the Right to Education 'amongst the fundamental rights guaranteed under the Constitution of India' (MHRD 1990: 120). However, this recommendation was not among those adopted by Parliament in May 1992.

A major legal breakthrough came on 30 July 1992 when the Supreme Court of India held that 'every citizen has a right to education' as 'concomitant to fundamental rights enshrined under Part III of the Constitution.'[10] Subsequently, on 4 February 1993, the Supreme Court of India reconsidered this judgement and held that the fundamental right that the citizens of this country have flows from Article 21 [of the Constitution], but it is not an absolute right; 'its content and parameters have to be determined in the light of Articles 45 and 41'.[11] This meant that, while every child has a right to free education until s/he completes the age of 14 years, thereafter the right to education is subject to the limits of economic capacity and the development of the State.

These judicial pronouncements came around the time when the country was entering the era of globalisation and embarking on the International Monetary Fund/World Bank influenced Structural Adjustment Programme. In 1994, the Government of India introduced the World Bank-funded District Primary Education Programme (DPEP). Under the DPEP, the constitutional commitment towards free and compulsory education was

10 Mohini Jain vs. State of Karnataka and Other (30 July 1992), 1992 AIR 1858, 1992 SCR (3) 658, https://indiankanoon.org/doc/40715/ (accessed on 30 August 2017).

11 J. P. Unni Krishnan and Others vs. State of Andhra Pradesh and Others (4 February 1993), 1993 AIR 2178, 1993 SCR (1) 594, https://indiankanoon.org/doc/1775396/ (accessed on 30 August 2017).

diluted: from fourteen years it was reduced to the first five years of primary education (Niranjanaradhya and Kashyap 2006: 6).

Although the policy-level changes were discouraging, the Supreme Court judgement of 1993 in the Unni Krishnan case empowered people to legally claim free and compulsory education. Many public interest litigation petitions were filed in high courts to seek enforcement of the judgement and obtain admission into schools (ibid.). The resulting pressure on Parliament to legislatively address the issue led to the introduction of the Constitution (83rd) Amendment Bill in the Rajya Sabha in July 1997. This Amendment proposed the introduction of Article 21-A (fundamental right to education for children in the age group of 6–14 years) in place of Article 45 (the directive principle on free and compulsory education) and the deletion of Article 51-A(k) (fundamental duty of parents). Due to the change in ruling regimes during 1997–2001, this Bill was not taken up for consideration. In 2001, it was replaced by the 93rd Amendment Bill, which in addition proposed that, instead of deleting Article 45, it could be amended to provide for early childhood care and education. This Bill was finally passed in 2002 as the 86th Constitutional Amendment Act.[12]

Thus, fifty-five years after the country became independent, primary education became a 'fundamental right' of its children.[13] How this right was articulated under Article 21-A of the Constitution needs some elucidation. While the age group 0–6 was encompassed by both the original Article 45 (up to 14 years) and the Unni Krishnan judgement ('till he completes the age of 14 years'), Article 21A has restricted coverage of 6 to 14 years; the 0 to 6 age group is now covered only in the new Article 45 under the Directive Principles of State Policy.

More importantly, the Unni Krishnan judgement had categorically stated that the right to education existed; it was only contingent upon the economic capacity of the State to provide it to children up to 14 years of age. According to Article 21-A, however, this 'right' would come into force 'in such manner as the State may, by law, determine' (GoI 2017: 11), that is, it was made contingent on a law that the State may enact. This took another eight years. The Right of Children to Free and Compulsory Education Act,

12 See supra Footnote 8.

13 Article 21-A reads: 'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine' (GoI 2007: 11).

2009, popularly known as The Right to Education Act or RTE Act, was enacted by Parliament and received the assent of the President of India on 26 August 2009 and was notified in The Gazette of India (Extraordinary, Part II, Section I) on 27 August 2009 (GoI 2009).[14] It came into effect on 1 April 2010; sixteen years after the Unni Krishnan judgement.

The Right to Education Act: The Promise

Despite some glaring shortcomings (see Niranjanaradhya 2009; Nawani 2017), this is a landmark legislation, which recognises 'the right to education' and makes the entitlement of all children in the age group 6–14 years non-negotiable and justiciable. Furthermore, it lays down the minimum parameters of quality elementary education.

The Act has ushered in a remarkable change in the orientation of primary education, in that state provided education is no longer an act of charity or welfare; it is an entitlement.[15] A corollary of this right is 'the duty of every parent or guardian to admit or cause to be admitted his or her child or ward … to an elementary education in the neighbourhood school' (GoI 2009: III.10). Recognising that success at every succeeding stage of education is premised upon the prior preparation for that stage, the Act has made provision for 'early childhood care and education for all children [above the age of three years until they complete the age of six years] for … free pre-school education' (ibid.: III.11).[16]

As intrinsic to the Right to Education, the Act has introduced some progressive measures of reform in elementary education. It mandates the establishment of schools in any neighbourhoods that do not already have them 'within a period of three years' (ibid.: III.6), that is, by April 2013; it has initiated age-appropriate learning with provision for time-bound special training for out-of-school children or school dropouts to enable them to be on par with their age peers (ibid.: II.4); and lays down norms and standards relating to infrastructure and pupil-teacher ratios (ibid.: Schedule relating to IV.19 and 25). The Act gives specific directions to the formulation of

14 This Act extends to 'the whole of India except the State of Jammu and Kashmir' (GoI 2009: I.1.[3]).

15 Section 3 (1) of the Act states: 'Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education' (GoI 2009: II.3[1]).

16 This is contemplated in the new Article 45 following the Constitution (Eighty-sixth Amendment) Act, 2002, Section 3 (see Footnote 8).

curriculum in consonance with the values enshrined in the Constitution and has introduced 'comprehensive and continuous evaluation' (ibid.: V.29). It outlaws 'capitation fee' (ibid:IV.13[1–2]) and 'physical punishment or mental harassment' of children (ibid.: IV.17[1–2]).

Recognising the importance of participation of all stakeholders, including parents, in realising the objective of the right to education, the Act introduced the institutional mechanism of School Management Committee for every school (ibid.: IV.21). Although this Committee is intended to be broad-based, consisting of 'the elected representatives of the local authority, parents or guardians of children admitted in such school and teachers', it stipulated that 'at least three-fourth of [its] members shall be parents or guardians', with appropriate representation for those belonging to 'disadvantaged group and weaker section and fifty per cent representation for women' (ibid.).

Transforming free and compulsory education from a directive principle of state policy (more in the nature of welfare) into a justiciable fundamental right is immensely important to indigent sections of the population.[17] It has as its target group children of traditionally disadvantaged groups (that is, those belonging to Scheduled Castes, Scheduled Tribes and socially and educationally backward groups) and chronically weaker sections (children of parents whose annual income is statutorily defined as low). Viewed thus, the RTE Act is a precursor to ushering in an egalitarian society.

Beyond Euphoria: The Reality

That significant progress has been made towards the goal of Education for All is a rhetorical statement we come across in official documents as well as academic literature (see NUEPA 2014: xvii).[18] According to official records, in 2013–14, there were 1,448,712 elementary schools, of which 858,916 imparted only primary education and 589,796 upper primary education. About 98 per cent of the rural habitations had a primary school within a walking distance of 1 km. The Gross Enrolment Ratio (GER), the Net Enrolment Ratio (NER), and the Age-Specific Enrolment Ratio (ASER) in 2013–14

17 The socio-economically better-off sections of the society, who have adequate social capital and financial resources, as also easy access to well-equipped private and government schools, hardly need the protection of this Act. These sections well appreciate the importance of investing in the pre-school and school education for reaping the benefits of public-funded higher and professional education in future.

18 For the sake of uniformity, unless otherwise stated, the statistical data cited in this paper are drawn from NUEPA (2014).

are shown in Table 1.[19]The NER had crossed 88 per cent, though it varied widely among states and union territories. More impressive is the GER for Scheduled Caste and Scheduled Tribe children in elementary education (see Table 2). Also encouraging is that, 'the number of out-of-school children has declined steadily since 2001', so too the drop-out rates (NUEPA 2014: 44 and 45 ff.). Much credit for these achievements is given to Sarva Shiksha Abhiyan (SSA), the Ministry of Human Resource Development's flagship programme for universalization of primary education which has been operational since 2000–01 (MHRD nd).[20] In fact, encouraged by this, SSA has been revised and designated as 'the vehicle to realise the provisions contained in the RTE Act 2009' (ibid: 50).

Table 1: Gross and Net and Age-Specific Enrolment Ratio in Education in 2013–14 (%)

Nature of Enrolment	Primary Education (6–10 years)			Upper Primary Education (11–13 years)			Elementary Education (6–13 years)		
	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total
GER	100.2	102.65	101.36	86.31	92.75	89.33	95.11	99.09	97
NER	87.02	89.26	88.08	67.82	72.89	70.2	86.57	90.26	88.31
ASER	91.97	94.36	93.11	87.07	93.16	89.92	90.18	93.33	91.95

Note: ASER = Age-Specific Enrolment Ratio; GER = Gross Enrolment Ratio; NER = Net Enrolment Ratio

Source: Computed from NUEPA (2014: Figures 2.2.7–2.2.10, pp.28–29)

19 National Council of Education Research and Training (NCERT) defines the various enrolment ratios as follows: *'Gross Enrolment Ratio*: Total enrolment in a specific level of education, regardless of age, expressed as a percentage of the eligible official school-age population corresponding to the same level of education in a given school-year. *Net Enrolment Ratio:* Enrolment of the official age-group at a given level of education expressed as a percentage of the corresponding population. *Age Specific Enrolment Ratio:* Percentage of the population of a specific age enrolled, irrespective of the level of education' (NCERT nd: 31–32).

20 The four important goals of *Sarva Shiksha Abhiyan* are: '(i) all children in schools; (ii) bridging all gender and social category gaps at primary ad upper primary stages of education; (iii) universal retention; and (iv) elementary education of satisfactory quality' (NUEPA 2014: xvii).

Table 2: Gross Enrolment Ratio in Education for Scheduled Caste and Scheduled Tribe Children in 2013–14 (%)

Nature of Enrolment	Primary Education (6–10 years)			Upper Primary Education (11–13 years)			Elementary Education (6–13 years)		
	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total
Scheduled Caste	112.1	114	113	95	101.9	98.3	105.9	109.7	107.7
Scheduled Tribe	114.4	111.9	113.2	90.5	92.2	91.3	105.9	105	105.5

Source: Computed from NUEPA (2014: Figures 2.2.14–2.2.16, pp. 35–36; 2.2.20–2.2.22, pp. 40–41)

Provision of schools and enrolment of children is one thing but what they learn in school is quite another. Since 2001, the National Council of Educational Research and Training (NCERT) has periodically monitored children's learning levels by conducting National Achievement Surveys for classes III, V, and VIII. This has helped in identifying gaps and diagnosing areas that need improvement. The Survey conducted for Class III students in 2012–13, covering 104,000 students (from 7,046 schools in 298 districts in 34 states/union territories) showed that, overall, these students 'were able to answer 64 per cent of language items correctly and 66 per cent of mathematics questions correctly' (cited in NUEPA 2014: 93). The national average score in Language was 257 on a scale ranging from 0 to 500; 'fifteen states/union territories scored significantly below the national average' (ibid.). Only 59 per cent of the students 'were able to read a passage with understanding' (ibid.).[21] The national average score in Mathematics was 252, on a scale ranging from 0 to 500; 'twelve states/union territories scored significantly below the national average' (ibid.).'The phenomenon of under-achievement among pupils reflects the quality-related deficiencies facing the education system', opines NUEPA (ibid.: 112).

The immense differences in the learning levels among students point to the inequalities in opportunities and the academic support, (or lack of) such

21 The fact that, in 2016, only 42.5 per cent of children enrolled in Standard III could read at least Standard I level text (Pratham Education Foundation 2017) suggests that though there are larger number of children in primary schools than ever before, they 'are not actually being 'educated'' (RTE Forum 2015: 5).

as tuition and help at home, for attaining acceptable levels of learning. It may be guessed that better performing students study in private and well-endowed and better-managed government schools and hail from middle or higher income families, as compared to their poor performing counterparts, who are more likely to attend ill-equipped and inefficiently managed government and private schools. One wonders if the encouraging statistics on the establishment of schools and the enrolment of children thereof is camouflaging the woeful state of elementary education, especially in government schools.

No wonder there is a high and increasing demand for private schooling even in rural areas. The 71st Round of the Survey conducted by the National Sample Survey Office in January–June 2014 revealed that in urban areas 69 per cent of primary school children were attending private (aided and unaided) institutions. Significantly, in rural areas the percentage of children attending private schools at the primary and upper primary levels was 38 and 24 respectively (Ministry of Statistics and Programme Implementation 2015). Analysis of this survey data indicated 'a surging preference for private schools': the percentage of children attending government primary schools had come down from 72.6 in 2007–08 to 62 in 2014 and at the upper primary level this percentage had come down from 69.9 to 66 during the same period (Saha 2016). This does not, however, mean the learning outcomes have improved.

As if in anticipation of the poor state of primary schools, especially those run by the government, the RTE Act had prescribed 'norms and standards' for establishment of schools to be met within three years (GoI 2009: IV.19). However, analysis of U-DISE data shows that 'a large proportion of schools continue to be not compliant to [these] norms and standards' (NUEPA 2014: 113).Only 8.3 per cent of government schools had complied with all ten parameters; about 31 per cent of the schools had complied with six or less number of parameters (ibid.: 113–14; see also RTE Forum 2015: 18).[22] If this is the state of compliance with the Act-prescribed norms and standards in government schools, it is easy to guess what could be the state of affairs in those private schools, which are no more than teaching shops. The provisions relating to training teachers who did not meet the minimum qualifications (GoI 2014: IV.23[2]) that were initially expected to be fulfilled by the end of March 2015 has been extended to 2019 (Niranjanaradhya 2012a).

22 In as many as twenty-one states the compliance is below the national average (Nawani 2017).

Making the Right a Reality: The Challenges

The significance of any 'right' recognised by the Constitution as 'fundamental' lies in it being delivered to the intended target population. It has been seven years since the RTE Act was implemented and one keeps reading scholarly articles and media reports that several provisions that were listed as 'norms and standards' in the Act are still not in place. The annual status reports prepared by the Right to Education Forum (RTE Forum)[23] raise questions about the efficacy of the salient features of the Act as well as the pace and process of implementation of its provisions.

Financial Allocation: Deficient and Underutilised

The realisation of the Right to Education implies dedicated financial resources for its implementation in successive years. No financial memorandum accompanied the Act. It is often pointed out that 'there has been substantial shortfall in funding for RTE through SSA' (NUEPA 2014: 99): in 2015, there was a 23.67 per cent cut in SSA budget (RTE Forum 2015: 21). Over all, the budgetary allocation for elementary education has declined.

However, what is even more serious is that, with the exception of 2010–11, the first year of the implementation of the RTE Act, the annual allocated budgets have not been fully utilised. In his report to Parliament, the Comptroller and Auditor General of India (CAG) notes that state governments have failed to utilise over Rs 87,000 crore of the allocated corpus in the first six years of the RTE Act. This underutilisation ranged from 21 to 41 per cent between 2010–11 and 2015–16 (Nanda 2017).[24] Misreading this to mean that funds are not required is perhaps responsible for the central and state governments cutting budgetary allocations to elementary education. What this reflects, as the CAG observes, is 'poor planning and execution by state governments, resulting in non-accomplishment of goals to provide

23 The RTE Forum is a broad-based platform of education networks, teachers unions, peoples' movements, educationists, non-governmental organisations, and international agencies working towards achieving 'the goal of equitable and quality education to all children through the realisation of the Right to Education Act, 2009 in its true letter and spirit' (RTE Forum 2015: 2). The Forum has twenty state chapters, and the six thematic areas of its work related to the RTE Act include: systematic readiness and redressal mechanism, issues of teachers, community participation, quality, social inclusion, and private sector. Starting with 2010–11, the Forum has brought out five annual status reports on the implementation of the RTE Act (http://www.rteforumindia.org/content/status-reports [accessed on 6 September 2017]).

24 Bihar, a state which has lagged in education for decades, had not utilised over Rs 26,500 crore of the RTE corpus between 2010–11 and 2015–16 (Nanda 2017).

infrastructure in three years and it remains a distant target even after six years of implementation of the Act' (quoted in Nanda 2017).

The RTE Forum notes that a large proportion of funds allocated for elementary education is spent on such model schools as Navodaya Vidyalaya and Sarvodaya Vidyalaya, set up for 'meritorious' students, and Kendriya Vidyalaya, meant to cater for the children of central government employees. The per capita expenditure is considerably higher in these schools as compared to other categories of government schools and aided private schools. Thus, these schools, which are in the upper end of the hierarchy of government schools, legitimise and reinforce social inequalities.

Teacher Shortage and Deficient Professional Preparation

A glaring weakness of primary education in the country, especially at the lower end of the hierarchy of government schools, is the acute shortage of teachers. This explains the very low pupil–teacher ratios in many states, hindering many a child's access to education. In 2013–14, 5.68 (28.64 per cent) of the 19.83 lakhs sanctioned positions were vacant (RTE Forum 2015: 50). More than 11 per cent of primary schools and more than 7 per cent of upper primary schools are literally single-teacher schools (ibid.: 52). A majority of 55.5 per cent of the teachers in 2014 were appointed on a contractual basis,[25] which is in violation of the RTE ACT (ibid.: 50). It is reported that, going by the RTE norms and standards, currently there are 8.81 lakh untrained teachers in government schools (ibid.:56); more than half a million teachers are under-qualified[26] and such teachers are mostly concentrated in low-performance states such as Bihar, Chhattisgarh, Jharkhand, Odisha, Uttar Pradesh, and West Bengal (NUEPA 2017; see also Nawani 2017). Recruitment of qualified and trained teachers will remain a daunting challenge in realising the Right to Education.

25 These contractual teachers (also known as 'para teachers') can hardly be expected to be committed to their work as they are paid 'almost a fourth of the pay of regular full-time teachers' (RTE Forum 2015: 50). The practice of hiring contractual teachers with little prospect of their being appointed as regular full-time teachers will adversely affect the quality of elementary education in the long run.

26 With 98.2 per cent of the candidates failing in the Central Teacher Eligibility Test conducted in 2014 (RTE Forum 2015: 53), the prospects of having quality teachers in our schools appears bleak.

Private Schools and Social Exclusion

It is widely believed that private schools provide better quality education as compared to government schools. The RTE Forum quotes a study by the Azim Premji Foundation on privatisation of education that explodes this myth (RTE Forum 2015: 12). While it is hardly gainsaid that there are many better quality private schools, the rapid growth in the number of private schools[27] is due to the increasing demand for private schooling even in rural areas. To ensure that the private schools are not merely teaching shops, the RTE Act provides for recognition of schools (GoI 2009: IV.18 and 19). However, the issue of unrecognised schools is far from being addressed. In 2013–14 there were 21,351 unrecognised schools in the country. They accounted for 36 lakhs and 11 lakhs enrolment at primary and upper primary level respectively, and 42.01 per cent of teachers were teaching in such schools (RTE Forum 2015: 12).

A discussion on private schools vis-à-vis the RTE Act is necessary in the light of the hierarchical nature of the school system in the country: this system is constituted by elite private schools[28] and special category schools (e.g. Kendriya Vidyalaya) at the top end of the hierarchy and the local state-run schools, low budget private schools and tribal schools at the bottom end. This results in what Vimala Ramachandran (2004) calls 'the hierarchies of access' to primary education, reinforcing socio-economic inequalities and non-egalitarian tendencies. Recognising this, the RTE Act provides for inclusion of children from disadvantaged groups and economically weaker sections (EWS) in private unaided schools (and special category schools such as Kendriya Vidyalaya). These schools are required to reserve at least 25 per cent of their seats for EWS category children in the neighbourhood at Standard 1 or pre-primary level and 'provide free and compulsory elementary education till its completion' (GoI 2009: IV.12[1][c]).[29]

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27 The secondary data analysed by the RTE Forum reveals that 22.09 per cent of elementary education is now provided by private schools (2015: 12).

28 Ironically, some of these schools are called 'public schools'!

29 The Supreme Court of India has exempted schools run by minority communities from this mandatory provision (see Society for Unaided Private Schools of Rajasthan vs. Union of India, (2012) 6 SCC 1–A, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=24500 [accessed on 9 September 2017). For a critique of this judgement, see Niranjanaradhya (2012b).

This social inclusionary intervention by the State in the private school system is resisted by private schools (Sarin and Gupta 2014). Interestingly, it is the parents of other students that fuel this resistance, with 'fear that these [disadvantaged group and EWS] children bring inferior upbringing, cultural disadvantage, and poor academic contribution to the classroom' (Sarin et al. 2017: 16). Expectedly, even after five years of implementation of the RTE Act, in only five states have more than 50 per cent of the seats been filled under this reservation; Delhi (92%), Karnataka (83%), Rajasthan (81%), Uttarakhand (74%), and Madhya Pradesh (56%); the performance in other states has been dismal (RTE Forum 2015: 77).

In this scenario, it is necessary to ask if we can depend on the private sector to be held legally responsible for realising the objective of free and compulsory education, let alone assuming responsibility for it. In a masterly study of the social origins of national systems of education in England, France, and the USA, Andy Green (1990) observes that wherever education has been universalised, it has been through publicly funded state-run schools, not through pro-profit private or philanthropic initiatives. It is in this context that the need for a common school system, advocated by the Education Commission (1964–66) long ago, (NCERT 1971: xviii) assumes importance.

However, given that the state managers as well as the middle class in India have uncritically embraced the neoliberal ideology, the idea of a 'common school system' will be dismissed as wishful thinking. In fact, what we are noticing now is the decimation of the public education system in the country through mergers and closures of schools. Until 2014, in all, 80,647 schools had been closed or merged in twelve states: Rajasthan (17,129), Gujarat (13,450), Maharashtra (13,905), Karnataka (12,000), Andhra Pradesh (5,503), Odisha (5,000), Telangana (4,000), Madhya Pradesh (3,500), Tamil Nadu (3,000), Uttarakhand (1,200), Punjab (1,170) and Chhattisgarh (790). When government schools are closed down, children who would have continued in such schools either drop out or seek education in low-cost private schools of doubtful quality (Rao et al. 2017).

Conclusion: Whither the Right to Education

In the educational history of post-independence India, the Right to Education Act is a progressive piece of legislation. It has, to be sure, some limitations in terms of its scope as well as flaws in the implementation of its provisions. This does not, however, make it a retrograde legislation that

should be repealed, as organisations such as the All India Forum for Right to Education (AIFRTE)[30] demand. While the call of such organisations for a genuine right to education legislation[31] is ideologically appealing, given the socio-economic and political reality of the land, it is sure to remain a pipe dream. Even if halting in its implementation, as the RTE Forum observes, the RTE Act 'constitutes an improvement over the prevailing reality in several States and offers scope for addressing the gaps in teacher availability and teacher training, bans discrimination and corporal punishment in schools, ensures compliance with school infrastructural development, provides for community participation and involvement …' (2015: 2). Obviously, we cannot dismiss what has been achieved through a long, drawn-out struggle. What we need to do is to periodically review the progress made in realising this 'right' and offer constructive suggestions for strengthening the Act and improving the efficiency of its implementation. In this regard, the work of the Right to Education Forum[32] is laudable.

Civil society organisations have an important role to play in realising the right to education for children. The RTE Act recognises that the right to elementary education of children in the age group 6–14 is the responsibility of the State to respect, protect and fulfil. Unlike many other fundamental rights, which are broader in scope and whose protection is often invoked in courts of law, the Right to Education primarily concerns children belonging to disadvantaged groups and the weaker sections of society. It cannot be expected that the parents or guardians of these children will have sufficient awareness or resources to fight for access to education on a par with children belonging to better off sections of society. It falls to civil society organisations to fight to ensure that the state does not, in the name of efficiency, abdicate this responsibility in favour of the private sector, or resort to so-called public–private partnership.

The RTE Forum's annual reviews of progress made in the implementation of the RTE Act highlights the fact that delivering the right to schooling does

30 The All India Forum for Right to Education was constituted at the Osmania University campus in Hyderabad during a seminar on 'Right to Education and Common School System' held on 21–22 June 2009. It is now working in sixteen states.

31 According to the AIRTEF, the 'genuine' right to education legislation would establish 'a fully public funded Common School System based on the concept of neighbourhood school managed in decentralised, democratic and participative mode' (http://www.aifrte.in/ [accessed on 9 September 2017).

32 See supra Footnote 24.

not automatically translate into the right to education (RTE Forum 2015: 5). The right to education does not mean provision of cheap and substandard schooling for the hitherto neglected children. It is important to translate this right into equitable educational opportunities, conditions, and experience for all children. Otherwise poor learning outcomes will nullify what the law guarantees, and the country will continue to hold the dubious distinction of having 'the largest primary school education system in the world' with the 'largest number of children who do not meet basic learning levels'.[33]

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33 Kishore Singh, United Nations Special Rapporteur on the Right to Education addressing the National Policy Seminar on Rights Based Approach to Education: Policies, Premises and Practice, organised by National University of Educational Planning and Administration, New Delhi, 15–16 February 2016.

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Migration and Human Rights

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In the nation-state system, the so-called sacred and inalienable rights of man prove to be completely unprotected at the very moment it is no longer possible to characterize them as rights of the citizens of the state.

– Giorgio Agamben

Abstract

This paper is a study on the nature and extent of human rights violations perpetrated against immigrants.[1] Globally there are certain issues on which human rights questions are raised about immigrants. Our intention is to provide a review of such situations through an exploratory method; it provides lucid descriptions of various aspects of the impact of current official apathy on immigrants globally and the need to address this problem. The study offers a 'human rights based' approach to the interrogation of the rights and privileges of global migrants. If not seen from the international human rights perspective, migration will remain at the national and regional level and remain a neglected field of study.

Introduction

Issues for underprivileged and marginalized people at national and regional level are subcategorized into separate fields of enquiry such as education, poverty, unemployment, and refugees. But when they are juxtaposed against international human rights they gain new significance. The issues are highlighted at universal level rather than as particular cases. It enables one to focus on the global purview of the issue. To illustrate the magnitude of the problem of immigration, it must be recognized that there are 244 million migrants across the globe, constantly living under a threat of

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1 In this paper we are mostly referring to international migrants who include the migrant workers, stateless refugees, asylum seekers, victims of human trafficking and migrants in an irregular situation.

human rights violations.

Rather than considering these issues country by country, approaching them from a universal human rights standpoint gives a uniform perspective. Instead of national boarders it looks at the issues internationally. It also shows the web of migration across the global spectrum as a phenomenon that is interconnected and interdependent. International human rights are intended to protect migrants from exploitation and discrimination, to safeguard the fundamental freedom of each individual migrant. It binds respective governments to pass legislation in favour of international immigrants, based on the Universal Declaration of Human Rights. Human rights are inalienable. Universal human rights bring immigrants of every race, religion, region, sex and ethnic group within the purview of protection of the law.

It is obligatory on part of the governance bodies of the state to ensure that it does not place obstacles in the way of migrants' enjoyment of their human rights. Detention and deportation of immigrants are areas that are still under the control of the state. The harsh treatment meted out to immigrants when they reach a country gets little attention from United Nations agencies. However, international human rights agreements declare that immigrants have the right to enter any country in search of employment, although the policies of various governments that want to restrict the entry of immigrants to their countries run contrary to this.

Historically, migration was a part of policy of every nation in a smaller or larger scale. There would be no country in the world from where people have not migrated. But the process of globalization characterises migration in modern times. Migration is the symbolic expression of the economic and political interlinking of the world. However, the condition of refugees and human rights violations against migrants in modern times is another reflection of the need for the intersection of migration and democracy. The grave condition of refugees in many countries is the manifestation of the powerlessness of migrants in the State of destination. In some countries the paradigm of the State's power is defined in terms of their policy on migrants who have become the new cultural and linguistic minority. Migrants as a category are mostly deprived of their rights.

There is an increasing tendency of considering immigrants as the others, distinct from citizens (Fisher 2006). Migrants represent everything citizens want to blame on in the others. They are portrayed as representing a complex

mix of behaviour and attitude that make citizens hate and fear them; for example, migrants are blamed for any increase in crime rates in a country. Thus the migrants are considered to be deviants that should be isolated and feared by society. Systematic creation of fear of the other is a deliberate process wherein xenophobia plays an important role (ibid.). Because of this, there is silence among mainstream society over migrant's detention and lack of job opportunities.

> 'Fear works by enabling some bodies to inhabit and move in public space and by restricting the movement of other bodies to spaces that are enclosed, such as when nation State creates policies to prevent 'illegal' immigrants, 'unqualified' refugees or 'bogus' asylum seekers to enter the State. It is the flow of fear among 'legal' citizens that establishes these boundaries between 'us' and them-the fear that illegal immigrants, unqualified refugees and bogus asylum seekers, for example, threaten the wellbeing of a State or the character of a nation' (Zembylas 2010: 33).

A Human Rights Based Approach to Migration

The challenges of migration can be best understood from the perspective of human rights, especially with regard to international migration. Human rights law is the only perspective that enables us to recognize its full legal potential. United Nations member states are bound to uphold international laws that protect the human rights of immigrants. Immigrants gain special rights in countries that have laws favourable to them. Their mobility is not regulated. According to the resolution adopted by United Nations General Assembly on 18th December 2014, 'Reaffirming also that everyone has the right to freedom of movement and residence within the borders of each State and the right to leave any country including his or her own and to return to his or her own country.'[2] Thus there are many forms of protection for the individual migrant under international human rights laws.

Immigrants are thus protected by international human rights law, but without human rights protection they have to face innumerable vulnerabilities. The right kind of papers should be at hand for the purpose of documentation otherwise they are subjected to penalization. There is a serious need for the presence of an international governing body, like the United Nations, as a

2 http://www.iom.int/sites/default/files/UN_Documents/69th_Session/N1470710.pdf. Accessed on 4/14/17

watchdog present in every country to govern the international movements of migrants. In many countries international human right laws are not implemented and because of this migrants are susceptible to violations. The State of destination thus becomes the most powerful agency regulating the life and work of migrants.

Hannah Arendt argues that there is a need for a global agency to look into the case of the human rights crisis (Issac 1996). One of the important pieces of legislation is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. It is a comprehensive international law adopted by United Nations General Assembly in 1990 that protects the rights of migrant workers. But very few destination countries have ratified it. When this is accompanied by the ignorance of law by migrant workers then they become more vulnerable to poor conditions.

Under the protection of human rights law even migrants are immune from certain forms of discrimination and punishment. It does not matter what kind of migrant or wherever the destination point. Under international human rights law, it is mandatory on the part of the state to accommodate migrants. Many states are open to the entry of the migrants, as everyone is looking for cheap labour, but when it comes to rights, they are often neglected.

State, Immigration and Methodological Nationalism

It is a general assumption that human rights are best explained when perceived through the eyes of the individual. Transnational migration of individuals goes beyond the notion of methodological nationalism (Wimmer Schiller 2002). When it comes to migration, membership of a nation should be considered as fluid. It is the will of the individual that reigns supreme when it comes to the decision to migrate. It is individuals and families that migrate. But in the case of refugees it is different; they have to find asylum in a country. The protection of the state becomes important. Refugees in particular, do not act as individual entities as most of the times it is the whole family or the whole community that decides to migrate (eg. Rohingyas). There is always tension between migrants and the sons of the soil (Weiner, 1978). This can be resolved only by adopting a liberal approach by allowing everyone to find employment. Apart from the problem of internal migration within a State, international migration is in conflict with human rights. '… States enjoy the right to control the entry, residence, and expulsion of aliens' (Marin 2014: 5). Another aspect of the liberal perspective is that it is side-

lined when one takes into consideration the mechanism of liberal market. As De Guchteneire and Pecoud state, 'what is basically at stake is whether rights can be made to derive not from universal norms like those in human rights conventions, but rather from the supply-and-demand mechanism that determines migrants' value in the labour market' (ibid.: 5). The liberal human rights perspective lays emphasis on personhood rather than on nationality. You are treated irrespective of your nationality, race, language or religion. This creates social conflict especially when the society is not as open as the liberal law guarantees.

The main reason for discrimination against international migrants is inconsistency within the law. While there is a universal norm that anyone can leave one's country and enter another country, there is no governing body to take care of the rights of migrants. It is the country of destination that actually has control over migrants. Thus the hold of the State is strong on the migrant. In the absence of a third agency the voice of unorganized migrants becomes subdued.

Countries are bound by the international laws agreed by the United Nations, but in most cases only when the violations are voiced by the civil society especially NGOs do the states becomes sensitive to their own violence. Police and the military become the most important agencies to control the rights of international migrants. It is the sole prerogative of the nation-state to regulate the entry of the foreign nationals to their country. When a foreign national enters the country and decides to stay longer than the desired period without proper documentation or working visa he or she becomes illegal in the eye of that state; hence they are hunted down by the police. A strong authoritarian state has more stringent rules than a state that is liberal towards international migrants. Many citizens are strongly opposed to migrants taking away their jobs; the belief is that the son of the soil takes precedence (Inter-Parliamentary Union, 2015).

According to the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, a migrant worker is defined as one who is involved in economic activity in the State of destination (Inter-Parliamentary Union, 2015). During economic crises international migrants are the worst hit. As the unemployment rate increases in a country the State of migrants becomes more and more vulnerable. The employer finds it easier to dismiss migrant labourers than

citizens. Both skilled and unskilled workers are hit by the situation. The loss of employment makes the migrant dependent on the state. When the burden on the state increases the state will try to push them out of the country. In most cases there is no job security in the private sector. As most migrants are temporary workers it becomes easy to expel them. Then pay cut affects migrant workers more. They are forced to take up whatever job is available to them at very low wages. Their bargaining power remains low at the time of financial crises.

Xenophobia and Denizenship: Intolerance and Tolerance

Xenophobia is another reason for discriminatory treatment of migrants. Migrants are alienated from society by cultural isolation. The culture of migrants is characterised as being differentiated and unique and therefore it is suggested that it cannot be assimilated to the mainstream. The linguistic identities of ethnic groups also vary from the mainstream. Their food habits and religious rituals are different from the mainstream. Derogatory cultural terms are used against migrants, and different ethnic groups and racial groups are given differential status in society. As the cultural interaction increases with the increase of international migration, naturally there should be more tolerance to migrants but xenophobia is on the increase at an unprecedented level, giving rise to cases of violence, mobbing and lynching.'In adopting legislation to deal with crises, social dialogue can provide a means to ensuring non-discrimination and equality of treatment and opportunity' (Inter-Parliamentary Union, 2015: 28). Canada is the best example of a country that has sanctioned funds, which are distributed to agencies and non-governmental organizations for the enhancement of its multicultural policy.

Mutual dialogue is the best way to eliminate conflict between countries of origin and countries of destination. There is need for the country of origin to open up bilateral relation with the country of destination. Dialogue would help immigrants to have a status in the place of destination. Freedom for international migrants to engage in economic and social activities should be a priority. The effectiveness with which human right laws are executed is based on the effort put in by international agencies and when civil society applies pressure on the state. There are also some countries, such as Norway, that have adopted welcoming policies in favour of migrants. Bilateral relations are good for the economic development of both countries. For example the European Union has liberalized its stand on guest workers for the benefit of

the economic development of the region. Citizenship attributed to them is termed as denizenship (Hammar 1990).When highly skilled workers such as doctors and engineers migrate to developed countries they get the chance to specialize in their field and acquire more qualifications. A dialogue based on human rights laws enables the international labour force to have a say in the economic system.

Need for UN intervention

Globalization has liberalized the economy. Has the neoliberal era reduced the inequality of labour? The United Nations considers that everyone is born free and this principle should be universally accepted also in the case of migrants. Globalization has increased migration. Three per cent of the world population has migrated from their country of origin (approximately 215 Million). In spite of this, nationality is still the criteria on which the law functions. This discriminates against the non-citizens and allows for unequal treatment. To bring about equality between citizens and non-citizens as workers, human rights law must be implemented. Government agencies should initiate wide spread awareness of the vulnerabilities of migrant workers. They should also show greater sensitivity towards their issue.

With the exception of a few countries, such as Canada, migrants are barely included in the policy agenda. The United Nations Programmes are committed to forcing countries of destination to introduce policies of inclusion of migrants as one of the categories requiring governmental intervention. Migrants are excluded from the social security networks but they should have both economic and social mobility. There should be educational opportunities for the children of migrants and these children should be treated as equal to other students. Migrants may belong to ethnic, linguistic and religious groups new to the destination country, they may form a minority group, but this should not be the basis for discrimination.

The most important challenge is xenophobia, the fear of foreigners. The social exclusion of migrants has to be handled at a developmental level. It is the role of the state to bring about equality of opportunity. They should be provided with equal wages. Middlemen mislead some migrants before reaching their employers; sometimes employers violate the rules of the labour and wages, and the migrant's visa maybe in the custody of the employer so that the migrant worker is unable to his or her to the country of origin.

> 'Economic, social and cultural (ESC) rights to work, education, health, social security, housing, food and water, a healthy environment and culture, embody essential elements for a life of dignity and freedom. These rights provide a common framework of universally recognized values and norms to mobilize efforts in support of economic and social welfare and justice, political participation and equality. They provide standard for the responsibility of State and non-State actors to respect and uphold these human rights' (Inter-Parliamentary Union 2015: 94).

This covenant is applicable to all migrants including asylum seekers, refugees and victims of international trafficking. All of whom are mentioned in the Universal Declaration of Human Rights (UDHR) and The International Covenant on Economic Social and Cultural Rights of 1966, which 165 countries had ratified by 2015.

Health Care Facilities for Immigrants

Do international migrants come within the ambit of medical facilities provided by the state? In many countries the health care of immigrants is the most ignored area. Health care benefits are provided only to nationals. Free health service facility is basic for the survival of manual labourers and other unskilled and semiskilled migrants. Health service authorities do not include migrants among the target population so many health care benefits do not reach migrants and their families. Health care is a basic human right, therefore should be provided to migrants in the countries of destination. Diseases are prevalent among migrants therefore they require special attention. Whether they are temporary or permanent, the status of migrants should not come in the way of treatment and providing free medical facilities. They should also be tested for HIV/ Aids and other transmissible diseases.

Freedom of Mobility of Migrants

In the case of less developed countries like Mexico and Morocco it is not only health issues that are a concern but their very right to immigration is an issue. The borders of the United States, for example, are guarded against the entry of the illegal migrants. Crossing the lines is strictly checked, but the border checks are constantly violated and migrants are regularly expelled. There has been further intensification of immigration policies especially after 9/11. Cross border terrorism has to be checked through regulations

especially with regard to illegal migration. However, most countries fail in checking illegal migration.

'Whether or not states have the ability to truly control migration, it remains that contemporary border policies are accompanied by several challenges to human rights. …the first concerns asylum. The measures meant to stop irregular migration have direct consequences on the asylum principle, according to which all human beings are entitled to seek protection from persecution. The lack of legal migration channels incites some economic migrants to present themselves as asylum seekers, which in a self-nurturing process, then casts doubts on all refugees and lead to even more restrictive measures' (Pecoud Guchteneire 2006: 72).

According to the United Nations estimate in the four years between 1997 and 2000 around 3000 migrants lost their life attempting to reach the Straits of Gibraltar (ibid.).Mobility of population is an intrinsic factor of globalization. The opportunity to change one's social and economic position has increased as a result. The increasing emphasis on democratic values also provides opportunities for social mobility. Migration and physical mobility are necessary to achieve social mobility. The movement of the population, whether long distanced or short distanced, offers better opportunities, especially for those that migrate to developed countries. Hence mobility is an equalizing process whereby people who do not have livelihoods can migrate to an area where they can gain profitable employment. The free flow of human population hence is a fundamental right.

Immigration Policy and Detention

In Thailand the introduction of a registration system controls the movement of immigrant workers. It keeps them tied to a particular employer and restricts their movement from one job to another (Derks 2013). The employers have the right to decide how long a migrant should work for and can impose harsh labour conditions. As described by Agamben, migrant workers live a 'bare life' devoid of any rights. (Agamben 1998)

They are forced in to harsh labour conditions. The rights of migrants are also violated in many other countries. For example in Australia stringent rules are applied to undocumented migrants. The authorities use the Migration Act of 1958 to violate the basic human rights of migrants.

Their vague status leads to migrants becoming easy prey. The law imposes fines on undocumented migrants and also allows the authorities to send migrants to prison. The Migration Act 1958 says that all those who are unlawfully living without a visa should be detained (Taylor 2006). Migrants have no access to welfare schemes or to legal support. The arbitrary nature of detention gives power to the law to put anybody behind the bars. The prolonged detention without trial is also a violation of human rights. There is high degree of physical constraint in the detention centres. They are not allowed to meet their family members and are refused permission to attend to their medical needs. There are also community detention centres where the father, mother and children are kept. Though in some cases if they are released they do not have the permits required to work, and so survive on their own. Often they are expelled from the country irrespective of how long they have been there. Such laws should be amended and should have a human rights perspective (Ozdowski 1985). 'The problem is that significant proportions of those who are taken into immigration detention remain in detention for long period of time. At 23 September 2005, there were 748 immigration detainees of whom 116 had been in detention for between one and two years and 92 had been in detention for two years or more' (Taylor 2006: 55). There is also no neutral agency to hear the case of the detainees.

According to Dauvergne (2012), the Immigration and Refugee Board of Canada has violated international human rights norms in many cases. The immigration office has not confined its activities within the limits of international human right laws. As the legal education of migrants and refugees are at the minimum, they have fallen easy victim to the immigration laws as interpreted by the immigration officers and there is little attention being paid to these human rights violations.

> 'Furthermore, on 14 March 2008, the Canadian federal government proposed changes to the Immigration and Refugee Protection Act. Critics of the proposed amendment point out that these changes processing of immigrants under the humanitarian and compassionate category and thus further support the current shift towards labour migration under temporary visa arrangement' (Basok Carasco 2010: 344).

Due to the precariousness of livelihood of temporary migrant workers, lawyers and activists lose interest in taking up their issues. 'Due to vulnerability of their status, unfamiliarity with the legal framework, and linguistic barriers,

migrants themselves are often not in the position to claim rights' (ibid 345). The human rights of non-citizens should go well beyond the moralistic exhortation. As countries are moving towards post-national citizenship (Soysal 1994) the demand for citizenship for migrants is also now considered a limited one. However, citizenship remains the main discourse on which the contemporary migrant issues are discussed. The methodological nationalism still unconsciously guides our thinking. Perhaps the shift should be from the nationalist to the humanity (ibid.).

Rather than big agencies, the role of local level actors becomes important. They are the ones who actually take up issues and highlight human rights violations. In Canada, 'Migrant rights advocates, including labour unions and grassroots organizations-have used diverse public forums (such as press conferences, electronic and printed media, and public awareness campaigns) to engage in what Benhabib calls 'democratic iterations' to claim rights for groups of people that nation states do not recognize as members of their political community' (Soysal 1994: 351).Migrants are the most economically vulnerable section and they have no political rights. For example, small-agricultural worker migrants live as a politically neutralized category. They come from Mexico, Guatemala, Jamaica and other Caribbean countries. For instance 'The Ontario government passed the Agricultural Employees Protection Act (AEPA) permitting migrant workers to 'form associations' but not to unionize, and it amended the Labour Relations Act to exclude agricultural employees from the application of the Act' (ibid.: 359). Such amendment is common in many countries. The laws are becoming retrogressive rather than being cordial towards the migrants globally.

Problems of Children and Women Immigrants

Another issue faced by immigrants is poverty among their children (Zhou 1997). For example, in the United States the inferior status of poor immigrants affects their children. In school and colleges the academic performance of the children is influenced by the precarious nature of the job of their parents. 'Success in school, one of the most important indication of adapting to society, depends not only on the cognitive ability and motivation of individual children, but also on the economic and social resources available to them through their families' (ibid.: 79). Racial oppression brings resentment in the minds of children towards their own society. It results in the formation of ghettoized youth subcultures. Criminalization of youth

is another effect of the disrupted status of the immigrant children's family. 'The low socioeconomic status of those immigrant families just arriving subjects children directly to underprivileged segments of the host society and associated disadvantages and pathologies' (ibid.: 80).

Women and children are the most vulnerable of migrants. Cases of abuses are far higher among women. Education and skills levels of women are low and therefore the unemployment rate among them is high. They end up doing manual labour and domestic jobs. They are paid less well compared to their male counterpart, there is no safety network of colleagues their job and they are also vulnerable to sexual abuse. They are often further exploited by not having their salary paid by their employer.

The United Nations Conventions has specifically remarked that the state of women migrant workers worldwide requires serious attention. The standard of work and the working conditions are often very bad in the case of women, therefore international human rights laws for the safety of women should be ratified and implemented by all nations. The most important law was passed by the Convention on the Elimination of all Forms of Discrimination against Women adopted in 1979 (Inter-Parliamentary Union 2015).

Women are migrating in increasing numbers and violence against immigrant women is on the rise. The condition of women in refugee camps is also severe. The United Nations Fourth World Conference on Women in 1995 declared that violence against women is a violation of human rights. Class and race are two important categories under which the inferior status of immigrant women is examined.

Domestic violence against women exacerbates the already appalling situation (Menjivar Salcido 2002). The cases of those women who have suffered from physical abuses are particularly high among the population of Latin America, Asia and Africa. Women who come from countries where domestic violence is already common generally don't complain.

> 'Isolation may occur more easily for immigrant women as many have left behind families and loved ones. They enter a foreign environment where they may not know the language, culture, or physical geographic area and may recognize only a few familiar faces. In these situations, it is easier for men to control women's lives both emotionally and physically' (ibid: 904).

The Need for Activism in Support of International migrants

The International Migrant Agency, (the UN Migration Agency) works with NGO's and Civil Society Organizations to co-ordinate activities around migrants.[3] There are various activities around which they collaborate. One important initiative was the appointment of a United Nations Special Rapporteur on Human Right of Migrants. NGO's can have a major influence on decision-making processes but there is a need for more activism in this field.

State sovereignty has more power than the United Nation's human right laws as border control laws regulate the movement of migrants. Human rights provisions then become guidelines to be followed rather than a powerful law to be enforced by the states. According to Benhabib, the rights of migrant for democratic self-determination are being curtailed (Costello 2012).

Human trafficking of women and children is the most serious crime committed in the name of migration. People from less developed regions of Asia are trafficked into urban centres. This should be checked with the support of the government agencies of countries where they are coming from and the countries they are migrating to. However, NGO's are collaborating with International Organization of Migration (IOM) to bring awareness among these migrants and to reunite them with their families.[4]

> 'IOM is working in each of the three stages of assisted voluntary returns: pre-departure, transportation and post arrival. IOM coordinates with NGO's to provide information dissemination, counselling, medical assistance, transport assistance and reintegration. NGOs also facilitate return assistance for migrants in an irregular situation and other migrants, such as unsuccessful asylum seekers, trafficked migrants and qualified nationals.'[5]

India has a MOU with IOM to facilitate the employment of the workers worldwide. It stands for the safety and the dignity of Indian labourers overseas.[6] Such activism is needed in other areas as well.

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3 https://www.iom.int/civil-society-ngos Accessed on 4/13/17

4 https://www.iom.int/civil-society-ngos Accessed on 4/13/17

5 https://www.iom.int/civil-society-ngos Accessed on 4/13/17

6 https://www.iom.int/civil-society-ngos

Conclusion

All the international human rights covenants and conventions remain merely recommendations until strongly implemented. Those countries that have not implemented covenants in domestic law are not obliged to execute the law. The power of United Nations has to override a country's sovereignty, only then will international human rights laws exist in practice. The dualism that is visible at times regarding the question of the practice of law in actuality seeks our special empirical attention. There is a possibility of absence of regulation binding on the states and it then becomes the paramount responsibility on part of the International agencies especially the non-State agencies to convince the State of the necessity of such human laws.

> 'Migrants and immigrants have often been perceived as able to work long hours for low pay and to have limited possibilities to demand benefits or other protections. Perspectives from the ILO and the International Confederation of Free Trade Unions (ICFTU) demonstrate that it is often very difficult to organize migrants and immigrants into unions or organizations to defend their interests and rights. ... Given their lack of legal recognition or precarious status in host countries, migrants can often be hired without payment of benefits, payroll taxes and other costs, representing further savings to employers' (United Nations 2000: 19).

The invisibility of migrants as a labour force is a reality. They are excluded from mainstream society. The process of exclusion and inclusion becomes arbitrary. The state becomes the mechanism through which the life of the migrant becomes 'bare'. In this process an inclusive category of citizens are constructed. The social formation of a new category as discriminated by the State loses its economic and political claim for life. Life becomes the one of someone who is excommunicated or a Homo Sacer (Agamben 2008). Thus we see different forms of life existing between citizens and non-citizens. To be human or deserve to be humanly treated, one needs to be coming within the inclusive category of the state.

There is a serious new threat to immigrants in the United States as the President, Donald Trump, imposes more injunctions on immigrants.[7] 'His

7 https://www.hrw.org/news/2017/07/27/trumps-dangerous-scapegoating-immigrants , accessed on 8/3/2017

words are part of a larger rhetoric that scapegoats immigrants as outsiders responsible for violent crime and deep societal problem' (Human Rights Watch 2017). 'But scapegoating immigrants as criminals-in-waiting is not only wrong but also counter-productive in that it is likely to endanger, not enhance, public safety' (ibid.). The Amnesty International, a human rights organization, reports some of the human rights violation that have taken place since the Trump administration. It found 35 potential human rights violations in Trump's immigration policies alone, including in the ban on U.S. refugee resettlement, the proposed border wall, demonization of the refugees as criminals, suspension of the Central American Minors program, detention of asylum-seekers, threat to separate families at the border, and the increased power handed to the Immigration and Customs Enforcement (ICE).[8] We hope this is not going to be the new trend in migration globally.

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8 https://thinkprogress.org/trump-threatens-human-rights-100-ways-ccdca056a7e9 accessed on 8/3/2017

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Law, Culture and Human Rights: An Analysis in Interrelations with Reference to India

*T. K. Oommen**

Abstract

Laws are instruments of particular states, cultures are specific to nations and human rights are applicable to the entirety of human population. In those polities in which the political and cultural boundaries are co-terminus (that is, nation-states) law, culture and human rights usually do not pose tensions in their interrelations. But in multi-religious/cultural polities the state legal system, the religious and folk (castes and tribes) legal systems and the universal principles of human rights often pull in different directions, creating conflicts. The project of cultural homogenization which states are often inclined to launch exacerbates these conflicts eroding the democratic ethos, weakening citizenship rights and diluting human rights. Therefore multi-religious/cultural polities such as India should recognize the idea of legal pluralism; state, religious and folk, which can nurture cultural identity of communities in addition to upholding citizenship rights, both of which are pre-requisites for celebrating human rights. This paper attempts to analyse the inter-relations between law, culture and human rights with special reference to India, identifying contexts of conflicts and proposing policy measures.

Introduction

That there are tensions between law, culture and human rights is a truism. In order to decipher the sources of these tensions one must recall three historical moments: The Treaty of Westphalia concluded in 1648, the anti-Jewish riots which broke out in Alsace in 1789 and the emergence of the New World in the 16th century following colonialism.

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Part I

Nations and states always existed but they came to be linked formally for the first time through the Treaty of Westphalia (a region in Germany), leading to the birth of the institution of nation-state. There are two basic problems with the institution of nation-state. One, the founding principle of nation-state namely, national self-determination by the people, cannot be functional '... until somebody decides who are the people' (Jennings 1956:56). That is, some peoples are denied the right to define themselves as peoples. Two, state and nation pull in opposite directions; state, the law making authority wants to count and label citizens, lesser the socio-cultural categories the easier to govern them. Understandably the state endeavours to create 'uniform homogeneous citizenship' (Scott 1998: 32). Thus viewed, state is a culture-destroying institution and law is an important device it invokes for this purpose. In contrast, nation is incessantly in search of its roots; it is a culture affirming entity. An important source of tension between law and culture should be located in the yoking together of state and nation.

The second historical moment occurred when the anti-Jewish riots broke out in Alsace in France, in 1789 the Count of Claremont-Tonnerre declared: 'The Jews should be denied everything as a nation, but granted everything as individuals' (quoted in Sacks 1997: 98), because if they had allegiance to one another, that would endanger their terminal loyalty to France as citizens. The Enlightenment project thus celebrated its triumph in inventing the universal man (man-as-much) over 'particular human beings set in specific traditions each with its own integrity' (Ibid: 100). Thus the institution of nation-state and the idea of enlightenment in conjunction gave birth to the uniformity pattern of state-citizen relationship, which did not recognize any intermediate primordial structures (religious and/or linguistic) as legitimate. The national culture was that of the national mainstream; other cultures are to be dissolved in it. Assimilation into the mainstream culture was perceived to be the authentic measure of nationalism of minorities (Worsley 1984). The underlying principle was: surrender cultural identity for political equality.

Notwithstanding the blue print of nation-state and the value orientation embedded in the enlightenment project, even in West-Europe, the cradle of these ideas, empirical reality varied vastly. After analysing the history of nation-state formation for five centuries Tilly concluded: 'Only a tiny portion of the world's distinctive religious, linguistic, and cultural groupings have

formed their own states, while precious few of the world's existing states have approximated the homogeneity and commitment conjured up by the label "nation-state"(1994:137).It is against this background the feasibility of conceptualizing the state-citizenship relationship as pluralist becomes an imperative. The pluralist pattern involves not only the recognition by the state of several cultural identities but also their careful nurturing within the state territory.

The third historical moment that I am referring to is colonialism, which led to the emergence of the New World consisting of North America, Australia and New Zealand. It is useful to distinguish here between retreatist and replicative colonialisms (Oommen 1991: 67-84). In the case of retreatist colonialism the colonizers withdrew from the colonies, after varying periods of colonisation, without uprooting or even substantially disturbing their basic cultural patterns. In contrast, replicative colonialism reproduced the society and culture of the colonizers decimating those of the original inhabitants. As the new settlers were drawn from a wide variety of geographical spaces with substantial differences in their cultures, particularly linguistic variations, the idea of nation-state was scarcely applicable in the New World. The idea of multicultural citizenship thus came into vogue (Kymlicka 1995) to cope with the specificity of the New World a product of replicative colonialism. Consequently the idea of human rights applicable to all irrespective of their citizenship status found a congenial political climate in the New World.

The New World produced the first multicultural situation. Initially there were three main racio-cultural streams in those settlements. The first group is those of European descent, the voluntary migrants who established their hegemony in their new homeland. Second are those of African extraction who were imported as slaves and migrants who came from Asian countries. The marginalized 'natives' who have been largely dislocated from their ancestral habitats constitute the third group. That is, if nationals predominantly populate their ancestral homelands, multicultural settlements are mainly populated by ethnies (see Oommen 1997; 2002). While legal institutions exist and/or introduced in both, the possibility of conflict between law and culture is greater in multinational and multi-ethnic polities.

The contemporary multicultural polities are products of a cultural dynamic which is neither pre-national as in empires, pro-ethnic as in the New World settlements, nor a mixture of national and ethnic groups, as in

some of the postcolonial and socialist states. It is a post-nation-state situation in that both citizens and non-citizens drawn from a multiplicity of cultural backgrounds reside in these polities. Contemporary multiculturality recognizes the facts that (a) cultural homogenisation launched by the project of nation-state has failed and (b) that cultural hegemonization within a state territory is not plausible any more thanks to the on-going process of globalization.

If multiculturalism was merely a social fact in the New World settlements in the beginning, it is also a favoured social value in contemporary multicultural polities. It incorporates the emerging new voices of African Americans, Euro-Asians, Australian Aboriginal people, and the like, in addition to the voices of women, same-sex couples and the physically challenged, all of whom demand separate and specific legal entitlements from the state. It is reinforced by the new waves of intercultural and intercontinental immigration. It recognizes the social fact that in a globalizing world not only capital but labour too migrate, which renders even Western Europe, traditionally a continent of net out-immigration, which aspired to create homogeneous nation-states, a continent of net-immigration and a conglomerate of culturally heterogeneous polities. Thus contemporary polities have not only nationals but also a substantial number of ethnies (migrants, refugees, exiles) in them, a proportion of the latter being conferred citizenship. This is the context in which the notion of multicultural citizenship assumes authenticity, although its initial formulation was based on the Canadian experience. (see, Kymlicka 1995)

If cultural pluralism is understood as a value orientation, which promotes the coexistence and preservation of a multiplicity of cultural identities within the territory of a state, the issue of national self-determination is not germane to multicultural polities. (cf. Murphy 2001: 367:78) At any rate, linking multiculturalism with national self-determination arises out of the confusion wrought by two conflations: (a) between state and nation (see, Connor 1994) and (b) between nation and ethnie (see, Oommen 1997) both of which are unsustainable. Territory is a shared feature between state and nation but its meanings for them vastly vary; for the nation, territory is a moral entity, for the state it is a legal entity (Smith 1998; May 2001). Similarly, culture is a shared feature between nation and ethnie, but while territory and culture in unison create nation, dissociation between the two leads to the formation of ethnie (cf. Smith 1998; Eriksen 1993; Fenton 1999). To put it pithily, ethnies are cultural groups living outside their ancestral homelands, usually in multicultural societies, interspersed with other cultural groups,

who may not always aspire to, or succeed in establishing their own specific states (sovereign or even provincial) and hence laws. However, if they are exclusive or major occupants of the territory into which they migrate, they may gradually become nationals through the process of identification with the new homeland and may often succeed in establishing legal institutions. That is, just as national groups can be subjected to a process of ethnification, ethnies can be transformed into nations. This processual dynamic needs to be clearly recognized in understanding the relationship between culture and law. Several processes have contributed to the emergence of multinational, multicultural and multiracial polities, which necessitated the recognition of specific legal rights of collectivities within them.

The first is the de-territorialisation of race, religion, and language, which started with geographical explorations and the colonialism that followed it. If during the colonial times the flow was mainly from Europe to the rest of the world, after the Second World War the flow to Europe and the New World from Asia and Africa increased. Even the Africans and Asians who were taken to new destinations as slaves and/or indentured labour became free citizens whose voices started becoming audible. One of the manifestations of this new audibility is the demand for collective/minority rights, often moulded by their customs, although the laws of the state are invariably conditioned by the dominant national/immigrant groups.

The second process is the tendency to recognize the specificities of states and nations; the co-existence of English and French Canadas within the Canadian state is an example. In turn, this led to the bifurcation of citizenship and nationality, patriotism and nationalism, and 'instrumental nationalism' attached to the state and 'symbolic nationalism' linked to the nation. If instrumental nationalism fends for legal equality, symbolic nationalism plumbs for cultural identity. In turn, individual-centred citizenship rights and human rights came to be differentiated, while the first are the entitlements of citizens the second are entitlements, of both citizens and non-citizens.

A third process, which is gradually crystallizing, is the abandoning of the notion of terminal loyalty to the sovereign state. With the unbundling of the nation-state, differentiation of the loyalty system too is taking place. Loyalties are no longer vertically ordered with loyalty to the state at the apex. There is a shift from the verticality of loyalties to their horizontality. In turn, this facilitates the latching of qualitatively different layers of loyalty to

specific contexts. As the content of loyalty varies, its context also differs. The loyalty of a Catholic or a Muslim on matters religious is not confined to her 'nation-state'. The loyalty of a French or Chinese in matters linguistic is not confined to his state. The 'racity' (loyalty to the race) of the Black American transcends the boundaries of the US and reaches Africa on the one hand and Brazil on the other. In all these cases only the loyalty of a person, tempered by citizenship, is confined to one's political community; the state. Loyalty to nationality and ethnicity, that is, cultural identity groups is dispersed across different geographical spaces and state territories. This spatial focusing of legal loyalty and dispersal of cultural loyalty has serious implications for the relationship between culture and law.

Concomitant to the above, a fourth process is in evidence; a shift from a sole emphasis on legal equality to legal equality and cultural identity. Project homogenization launched by the nation-state assured legal equality to all citizens if the smaller and weaker groups shed their cultural identity and as a reward for assimilating with the cultural mainstream. And several nation-states of Europe succeeded in the project, although assertion of cultural identities is gradually re-emerging. But in the case of the post-colonial and multi-national polities of South Asia, the constituting groups did not abandon their cultural identity for citizenship equality. That is, the nationals, ethnies, and minorities in the federal polities of all the continents are increasingly insisting on legal equality and cultural identity simultaneously.

In the light of the analysis so far I want to make the following suggestions. First, one must clearly distinguish four dimensions of societies; stratification, heterogeneity, hierarchy and plurality, based on the nature of the elements that constitute them, their internal social milieu, which has implications for the legal system they adopt. Second, the distinction between plural society in which insiders and outsiders are polarised (Furnivall 1948), and pluralism, which insists on equality and fraternity among them should be clearly maintained. Indeed, the route through which plural societies can become democratic is to accept legal pluralism. Third, the doctrine of homogeneity should be abandoned, as it is antithetical to the spirit of both democracy and pluralism. All these will lead to legal pluralism as against the legal monism of nation-states.

All societies are stratified on the basis of age, gender, and class. However, if a society's population is drawn from the same race, religion and or linguistic group, it could be designated as 'homogenous'. Such societies

can adopt a uniform legal system with relative ease. Conversely, multiracial, multi-religious, multi-linguistic and poly-ethnic societies may be referred to as heterogeneous societies. In this type of society, there is a possibility of inequality becoming a formal feature based on race (e.g. apartheid South Africa) or caste (e.g. India, before 1947), which also renders them hierarchical societies. That is, heterogeneous societies with institutionalized inequality are hierarchical. A heterogeneous society need not however be hierarchical as racially and/or culturally diverse groups in the polity may have formal socio-economic equality.

In the cases of stratified, heterogeneous, and hierarchical societies, however, the internality of none of the constituent elements is questioned. Thus, the American 'Negro', the Indian 'untouchable', and the Greek 'slaves' were all accepted as essential and useful internal elements although equality was not granted to them. In contrast, the internality of one or another segment in a plural society is questioned; that is, plural society is polarized between insiders and outsiders (See Furnivall 1948). Sometimes, the insiders may be marginalized (e.g. the First Nations in the New World) and the outsiders become dominant and sometimes the outsiders may be marginalized and deprived of their rights (e.g. Indians in Fiji, or guest workers in Western Europe). It is of signal importance to note that the first three dimensions of societies are not either/or but additive. That is, culturally diverse societies are also stratified and heterogeneous although they may or may not be hierarchical. However, they may have one or more segments whose internality to the society is questioned. Some of the contemporary polities encapsulate all these four dimensions; stratification, cultural heterogeneity, hierarchy and externality; India being an example of this. Understandably the legal system needs to be responsive to the differing social milieu of societies.

Individual-based legal equality is plausible in theory and tenable in practice in homogeneous societies where classes, gender, and age groups constitute the basic building blocks of the social structure. However, in heterogeneous, hierarchical, and plural societies several groups and communities too become salient units of social structure. Pursuantly, legal equality as conceptualized in and applied to homogeneous societies is not entirely amenable for application in the latter three types. And this is the rationale behind the advocacy of legal pluralism.

What is the rationale in maintaining that there is a qualitative difference in the nature of inequality between homogenous societies, on the one hand,

and heterogeneous, hierarchical plural societies on the other? To answer this question, we need to note that there are essentially two sources of inequality: performance and perception (Beteille 1986: 121-34). Generally speaking, inequality in homogeneous societies emanates from differences in performance that can be improved and eradicated through appropriate socialization within the family, inculcation of the relevant values, adequate education, training, etc. That is, inequality in homogeneous societies can be grappled with the aid of appropriate social engineering. This is exemplified by the increasing mobility among classes, gender and age groups in contemporary societies. That is, even if a group has hitherto been defined as inferior, in homogeneous societies it is relatively easy to change this evaluation.

Inequality in heterogeneous, hierarchical, and plural societies is largely based on the dominant collectivity's perception of the quality of performance of the dominated collectivies. This may have nothing to do with the actual quality of performance of the collectivity in question but the dominant collectivity's history and culture. Therefore, providing equality and delivering justice the ultimate purpose of law in democratic societies is not only a matter of impartial application of law but also one of understanding the dominant collectivity's evaluation of the quality of performance of the dominated collectivity. If such an understanding does not crystallize there are only three routes to 'solve' the problem, all of which are geared to homogenization. The first is genocide; clearly the victims are the weak and/or minorities. The second is liquidating cultural diversity through assimilation of the weak: the extreme measure being inter-group marriages. While intermarriages across diverse groups may be welcomed if they happen voluntarily, it cannot be advocated as a formal measure to achieve equality because this entails coercion, and usually the children born of coerced intermarriages are assigned a stigmatized status. Third, bifurcation of the polity into homogeneous units, that is secession, based on race, religion, tribe or language, which clearly smacks of intolerance. If the first 'solution' results in the physical annihilation of cultural identity groups (genocide), the second leads to their cultural liquidation that is, culturocide. (Oommen 1986: 53-74) The third assumes that the coexistence of inter-group equality and collective identity is impossible.

I am making this point because the quest for homogenization is often viewed as a pre-requisite for legal equality, and the coexistence of diverse cultural identities and legal equality is believed to be extremely difficult if

not impossible. Therefore, nation-states (that is, mono-national states) pursue equality through the fusion of nationality and citizenship. In contrast, in heterogeneous, hierarchical, and plural societies both legal equality and cultural identity is pursued simultaneously. This calls for the de-coupling of citizenship and nationality (see Oommen 1997).

The oppressed and the exploited do not often accept the premise that the state legal system is an impartial or final arbiter. Simply asking the question 'what is the state' does not satisfy them; they pose the probelmatique, 'who is the state', that is, who wields power and authority. Thus decentralization of authority across primordial collectivities that exist in heterogeneous, hierarchical, and plural societies is a much more vexatious process than that of dispersal of power across classes, gender, or age-groups in homogenous societies. That is, the constituent elements of heterogeneous, hierarchical, and plural societies may often pursue the goal of 'shared sovereignty', an irrelevant quest in homogenous societies. This is not to deny that a homogenous society may get divided into two or more sovereign states based on secular ideology, and establish different nation states and legal systems as was in the case of Germany and is so of Korea. However, the elective affinity between the populations of such states will be maintained in spite of the artificial vivisection of the society. On the other hand, the issues of legal equality take a different direction in heterogeneous, hierarchical, and plural societies. It is therefore not surprising that some would argue for the homogenization of societies to be brought about through the instrumentality of law obliterating cultural identities because such societies are likely to be more egalitarian and participative.

However, the proposition is not admissible for three reasons. First, to homogenize often means to establish the hegemony of the dominant collectivity, annihilation of the weak and minority collectivities, or at best their assimilation into an artificially contrived cultural mainstream, leading to the eclipse of their cultural identity. Second, most polities as they are constituted, draw their population from diverse sources. Therefore, annihilation and assimilation endanger the principle of maintaining cultural freedom and nurturing specific identities endangering human rights. Third, contemporary societies are constantly exposed to alien influence and hence characterized by frayed edges and loose textures. If anything, the ongoing process of globalization will intensify this trend. In such a situation, the only viable option is to celebrate cultural diversity, foster inter-group equality and

nurture collective identities within polities. For this to happen appropriate legal institutions should be instituted.

Part II

Human society has been in existence for three million years but the discourse on rights is only little over 300 years old. Rights are entitlements available for citizens of democratic states. The first set of rights to be introduced were civil rights in 18th century Europe. Civil rights provide citizens with the rights of individual freedom; liberty of person, freedom of speech, thought and faith; the right to own property, to conclude valid contracts and the right to justice. That is, equality before law is the crux of civil rights. But two points may be noted. One, none of the civil rights allude to basic material needs such as freedom from hunger, provision for nutrition, entitlement to shelter or clothing, that is basic needs for human survival. Thus civil rights were relevant only to property owning citizens and those were mainly male citizens those days. Two, while civil rights were made available to citizens of European states, these states were competing to colonize the non-European world; the Americas, Australia, Africa, Asia, transforming the peoples of these continents, into subjects. And, rights that were provided for citizens at home were denied to subjects in the colonies.

By 19th century political rights of citizens were recognized; these were mainly the right to franchise and the right to justice. But the right to franchise was available only to male citizens who paid tax and owned property. Only by mid-20th century universal adult franchise, that is, equality of political rights has become a reality.

The third set of rights, designated as social rights (Marshall 1965) had two components: one, a bundle of economic entitlements consisting of economic welfare and social security and two, entitlements to a full share of social heritage and to live as civilized human beings. The allusion to citizens' entitlement to social heritage is indeed a reference to retain one's culture and nurturing cultural identity.

The ideas of multi-cultural citizenship and entitlement to one's social heritage are conceptual innovations required to cope with the changes in the unit of analysis, namely nation-state. Following the same trail, I have suggested the need to introduce ecological rights (Oommen 2007: 4-10) given the devastation of nature that is taking place because of thoughtless

production and rash application of high technology for economic development. Having made the point that new rights are required to cope with the social transformations that are taking place let me allude to human rights. For 300 years from 1648 (the year in which the Treaty of Westphalia was concluded) the world had witnessed the relentless urge to create nation-states and as Grahm Wallas puts it:

> ... no citizen can imagine his state or make it the object of his political affection unless he believes in the existence of a national type to which the individual inhabitants of the state are assimilated; and he cannot continue to believe in the existence of such a type unless in fact his fellow citizens are like each other and like himself in certain important respects. (1921:287)

But the assumption that citizens of a state are nurtured by a veritable elective affinity as implied in the articulation of Wallas seemed to have disappeared with the ushering in of Global Age characterised by the delinking of the institutions of state and nation, and identities attached to them (Albrow 1996). The Universal Declaration of Human Rights in 1948 came as a big relief to all human beings living anywhere in the world irrespective of their citizenship status and cultural identities. The declaration was followed by two separate Covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Covenants were introduced in 1966 but became effective only in 1976; they have a history of only four decades but they have irreversibly eroded the importance of the institution of nation-state and heralded a new era for affirming cultural identities within and across polities.

As noted at the very outset, if states tend to homogenise cultures, nations have a proclivity to affirm the specificity of their cultures. The two most important sources of culture are religion and language and given the multiplicity of religions and languages, cultural diversity is likely to exist in most polities. However, it is useful to distinguish between cultural universals, specialties and alternatives. (Linton 1936). Cultural Universals are common to the entire humanity and only human beings are endowed with the ability to discern culture, which in the ultimate analysis is embedded in the ability to create and comprehend symbols. Symbols cannot be understood through sense organs, they are suprasensory. Within the cultural universal there are cultural specialities within civilisations and societies. All societies permit variations with regard to dress, food, and style of life in general. And if a

society is multi-religious and multi-lingual, like Indian society, the possibility of variations is immense. Cultural alternatives indicate the individual variations in cultural practices within cultural specialities. If a sufficient number of individuals followed similar alternatives they come to constitute a cultural sub-group.

While recognizing the cultural differences of religious, linguistic and tribal communities within the Indian polity, the citizens should develop the ability to respect them; to be different is not to be inferior or superior. All religious groups have their beliefs and rituals and they carry with them these cultural traits wherever they go. For a believer in Hinduism water from river Ganga is sacred, and a believing Sikh male keeps the five Ks irrespective of his geographical location. The distinction between canonical rituals on the one hand and social and political rituals on the other hand is crucial. Canonical rituals are prescribed for religious communities to be observed during life-cycle crises: birth, confirmation, marriage and death. These are also practised irrespective of geographical locations; a twice-born Hindu male undergoing the sacred-thread ceremony in New York is an example of this. Similarly there are rituals specific to peoples of Kerala or Punjab in which members of their linguistic communities participate irrespective of their religious differences. And, finally, political rituals linked to the state, such as Independence Day, Republic Day, and the like are common to all citizens of India, although due to the conflation between state and nation, political rituals are often wrongly designated as 'national'. The point to be noted is that the totality of citizens of a multi-religious and multi-lingual polity share only limited identities; often citizenship is the only identity common to all, as in India. To complicate matters citizens of several neighbouring sovereign states share some aspects of their cultures with citizens of India, particularly Bangladesh, Pakistan, Nepal and Sri Lanka.

I have suggested that there exists tension between law and culture and the most important sources of this are religion and language. Therefore, it is necessary and useful to discuss the nature of this tension. Religion prescribes specific norms of behaviour for the faithful pertaining to food and dress, laws of property inheritance and adoption of children and a host of other matters, which may conflict with the laws of the state. The mismatch between state-ways (laws) and folk-ways (culture) is a perennial source of conflict in multi-religious polities and if a particular religion even if it is the religion of the majority, is reckoned as the official/national one, that conflict exacerbates.

It is frequently argued that one of the prominent features of the modern state is that it has a legal system, which applies uniformly to all its citizens. However, this proposition is applicable only to nation-states wherein there is co-terminality between nation and state. But in multi-national and multi-cultural polities such as India there are several legal systems, which co-exist and compete, creating crisis (see, Baxi 1982). First, the State Legal System (SLS), which applies uniformly to all citizens in 'secular' and 'criminal' contexts. Second, the religious legal system (RLS) which has two main variants: (a) the RLS, partly written and partly oral, which operates on an all India basis for those who profess religions of Indic origin and the Indian diasporic community drawn from them and who may not be even Indian citizens; and (b) the RLS applicable to those who profess religions of alien origin which is at least partly applicable to co-religionists everywhere in the world irrespective of their citizenship status and spatial location. Third, the folk legal system (FLS) based invariably on oral traditions as practiced by the citizens in their specific regional-cultural contexts such as linguistic groups, castes and tribes. The point to be noted here is that cultural diversity begets legal diversity. To erase cultural diversity cuts at the very root of authentic democracy. But if RLS and FLS uphold and encourage beliefs and practices antithetical to the values of equality and justice, it is necessary to correct them, and uniformity of laws is no guarantee of achieving this.

The persisting tensions between law, culture and human rights in the Indian polity can be traced to the competing conceptualizations of India as a cultural entity. Broadly speaking there are four such conceptualizations (see Oommen 2004: 745-55): cultural monism, cultural pluralism, cultural federalism and cultural subalternism. The cultural monists characterise India as a nation-state wherein the political and cultural boundaries are believed to be co-terminus. They hold that India is a victim of centuries-old domination by outsiders, that is, Muslim conquerors and western Christian colonisers, whose contributions remain alien additions to Indian cultural ethos. The way out is to exorcise these external elements through a process of cultural cleansing and the pristine purity of India's ancient cultural integrity is to be restored. National identity anchored to religion (Hinduism) is central to this conceptualisation (see Golwalker, 1939). As a part of the Hindu consolidation, the traditionally underprivileged; Scheduled Castes, Scheduled Tribes and the Other Backward Classes, should be firmly incorporated into the Hindu Nation. The motto of this conceptualisation is: one nation, one

people and one culture. The state legal system is the single most important instrument of this national consolidation.

While it is true that Hinduism is the religion of the majority, consisting of 82 percent of India's population the three numerically significant religious minorities of India—Muslims, Christians and Sikhs—together makes for 18 percent counting nearly 200 million. This should be viewed against the fact that only 10 member-states of United Nations, out of the 220, have 100 million plus population. Similarly, the number of mother tongues spoken in India, according to the Censuses of independent India, is 1019 (in 1971) and 1576 (in 1991). And, Hindi, which is often projected as the national language is spoken by less than 40 per cent of the population, even after speakers of several mother tongues/dialects are counted as Hindi speakers. Small wonder Radhakrishnan one of India's first citizens observed:

> Hindi does not enjoy in India such natural ascendancy over provincial languages so as to incline the inhabitants to accept a secondary position for their own language. Hindi is the language of the minority, although a large minority. Unfortunately it does not possess any advantage, literary or historical, over other modern languages (1950:317).

And, the persisting controversy regarding the specificity of Aryan India and Dravidian India cannot be ignored. After reviewing the latest evidence about Aryan migration to India it is concluded: 'What is abundantly clear is that we are a multi-source civilization, not a single-source one, drawing its cultural impulses, its tradition and practices from a variety of lineages and migration histories' (Joseph 2017:9). Admittedly, to mould India as a nation-state would entail considerable coulturocide (systematic destruction of cultures) and unprecedented violation of human rights.

The Indian citizens speak languages belonging to four linguistic families: Indo-Aryan (73%), Dravidian (25%) Astro-Asiatic (1.5%) and Tibeto-Chinese (0.5%) and, some of the cultural practices vary based on the linguistic family to which they belong. For example, in the areas in which Indo-Aryan languages are spoken village exogamy is practiced; one has to seek one's spouse outside the native village. In contrast, in areas where Dravidian languages are spoken village endogamy is practiced. Of the three preferential marriages practiced among Hindus in India, one namely marrying one's maternal uncle's daughter is a pan-Indian phenomenon. But the practice of marrying one's

paternal aunt's daughter is also permitted in Dravidian India. However, the preferential marriage with one's elder sister's daughter is allowed only in the Telugu-speaking areas. While both cross-cousin marriages and parallel cousin marriages are permitted among Muslims, Christians do not allow them. Thus intersectionality between religion and language do determine some of the cultural practices. But these cultural practices are not regulated by the state legal system but fall under the purview of religious and folk legal systems. Permitting these flexibilities are indicative of respecting the cultural diversity prevalent in India.

It is against this background that the cultural pluralists visualise Indian Society as a product of gradual accretion of cultural elements; Aryan, Dravidan, Mughal and European- each of which made a distinct contribution to the making of the composite and complex culture of contemporary India. Cultural pluralism is celebrated and the idea of 'secularism' is defined as a tool to accord equal respect and dignity to the constituting elements. This mode of conceptualising India crystallised during the anti-colonial movement and facilitated the united fight of diverse elements against the colonisers (see Nehru, 1961). While recognizing the prevalence of legal pluralism, the crucial role of the state legal system in building a modern Indian state, was acknowledged. Probably this explains the listing of a common civil code in the Directive Principles to be legislated subsequently. However, the Hindu Code Bill, which encapsulated Buddhists, Jains, Sikhs and those scheduled Tribes who did not convert to Christianity or Islam indicate that the pluralists accepted the differences between indic and non-indic religions. The idea of secular India has been roundly criticised and rejected by cultural monists. Perhaps a more acceptable phrase in this context could be cultural pluralism.

Cultural federalists conceive India as a conglomeration of 'nations', basically linguistic and tribal communities; a multi-national state. In this view, each of the constituting cultural communities (such as Bengali, Tamil, Punjabi etc.) has its own cultural specificity that needs to be recognised and nurtured. As the cultural monists focus on religion as the basis of Indian nationalism, the cultural federalists emphasis the role of language in the formation of the multiplicity of 'nations' in the Indian polity. Cultural pluralism and political federalism are viewed as the two sides of the same coin (Mukherji, 1958; Oommen 2000, 1-18). Admittedly cultural federalists give importance to both the state legal system as well as the folk legal system. And, this perception falls in line with the articulations of Official Language Commission:

The variety of Indian linguistic media is not a national skeleton to be ashamed of and to be somehow hidden away. It is a wealth of inheritance in keeping with the continental size, ancient history and distinctive tradition of assimilating and harmonising diverse cultural and racial elements, of which this country can be justly proud (Government of India, 1956: 67).

The traditionally underprivileged social categories in Indian polity, who together constitute an overwhelming majority, however view the above three conceptualizations as elitist. The Scheduled Castes (16 percent) the Scheduled Tribes (8 percent) and the Other Backward Classes (52 percent), consisting of the peasantry and artisan groups, falling between Scheduled Caste and the twice-born upper castes, together referred to as dalit-bahujans (oppressed masses) make for the overwhelming majority of Indian citizens (76%). The caste system, which legitimized institutionalised inequality, sanctioned and sanctified by Hindu scriptures provide the major source of discontent to dalit-bahujans whose inspiration and conceptual perspective is designated as cultural subaltarinism (see Ilaiah, 1996) is largely derived from Dr. Babasaheb Ambedkar. Understandably cultural subalternists reject the Brahmin crafted Hindu religious legal system and while upholding the state legal system perceive it as weighed against their interests. Taking a bottom-up perspective they find the Folk Legal System articulates their cultural specificities and aspirations.

Part III

Confucius (551-479 BC), the Chinese philosopher, advised: 'For peace in the Kingdom, take good care of definitions'. The roots of most of the social conflicts that are experienced in the Indian Republic can be traced to inadequate definitions that are invoked. The co-terminality between political and cultural boundaries is the defining feature of nation-state and the Indian situation is distinctly different. In West Europe, particularly in the cases of Great Britain and Spain, the institution of nation-state is not firmly institutionalised even after five centuries of nation building and the persisting tensions within them are well known. In France and Italy where the idea of nation-state is actualised destruction of cultures of several linguistic communities have taken place (see Oommen 1997). Earlier the prescription to minorities was: surrender cultural identity and avail of citizenship equality. But now minorities; religious, linguistic, racial, tribal, insist on retaining their identity and demand equality as citizens.

The Indian constitution captured the spirit of this dictum; Hinduism was not declared the official religion of India in spite of the fact that 82 percent of its citizens were listed as Hindus; similarly, as many as 22 languages are endorsed as official languages in India. The state-citizenship relationship took into account several primordial identities; religious, linguistic, tribal and caste, in extending citizenship rights to them thereby recognizing and establishing a pluralist-pattern in state-citizenship relationship. In reinforcing this pattern, even as the State Legal System is given primacy, the Religious Legal System and the Folk Legal System are not ignored. This recognizes the fact that if a polity is multi-cultural it requires a plural legal system because cultural pluralism begets legal pluralism. Any attempt to ignore and decimate RLS and FLS and establish the hegemony of SLS is a sure invitation to destroy the idea of India as a culturally diverse polity. But inequality, injustice, indignity and insecurity persisting in all the three legal systems should be done away with. Similarly, the cultural/racial specificity of several identity groups call for the invocation of human rights regime particularly when they are dislocated from their ancestral habitats. To put in sharply the State Legal System should not be used as an instrument to destroy cultures and deny human rights. Therefore, the label nation-state is ill-suited for India and the designation national state, which celebrates cultural diversity, is more appropriate as I suggested a few year ago (see Oommen 2009: 22-43).

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Celebrating Secularism and Minority Rights in Our Constitution

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"Day and night, thy voice goes out
from land to land,
calling Hindus, Buddhists, Sikhs and Jains
round thy throne
and Parsees, Mussalmans and Christians.
Offerings are brought to thy shrine by
the East and the West
to be woven in a garland of love.
Thou bringest the hearts of all peoples
into the harmony of one life, ..."

-- *Rabindranath Tagore*

(From the expanded version of National Anthem quoted by Chief Justice S.R. Das in **In Re Kerala Education Bill, 1957,** AIR 1959 SCR 995, SCC On Line Web edition, p. 31)

Abstract

Against the backdrop of some conceptual discussion on secularism and its practice, the paper examines the constitutional provisions concerning secularism and their interpretation and application in specific instances by the courts. On such examination a conclusion is reached that, while no serious flaws may be attributed to these provisions or their interpretation and application either in the courts or the legislatures, secularism has failed to become part of the

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life of the people. This is primarily because of increasing use of religion in public life, occasionally supported by the State or government in office. A few special provisions that the Constitution makes for minorities, in the light of historical antecedents at the time of the Constitution's making, for ensuring them equality in matters that are intimate to their minority character and its preservation are also fully justified, not only in our context but also in the context of developments for the protection of minorities globally.

These provisions in no way conflict with secularism as incorporated in the Constitution. As a land of almost all religions and people of the world the constitutional provisions in this regard need to be meticulously interpreted and applied in the spirit of their makers. As custodians of the Constitution the courts must ensure that the basic rights of the people, including minorities, are not trampled by shifting political majorities. Constant vigilance is the price of liberty.

The Background

Accommodating and managing the immense diversity of India was as challenging a task at the time of making the Constitution as it continues to be till date. Instead of denying, suppressing or ignoring the diversity, the Constitution makers gave it due recognition, consistent with the unity of the nation. Indian nationhood could not be conceived on the European model where all the nations together were not as diverse as India. Therefore, the Constitution had to be designed on the principle that each individual and the group to which he belonged could take comfort in the fact that the Constitution takes into account each one of them. As it was not an easy task for a vast and diverse country, loopholes could still be found in the Constitution, but its ability to survive all kinds of upheavals and adversities is attributed to its inclusiveness besides its flexibility and length.[1]

One of the major issues of diversity has been religion. India is acknowledged as a land of almost all major religions of the world, of which some are indigenous while others have arrived from other parts of the world. None of them are as populous as the Hindu religion, having more than an eighty percent following, while some others like Jews or Zoroastrians are merely a fraction of one percent. Even though some voices were raised in

1 Z Elkins, T Ginsburg & J Melton, *The Endurance of National Constitutions*, 78ff (Cambridge University Press, 2009).

the Constituent Assembly to declare India a Hindu state, they could not make much headway in view of the strong support for giving no special status to any particular religion and giving them all equal status along with a specific provision for interference with some of the practices associated with the Hindu religion.

Although the Constitution makers did not expressly declare India a secular state, there is hardly any doubt that they meant it to be one. Therefore, as we will note below, from the very beginning of the interpretation of the provisions on religion the Supreme Court consistently took the view that the Constitution provided for a secular state well before the word 'SECULAR' was included in the Constitution in 1976, and the Supreme Court held it to be part of the basic structure of the Constitution beyond the reach of the power of amendment.

The Constitution makers did not conceptualised secularism either at the time of making the Constitution or its amendment in 1976. They were fully aware that historically the concept is of Western origin resulting from the long standing dispute between the jurisdiction of the church and the state to regulate human affairs, resulting finally in thirty years of religious war that concluded in the Westphalia Treaty of 1648. Following this, religious matters were assigned to the church and the secular matters to the state.

Although the concept of secularism originated in the special historical context of Christian religion and state in Europe, in the course of time it became a general principle of organising political societies. Our Constitution makers believed that secularism was a principle for administering plural societies through democratic consensus, which eventually became the best principle for releasing diverse people from blind and unreasoned faith, or making that faith a personal matter distinct from social and political organisation of the state.

It is with such a vision that the Constitution makers framed the Constitution and specifically its provisions relating to the right to religion, as well as the additional rights of religious and other minorities. The rights of minorities were conceived, not as favour to them, but as an assurance of equality in matters such as the conservation and exercise of their language, culture and religion, without which they would have remained uncertain.[2]

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2 For a brief discussion on the process of incorporation of these provisions in the Constitution see, 5 B. Shiva Rao, The Framing of India's Constitution, 257 – 281 (Universal Law Publishing Co., Delhi, 2nd ed., 2004).

In the interpretation and application of the Constitution such understanding of these rights has generally been acknowledged by our law makers and the courts. But they have not always been free from controversies. Such controversies have arisen both in matters of religion as well as of language though they may be more in number and intensity when both language and religion coincide, particularly in matters of establishing and administering educational institutions.

Law persons, including judges, lawyers and academics have not expressed as much dissatisfaction either with the making or working of these provisions[3] as other intellectuals, especially social scientists. T.N. Madan, Ashis Nandy, Partha Chatterjee, Akil Bilgrami and Amartya Sen, to mention a few, have seriously doubted whether the constitutional vision of secularism has been properly appreciated and internalised by the people in general and the majority community in particular. Incidents such as riots against Sikhs in Delhi in 1984, against Muslims after the demolition of Babari Masjid in 1992 and again in Gujarat in 2002 and numerous other instances taking place in different parts of the country in which even the law and order machinery becomes prey to communalism.[4] Some scholars have alleged a lack of secularism even in the process of making and the final provisions of the Constitution, which express bias in favour of Hindus.[5]

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3 See, e.g., R. Sen, Secularism and Religious Freedom, in S. Choudhry, M. Khosla& P.B. Mehta (eds), *The Oxford Handbook of The Indian Constitution*, 885 ff (OUP, 2016). Cf. in the same book K. Vivek Reddy, Minority Educational Institutions, 921 ff.

4 For their views see their papers in R. Bhargava, Secularism and its Critics (OUP, 1998). Bhargava, as noted before, has done enormous work on secularism and vigorously defended the Indian model of secularism in the face of all other criticisms. See, e.g., R. Bhargava, The distinctiveness of Indian secularism, in Aakash Singh & Silika Mohapatra (eds.), *Indian Political Thought: A Reader*. (Routledge); R. Bhargava, *The Promise of India's Secular Democracy*. (OUP, 2010); R. Bhargava, "Giving Secularism Its Due." *Economic and Political Weekly,* vol. 29, no. 28, 1994, pp. 1784–1791 (1994); R. Bhargava, "What is Secularism for?" in *Secularism and its critics,* 487-550(OUP,1998).
Dealing with religious conflicts in South Asia William Gould concludes that "there is no doubt that effects of violence have been evoked, reproduced and publicised to further the social dominance of those championing organisations of religious community mobilisation." W. Gould, *Religion and Conflict in Modern South Asia*, 316 (Cambridge University Press, 2012). For somewhat similar conclusion, also see, A.D. Needham & R. S. Rajan, *The Crisis of Secularism in India*, (Permanent Black, Ranikhet, 2007, 3d impression 2015) in the concluding part of their long introduction state: "it does not seem as if we can do without secularism in India yet, but that we need other resources as well to take us into the violence-free society we envisage, nationally and globally." At p. 30.

5 See, e.g., P. Singh, Hindu Bias in India's Secular Constitution: Probing Flaws in the Instruments of Governance, 26, *Third World Quarterly,* 909 (2005). He cites a few other scholars also who hold similar views and relying upon Constituent Assembly debates and other sources cites in support use of Bharat in Art. 1, special provisions for Hindus in Article 25, protection of cows and calves in Article 48 and Hindi in Devnagri script as the official language of the Union of India as examples of Hindu bias in the Constitution.

While doubts persist as to whether India will ever be a truly secular state, scholars like Akil Bilgrami have tried to formalise their suggestions in terms of some sort of formula. Following Charles Taylor, who also relies on John Rawls' 'overlapping consensus', Bilgrami lays down a formula in support of secularism in India. Pointing out that secularism is a political doctrine and not a 'good' in itself, but a remedy to repair the harms perceived to have been caused by religion. He concludes that there are no "secure universal grounds on which one can base one's argument for secularism",[6] but in "a religiously plural society [like ours] secularism requires that all religions should have the privilege of free exercise and be even-handedly treated except when a religion's practices are inconsistent with the ideals that a polity seeks to achieve ... in which case there is a lexicographical ordering in which the political ideals are placed first."[7]

In his view it is not in the Constitution but in practice that this definition of secularism has failed in India, because of the failure of the majority religious community to adhere to this norm.[8] On similar lines Srinivasan links secularism to a sociological concept of secularisation in which religious beliefs become less the basis of conflicts than in the previous generations. In his view, while Indian society appeared to be moving in that direction during Nehru's Congress, it started retreating later, particularly under the rising influence of BJP (Bhartiya Janata Party).[9]

Rajeev Bhargava, a strong votary of the constitutional model of secularism argues that deviating from Western models of secularism, such as that in the US, which creates a wall of separation between the state and religion or in France, which prohibits any public depiction or exercise of religion, the Constitution of India creates a model of secularism that provides for equal treatment of all religions.[10] While Bhargava's constant support to make this model work for India, which is equivalent of Sarva Dharm Sambhava, may be sympathised and supported the ground realities fail to support it.

Besides the fact that in social and political life people are often divided

6 A. Bilgrami, *Secularism, Identity, and Enchantment*, 7 (permanent black, 2014).

7 Id. at 12.

8 Id. P. 30 ff.

9 T.N. Srinivasan (ed), *The Future of Secularism*, 1-5 (OUP, New Delhi, 2005).

10 See, e.g., his writings in fn. 3 above and many more either in his own collections or in collections by others including his disagreement with the Chief Justice's understanding of secularism in *Abhiram's case* (fn. 12 below.) in *The Hindu* Op-Ed of 19.2.2017.

on religious lines and the state fails, not only in giving equal treatment to all religions, but also promotes religiosity among the people by the use of media and financial support. This is not conducive to the constitutional goal of secularism. It leads to too much religiosity in people's life, and establishes and promotes their faith in an unseen and unknown reality and power for their wellbeing in life rather than their own efforts. This distracts them from secularism and also from their fundamental duty, "to develop the scientific temper, humanism and the spirit of inquiry and reform".[11] Brutal attacks and killing of rationalists by believers, and expression of their religious beliefs by High Court judges from the bench, are in clear violation of the Constitution and can hardly be justified as secularism of any kind.

In the absence of any church like institution having the monopoly of interpretation and specification of religion in Christianity, neither the religions of Indian origin nor Islam can tell with finality the contents of religion. Even the corresponding expressions, 'dharma' in Hinduism and other religions of Indian origin and 'din' in Isalm – are not equivalent to 'religion' in English.[12] Therefore, in Hindi translation of the Constitution's secularism is "panthnirpeksh" instead of "dharma nirpeksh". May be there is a similar equivalent expression for din in Urdu language also.

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11 Srinivasan cited in fn 7 above and and P.K. Tripathi in fn 37 below who says that secular spirit of liberalism requires liberation of individual from the clutches of both the state as well as the religion. Consti. Art. 51-A (h). In view of this duty of every citizen how do we justify state's contribution to Haz pilgrimage for Muslims, or donation of gold ornaments worth several crores of rupees by the Chief Minister of a State to Hindu temples out of State funds (See, The Indian Express, 27.2,2017, p. 12, col. 1 under the caption "All that Glitters") or acquisition of land by the state for the construction of a mosque or any other religious place of any section of the society (a case relating to this issue has been referred to the Chief Justice of India for constituting a larger for deciding this matter)? For some of the views similar to Srinivasan's see, M.S. Gore (ed.), *Secularism in India* (Indian Academy of social Sciences India, 1991) e.g. C.T. Kurien at p. 201: "It is, therefore, necessary to evaluate religious convictions and communities in terms of their commitments to justice here and now, whatever may be their views about the hereafter." Also see, S. Subrahmanyam, Secularism and the Happy Indian Village, in his Is *Indian Civilization a Myth*? 21 ff where at 25 he states: "Secularism as discussed and understood in India is in large measure not an imitation, but sui generis" and is critical of religious politics of RSS and BJP naming specifically Modi, the current Prime Minister. Also Abdul Khaliq, "We the other" in *The Indian Express*, p. 15 of Jan.20, 2017 criticising the Bombay High Court decision granting bail to the killers of a Muslim priest for the reason that the later appeared to be different to the former which led them to sudden provocation. He also discusses other cases and issues promoting Hindutva contrary to the idea of secularism enshrined in the Constitution.

12 For the definition of Dharma, see, P.V. Kane, *History of Dharmsastra,* vol. 1, p. 1 which is equivalent of duty and it is in that sense that the word has been used in the literature on Dharma. For similar views on Islam, see, S. Ahmed, *What is Islam*? 176 ff (Prinston University Press, Princeton and Oxford, 2016) where the author distinguishing 'din' in Islam from religion in the West as the corpus of obligatory prescriptions given by God, to which one must submit." P. 194.

In the background of these institutional and linguistic differences, while secularism in India ensures certain rights and freedoms to the individual and religious institutions in matters of religion, the state must take the responsibility of ensuring that neither religion, nor any institution attached to it crosses any of the constitutional limits. The state must also take the responsibility of enforcing specific provisions of the Constitution such as the fundamental duties of all citizens "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women"; "to value and preserve the rich heritage of our common culture"; and "to develop the scientific temper, humanism and the spirit of inquiry and reform".

There are several other provisions also in the Constitution such as the abolition of the practice of Untouchability and special provisions for the Scheduled Castes and the Scheduled Tribes to remove the shackles that were imposed in the name of religion. Although, as noted above, doubts have been expressed about the secular credentials of the Constitution and its makers as well as of those who have been in the helm of affairs since that time, I am still of the opinion that even though Hindus constitute nearly eighty per cent of India's population, Indians in general believe that secularism is the best option for them to live and progress in peace and harmony. In the world of today no better alternative is available to us. Let us hope we accept this fact and work for its most effective operationalisation.

The Constitution

Until the insertion of the word 'SECULAR' in the Preamble to the Constitution in 1976, the word appeared only by way of an exception to the right of an individual "to freedom of conscience and the right freely to profess, practise and propagate religion" as something different from religion.[13] But besides what the Constitution makers intended and expressed in the Constituent Assembly, the Supreme Court of India has from the very beginning of the Constitution asserted that the Constitution establishes a secular state in our country.[14] Recently in a seven-judge bench decision,

13 See, Art. 25 (2) (a) "secular activity".

14 See,e.g., Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt, AIR 1954 SC 282; Ratilal Panchand Gandhi v. State of Bombay, AIR 1954 SC 388; Ayyangar J in Sayedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 871;

the just retired Chief Justice of India has quoted from a large number of decisions and other sources the nature and recognition of and support for secularism consistently followed and emphasised by the court.[15] By the time the word secular was inserted in the Preamble, the Court had also established the doctrine of basic structure of the Constitution. A few years after the introduction of the word in the Preamble the Court also held in more than one instances that secularism is part of the basic structure of the Constitution.[16] Therefore, from the lawyer's perspective, which is my perspective too, the formation of the Constitution of India, its provisions and subsequent amendments all go in the direction of not only making India a secular state but also in support of it in every possible way. It is another matter that in the day-to-day life of the people it has not been understood and internalised or the state itself has deviated from the constitutional mandate of secularism.[17]

Undoubtedly, in the history of the Constitution making, never was the demand for a theistic constitution, either during the British period or in the Constituent Assembly, raised more than by those who were in the forefront of the constitution making process.[18] They were rather critical and unhappy with the communal representation, which the British rulers introduced in the Government of India Act 1935. They were also opposed to the demand of the Muslim League to divide the country on communal lines. Understandably, therefore, they did not follow the path of the divided part of the country. They proceeded to make the Constitution on liberal ideology in which individual rights and liberties against the state as well as religion were fundamental. Its provisions on religion also are part of that scheme. Accordingly religion plays no part in the recognition of citizenship in India. All fundamental rights are available to all citizens and most of them to all persons. Thus the right to equality is available to all persons though the discrimination on certain specific grounds including religion has been restricted to citizens.[19]

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15 See the judgment of former Chief Justice T.S. Thakur in Abhiram Singh v. C.D. Commachen decided on 2.1.2017. Bhargava (fn. 8 above) and several others have expressed their disagreement with the majority judgment because contrary to the constitutional scheme, it draws a wall of separation between the state and religion.

16 See, e.g., S.R. Bommai v. Union of India, AIR 1994 SC 1918; M. Ismail Faruqui v. Union of India, (1194) 6 SCC 360; Valsamma Paul v. Cochin University, (1996) 3 SCC 545; R.C. Podyal v. Union of India, AIR 1994 SC 2342.

17 In support see the discussions in Shiva Rao, fn 1 above. Also see fn. 9 above.

18 See, ibid.

19 Arts. 14 & 15(1).

This prohibition has been extended, even against private establishments and persons in specified cases.[20] State employment cannot be denied to any citizen on the basis of his or her religion.[21] The practice of untouchability, which has been an evil associated with the Hindu religion, has been abolished and subjected to punishment by law.[22] Religion cannot be the basis for taking compulsory service from any person.[23] The main provisions directly related to secularism include equal entitlement of all persons, citizens and non-citizens, "to freedom of conscience and the right freely to profess, practice and propagate religion".[24]

The freedom and the right are, however, subject to public order, morality and health, other provisions in the chapter of fundamental rights, regulation or restriction of "any economic, financial, political or other secular activity associated with religious practice" and provision for "social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."[25] Subject to public order, morality and health, religious denominations also have the right to establish and maintain institutions for religious and charitable purposes, manage their affairs in matters of religion, own and acquire movable and immovable property and administer such property according to law.[26]

No one can be compelled to pay any tax that is specifically appropriated in payment of any expenses for the maintenance or promotion of any particular religion or its denomination.[27] No religious instructions can be given in wholly state funded schools. Even in state recognised or aided schools religious instructions or worship are prohibited unless a person, if major or his or her guardian, if minor, consents to it.[28] Also any resident section of Indian citizens having a distinct language, script or culture has the right to conserve it.[29] Every citizen also has the right to seek admission in

20 Art. 15(2).

21 Art. 16(2).

22 Art. 17 and laws in support of it such as the Protection of Civil Rights Act, 1955 & the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended in 2015.

23 Art. 23 (2)

24 Art. 25(1)

25 Art. 25(2).

26 Art. 26.

27 Art. 27.

28 Art. 28.

29 Art. 29(1).

a state maintained or funded educational institution without regard to his or her religion or language.[30] Finally, all religious or linguistic minorities have the right to establish and administer educational institutions of their choice and are also entitled to receive the same grants in aid from the state that it gives to non-minority institutions.[31]

Besides these main provisions of the Constitution on the issue under consideration, are such provisions as the directive principle requiring the state to provide a uniform civil code applicable to all citizens throughout the territory of the country.[32] This is because the so-called personal laws in matters of marriage, succession, guardianship, maintenance, adoption etc are different for different religious communities. Although no consensus on the issue has yet emerged among the various minorities, Muslims are apprehensive that it is an excuse to deprive them of their personal law, which is founded on Islam.[33]

Similarly the directive principle in Article 48, which among other things, requires the state "to take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle" has been a bone of contention for non-vegetarians and those who run businesses of animal slaughter and of selling their meat and hides. These are mostly, if not exclusively, Muslims.[34] In support of secularism the

30 Art. 29(2).

31 Art. 30.

32 Art. 44.

33 In reference to a questionnaire issued by the Law Commission in Oct. 2016 on the desirability of the uniform civil code serious apprehensions have been expressed by the Muslim community that it is a design to deprive them of their personal law. Apart from other arguments against such code, it is also said that it has adverse impact on the freedom of religion because group rights promote religious freedom. See, e.g., F. Ahmed, Religious Freedom under the Personal Law System (OUP, Delhi, 2016). Also M.P. Singh, On Uniform Civil Code, Pluralism and the Constitution of India, 5 (monsoon) Journal of Indian Law and Society, v (2014). Also note Macaulay's comment after he completed draft Indian Penal Code:"A code is almost the only blessing, perhaps it is the only blessing, which absolute governments are better fitted to confer on a nation than popular governments." Quoted in Robert E. Sullivan, *Macaulay The Tragedy of Power*, 149 (Orient Black Swan, 2010). The present BJP government at the Centre has also asked the Supreme Court to decide authoritatively whether personal laws – as a facet of freedom to practice religion – would be circumscribed by fundamental rights of equality and to live with dignity. See," Fundamental Rights vs personal laws: Centre wants SCC ruling" *The Indian Express*. P. 9 of 17.2.2017. Arguments on the validity of triple talaq in Islam have been concluded in the Supreme Court and a decision is expected any day on how far courts can take a lead under Article 44.

34 See, e.g., Mohd. Hanif Quarshi v. State of Bihar, AIR 1958 SC 731; Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat, (1986) 3 SCC 12 &Hashmatullah v. State of M.P. (1996) 4 SCC 391.

Constitution also places a duty on every citizen to abide by the Constitution and respect its ideals and institutions, to promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic and regional or sectional diversities; to value and preserve the rich heritage of our composite culture; to develop a scientific temper, humanism and the spirit of enquiry and reform, and to strive towards excellence in all spheres of individual and collective activity. [35]

The other provisions that have some relation to secularism are Article 290-A, introduced as part of the process of reorganisation of States, requires the States of Kerala and Tamil Nadu to pay specified amounts from their respective consolidated funds towards the maintenance of Hindu temples and shrines that were traditionally supported by the ruler of Travancore and Cochin before the reorganisation of the states.

The Constitution also provides for one general electoral role of all eligible persons for participating in elections for Parliament and State legislatures from which nobody can be excluded on the ground of religion. The Constitution also makes a few favours to the Anglo-Indian community such as their representation through nomination in Parliament and State legislatures, their representation in some services for a limited period and also special financial grants for their educational institutions for a limited period. [36]

The Constitution makes several special provisions for Scheduled Castes and Scheduled Tribes. While the latter may or may not belong to any religion, the former are Hindus even though the Hindu religion made them outcastes and untouchables.[37] A few special provisions, such as admission in educational institutions and state jobs are also made for backward classes among whom persons of any religion can be included depending upon their backwardness.[38] A special provision is also made for the appointment of a special officer for linguistic minorities in the country.[39]

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35 Art. 51-A.

36 Arts. 331, 333, 336 & 337.

37 See, e.g. Arts. 15(4) & (5), 16 (4A) & (4B), 330, 332, 335, 338, 338-A, 339.

38 See Arts. 15(4) & 16(4), 340.

39 Art. 350-B.

Interpretation and application of these provisions by the courts

The courts are not the only but one of the institutions for the realisation of the goals of the Constitution through their interpretation and application of the provisions of the Constitution in specific cases or instances brought to them either by the affected parties or on their behalf as public interest litigation. Their interpretation, exposition and application of any provision of the Constitution not only educate people and government functionaries, they also bind them unless either the Constitution is amended or the same or a higher court overrules such interpretation, exposition or application.

An amendment of the Constitution may not be possible if it goes against the basic structure of the Constitution, which, as already noted, includes secularism. By holding secularism as part of the basic structure of the Constitution the Court has at least ensured that India is not and cannot be converted into a theistic state. But a non-theistic state may also not necessarily be a secular state. Much depends upon the connection and interaction between the state and religion or different religions in a multi-religious state like ours. The courts perform an important role in determining that connection and interaction. For a student of law like me and for a legal discourse like the present one constitutional provisions and their application and interpretation by the legislature, the executive and the judiciary are the prime factors in that determination. Therefore, much of this paper revolves around them.

Despite the courts having said from the very beginning of the Constitution that it establishes a secular state, it has been criticised for having missed the secular spirit of liberalism quite early in the interpretation and application of the provisions of the Constitution.[40] A secular spirit of liberalism requires liberation of individual from the clutches of both the state as well as the religion. While the making of the Constitution and its provisions are explicit on this point the Court took a cautious step in the interpretation of the provisions relating to the right to freedom of religion. Dealing with that right initially the Court acknowledged the distinction between religion and the activities associated with it and noted that a religion and activities or matters connected with that religion must be determined according to the tenets of that religion.

40 See, P.K. Tripathi, Secularism: Constitutional Provision and Judicial Review, http://14.139.60.114:8080/jspui/bistream/123456789/680/12/Secularism_Constitutional%20Provisions.pdf.

While this appears to be reasonable approach by the Court, in reality it is not intended by the Constitution, because otherwise how could it provide for the abolition of "Untouchability" and forbid its practice in any form? And how could it subject the freedom of religion to all other fundamental rights, including prohibition of discrimination on the ground of religion, or authorise the state to regulate secular activities associated with religion or provide for throwing open of Hindu religious institutions of public character to all Hindus?

Because of the Court's interpretation, religion or its freedom has gained and continues to gain priority over other fundamental rights as well as resulting in discrimination against minority religions.[41] For example, quite soon after the commencement of the Constitution, laws made in pursuance of the directive principle requiring the state to take steps for "prohibiting the slaughter of cows and calves and other milch and draught cattle" was given priority over the right "to carry on any occupation, trade or business". By applying the rule of harmonious construction, which earlier the same Judge in the Court failed to apply to the Madras Government Order, which the Government defended under the directive principle requiring the State to "promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes", and held that "the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of fundamental rights".[42] One could allege application of different standards by the Court in these two cases because in both cases the Court's interpretation had adverse effect on the interests of minorities in terms of their religion or weaker position in society.

In the course of time the directive relating to slaughter of animals has been exploited to the extent of a complete ban on the killing of any animal in some of the States.[43] This has either put some people of a religious minority out of business or has adversely affected the economic interest of a traditionally vulnerable section of the majority community. These laws have been used to harass and torture vulnerable sections of society even within

41 For details, seeTripathi in the previous n.

42 State of Madras v. Champakam Dorairajan, AIR 1951 SC 226, 228. For a criticism of this approach see, P.K. Tripathi, Directive Principles of State Policy (1954 17 SCJ 7. Also M.P. Singh, The Statiucs and Dynamics of Fundamental Rights and the Directive Principles - A Human Rights Perspective, in S.P. Sathe and Sathya Narayan (Eds.), *Liberty, Equality and Justice*, 45 (EBC, Lucknow, 2003).

43 E.g. in Gujarat, see, State of Gujarat v. Mirzapur Moti Kureshi KasabJamat, (2005) 8 SCC 534.

the majority religion, such as the dalits.[44] The same directive principle is being currently invoked not only to prohibit the slaughter of animals but even for possession of animal meet, ordinarily the beef or cow meat, but any meat without giving any opportunity to its possessor even to explain its contents.

These laws or their application primarily targets a particular religious minority, Muslims, who are generally or are considered by the Hindu majority community, to be non-vegetarians. Notably, in recent times these laws are being enforced, not so much by the state authorities as by private persons or hoodlums, maybe in connivance with the state authorities. Such acts have led not only to the harassment of men, women and children of the religious Muslim minority, but also they have resulted in loss of life causing immense fear and dislocation of that minority community. The same has happened to Dalits, who I consider a minority among the Hindu majority in view of their traditional vulnerability and exclusion in Hindu society.[45]

The foregoing interpretation of the right to religion has also resulted in the denial of other rights such as equality before the law and prohibition against discrimination on the basis of sex and caste to the vulnerable sections even of Hindu society such as women and Dalits, especially on the issue of their entry into the Hindu religious institutions of public character. Reconciliation between the power of the state to throw open such places to all persons with the right of religious denominations "to manage its own affairs in matters of religion" has also led to denial or considerable curtailment of the right of women and Dalits to enter the places of worship in violation of their right to equality.

They are still struggling for their right to equality in matters of religion such as temple entry even after 67 years of the Constitution being in operation. Upholding the validity of the Acquisition of Certain Areas at Ayodhya Act, 1993 the Court also remarked that "[the] right to practice, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property"[46] while such right is available to all religious denominations under Article 26 (c).

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44 See innumerable instances reported in the newspapers in the year 2016 about the loss of business for many cattle traders, adverse impact on national economy and trade and atrocities on Dalits, especially in Una town in Gujarat *The Indian Express* of 13.7.2016, p. 11.

45 The previous not and many more instances of enacting or amending the laws making possession of meat or transport of animals a crime enacted since 2014 besides the newspaper reports noted in the previous note above.

46 M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360.

I think that Muslims as such and as members of different sects such as Hanfee, Shia or Chisti also constitute religious denominations and are therefore equally entitled to the rights under Article 26 (c) and (d). Although the majority of the Court justified the acquisition of property in that case on the ground of public order, the minority of the Court called it an end to secularism in the country because the majority community could at any time create a justification for the acquisition of property of a religious minority simply by creating public disorder.[47]

Among the cases concerning religious minorities two stand out clearly in support of them of which one is criticised for having sacrificed the liberty or the rights of the individual, which was the goal of secularism, in favour of the power of the head of an Islamic sect.[48] The other has been acclaimed for having strengthened secularism by upholding the religious freedom of a small religious minority – Jehovah's Witnesses.[49] Financial support to religious minorities from taxes collected by the state has, however, been supported by the courts in some cases for one reason or another primarily on the consideration of establishing equality between minorities and the majority.[50]

Cultural and educational rights of minorities

The concern for all minorities along with the religious minorities expressed in the Constitution has become a matter of concern for some sections of the majorities in different parts of the country, and generally among the, so-called, nationalists for the extent to which they give special rights to religious minorities. They argue that they are inconsistent with the concept of secularism, which is a basic feature of the Constitution. By and large these are the same people who are also opposed to the idea of India being a secular state.

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47 Id. at 438. Also see Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402.

48 See, Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853. For its criticism see P.K. Tripathi, Secularism: Constitutional Provision and Judicial Review, n. 26 above.

49 Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615. There is a fear of this position being diluted by the court in a case relating to the question of standing up in the cinema halls when the National Anthem is displayed at the beginning of a film. The matter is still pending before the court for final decision.

50 See, Suresh Chandra Chiman Lal Shah v. Union of India, AIR 175 Del 168; Brij Kishore Mohanty v. State of Orissa, AIR 1975 Orissa 8; Papanna v. State of Karnataka, AIR 1983 Kant 94 & Prafull Goradia v. Union of India, (2011) 2 SCC 568.

This factor may have knowingly or unknowingly played some role in the policy decisions or law making of the administrators or the legislators in some cases, but the courts have generally extended their support to these provisions subject to occasional wavering. Out of the two provisions on cultural and educational rights, even though the marginal note of the first, Article 29, reads: "Protection of interests of minorities" it is not confined to rights or interests of religious or linguistic minorities. Its two clauses confer two different rights though in some respects they may be complementary of each other. Clause (1) of Article 29 assures a general right to every section of the citizens of India residing in any part of its territory who have a distinct language, script or culture to conserve that language, script or culture.

Definitely this right extends only to citizens who have a distinct language, script or culture, i.e. those who are different from mainstream citizens in any of these three matters. It is in that sense that they are minorities and not in the sense of religion. But even if any religious group of citizens is distinct in any of these matters that group is entitled to this right. As education is and may be directly relevant to the meaningful exercise of these rights, this group of citizens may also avail the rights under Article 30 to establish and administer educational institutions of their choice and all that goes with it under that article.

But the rights in the two articles do not control one another. While rights in Article 30 are confined to linguistic and religious minorities the rights in Article 29(1) extend to all groups of citizens having distinct language, script or culture. Further, Article 30 rights are confined to establishing and administering educational institutions while Article 29(1) gives a general right to "conserve" the language, script or culture by any means including establishment of educational institutions. A citizen may even "agitate for the protection of the language" and "Unlike Article 19(1), Article 29(1) is not subject to any reasonable restrictions" and is to that extent absolute.[51]

Article 29(2) which prohibits denial of admission to any educational institution, maintained by the state or receiving aid out of state funds, on grounds only of religion, race, caste, language or any of them, is not restricted to religious or linguistic minorities, but it has implications for minority educational institutions protected under Article 30. Minority educational institutions receiving aid from the state cannot prevent admission of students

51 Jagdev Singh Sidhant v. Pratap Singh Daulat, AIR 1965 SC 183, 188.

having language or religion or both different from that of the minority community.[52] Nor can a hard and fast limit be placed on minority institutions in respect of intake of minority and non-minority students so long as merit is the criteria for admission.[53]

Until 2005 the rights of the individual and constraints on institutions in matters of admission under Article 29 (2) were relevant only to state aided institutions. The unaided institutions were not affected by that provision. Clause (5) added to Article 15 in that year modified the situation to the extent that even unaided, non-minority institutions could be subjected to reservation in admissions for the advancement of socially and educationally backward classes and the Scheduled Castes and the Scheduled Tribes. The rights of the minority institutions, aided or unaided, however, remain unaffected.[54]

Unlike Article 29 uses the expression 'minorities' in the marginal note but not in the body of the article, Article 30and its clause (1) use that expression both in the marginal note as well as in its body. It entitles all minorities, based on religion or language, to establish and administer educational institutions of their choice. As the word minority is not defined in the Constitution, the Supreme Court has evolved a working criterion of percentage of total population of the area to which a law, whose validity is questioned, applies, i.e. that section of population which is less than fifty per cent in terms of its language or religion will constitute minority. Going by that test generally in terms of religion Hindus form the majority in most parts of the country, with the exception of some small parts at the periphery where persons of some other religion such as Islam or Christianity are or may be the majority.

In terms of language also, Hindi is the language of the majority in central India while other languages are confined to smaller areas all around the country, making them majority language at the state or union territory level but not beyond. In view of these facts the Court has suggested that minority status should be determined on the basis of states and not on the all India basis both for linguistic as well as religious minorities.[55]

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52 See, State of Bombay v. Bombay Education Society, AIR 1954 SC 561 for language issue and St. Stephen's College v. University of Delhi, AIR 1992 SC 1693 on minority issue in general.

53 TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, 583.

54 It may be noted that Article 29 (2) was subjected to special provisions in favour of SCs and STs and socially and educationally backward classes as early as 1951 by the first amendment. The constitutional validity of 93rd amendment which added clause (5) in 2006 has been upheld in Pramati Educational and Cultural Trust v. Union of India, (2014) 8 SCC 1.

55 TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481

This criterion breaks down in situations where no community constitutes fifty percent of the total. It also breaks down, particularly in the case of linguistic minorities, when a non-minority group in the neighbouring or any other state moves in just to take the advantages or protections available to minorities. This anomaly seems to have been realised by the Court also in holding that Article 30 does not protect political minorities based on numerical strength but rather "It protects insulated sections of the society whose vote may influence politics but is not decisive in it."[56] This understanding is similar to the one in international law and practice, according to which "a minority is a group which is numerically inferior to the rest of the population of a state and in a non-dominant position whose members possess ethnic, religious or linguistic characteristics which differ from the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language."[57] Further, the members of the minority must be citizens of India and not every person or citizen of any country.[58]

It may also be noted that the earlier assumption of the Court that the laws affecting the minorities will be only state laws has also become out-dated with the transfer of education from the State List to the Concurrent List in 1976. This has actually happened by the enactment of the Right of Children to Free and Compulsory Education Act, 2009 and also by the establishment of Central Universities in all the State in the same year.

Minorities have every choice to establish an educational institution either to teach their religion or language or to give general secular education of any kind to their own members as well as to others, subject to the condition that if they take aid from the state they have to satisfy the requirement of admitting members of other communities too. If they seek recognition they must satisfy the conditions for such recognition in terms of curriculum, though not by sacrificing their right as minority under Article 30(1). Unlike non-minority institutions minority institutions cannot be compelled to admit certain percentage of Scheduled Castes and Scheduled Tribes candidates. The right to administer or run such institution arises only if it has also been

56 See, e.g., Dayanand Anglo Vedic (DAV) College Trust & Management Society v. State of Maharashtra, (2013) 4 SCC 14, 34.

57 F. Capotorti, "Minorities" in R. Bernhardt (Gen. Ed.), *Encyclopedia of Public International Law*, vol. 3 (North Holland, 1997) 411.

58 St. Stephen's College v University of Delhi, (1992) 1 SCC 558, 587.

established by the minority that claims that right. Therefore, the Court held that as Aligarh Muslim University was established by an Act of legislature and therefore Muslim minority could not claim the right to administer it.[59] The minority educational institutions have the same right of recognition and affiliation as any other institutions subject to fulfilling conditions that do not deprive them of their minority character.

Although the rights of minorities have been stated in absolute terms in Article 30 (1) they are not free from all regulation or general laws of the land. They have the right to administer and not to mal-administer and accordingly conditions in the interest of proper administration of the minority institution may be laid down for them. But the conditions should not be such as to deprive them of their right to administer.

Back in 1963 the Court held that "if every order, which while maintaining the formal character of a minority institution destroys the power of administration, is held justified because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a 'teasing illusion', a promise of unreality."[60] Much later the Court changed this position by holding that "The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf"[61]. Following this decision in Maharashtra compulsory teaching of Marathi in all schools including of minorities was upheld.[62] Later, in P.A. Inamdar v. State of Maharashtra[63] the Court also said that TMA Pai Foundation case had overruled Sidhrajbhai v. State of Gujarat[64] on the point cited above. But a few years later the Court restored part of the lost ground for the minorities by holding that reservation of posts of teachers for SC and ST candidates could not be applicable to minority educational institutions because national interest must be consistent with law and national interest could not be claimed in disregard of the rights of the minorities.[65] Going by the background and

59 S. AzeezBasha v. Union of India, AIR 1968 SC 662. The minority character of the University has, however, been restored by amendment in the law. But that is also under challenge and pending in the Supreme Court.

60 Sidhrajbhai Sabbai v. State of Gujarat, AIR 1963 SC 540, 547.

61 TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, 563.

62 Usha Mehta v. State of Maharashtra, (2004) 6 SCC 264.

63 (2005) 6 SCC 537, 590.

64 See, n. 40 above.

65 Sindhi Education Society v. Govt. (NCT of Delhi) (2010) 8 SCC 49.

existence of the rights of minorities, they are crucial for the durability or longevity of the constitution because inclusivity of all members of society is one of the three factors that are crucial for the durability or endurance of a constitution.[66] Thus respecting the minorities is in the interest of constitutional stability and national interest. Therefore, justifying the non-application of some provisions of the Right of Children to Free and Compulsory Education Act, 2009 to minority educational institutions the Court cited its remark in the famous Kesavananda Bharati case[67] that these rights are part of the basic structure of the Constitution.[68]

As already observed, the rights of the minorities in Article 30(1) to administer educational institutions of their choice are not, however, absolute in the sense that the right to administer does not include the right to mal-administer and therefore laws or regulations in the interest of good administration of a minority institution do not curtail its rights, nor do the general laws or regulations applicable to all others such as building laws, safety and health measures, general taxes, etc do not curtail their rights. In some cases courts have also subjected the minority rights to the requirements of equality requiring parity in pay scales for minority and non-minority institutions and observance of principles of natural justice including the prior permission of state authorities administering educational institutions or to approach such authorities after the action for taking any action against an employee of the minority educational institution do not violate these rights.[69] Nor do the requirements of registering the management committee of a minority educational institution as a society under the societies registration law[70] or creation of supervisory body over the minority institutions[71] or the requirement of admission of students on the basis of common admission test[72] or introduction of optional education in mother tongue at primary

66 Z Elkins, T Ginsberg & J. Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 65 ff & 78ff. The three factors according to the authors are inclusivity, flexibility and explicitly.

67 Kesavananda Bharati v. State of Kerals, (1973) 4 SCC 225.

68 Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1, 269 (Para 54).

69 See, Frank Anthony Public School Employees' Assn. v. Union of India, (1986) 4 SCC 707; Y. The clamma v. Union of India, (1987) 2 SCC 516; manohar Harries Walters v. Basel Mission Higher Education Centre, 1992 Supp (2) SCC 301

70 All Bihar Christian Scools Assn. v. State of Bihar, (1988) 1 SCC 206

71 Bihar State Madarasa Education Board v. Madaras Hanfia Arabic College, (1990) 1 SCC 428;

72 St. Stephen College v. University of Delhi, (1992) 1 SCC 558. Sankalp Charitable Trust v. Union of India, 2016 SCC OnLine SC 366.

school level violate[73] the rights of the minorities. The laws in the foregoing instances are not the laws that are directed against the rights of the minorities protected in Article 30. Any of their effects on the rights of the minorities are simply incidental.

As part of the rights of the minorities in clauses (1) of Article 30 its clauses (1-A), which was added on the repeal of the right to property in Article 31, requires that if the state acquires any property of any minority educational institution it must ensure that the compensation paid for such acquisition does not curtail or abrogate the right guaranteed to the minority in clause (1). Moreover, the state is also under an obligation to pay the same grants in aid to minority educational institutions that it pays to any other educational institution. Similarly the Court has also recognised the right of the minority educational institutions to affiliation to an education board or university on such conditions that are not inconsistent with the rights of the minorities in clause (1) or Article 30.[74] The state cannot put such conditions for the grant of aid or recognition that will deprive them of their rights under Article 30.

Although the rights of minorities in Articles 29 and 30, especially the rights of religious minorities in Article 30,have been subjected to severe criticism on a number of grounds including equality and secularism[75] as a matter of well-established facts of their making they were negotiated and settled after long and intense discussion and deliberations in the Constituent Assembly on the basis of the report of Constituent Assembly's Sub-Committee on minority rights in justification of discarding elections on communal lines introduced in the Government of India Act, 1935.[76] They did not agreed upon as a lesser evil between the two but on the principle of justice to minorities well recognised by the Constitution makers prior to its recognition in international law and other national constitutions.[77] No doubt,

73 English Medium Students Parents Assn. v. State of Karnataka, (1994) 1 SCC 550 & State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools, (2014) 9 SCC 485.

74 In Re Kerala Education Bill, 1957, AIR 1958 SC 956; Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717; Mili Talimi Mission v. State of Bihar, (1984) 4 SCC 500.

75 See, e.g., K. Vivek Reddy, Minority Educational Institutions, in S. Choudhry, M. Khosla& P. Mehta (eds), The *Oxford Handbook of The Indian Constitution* (OUP, 2016) 921 ff.

76 For details in brief, see, G. Austin, The Indian Constitution (OUP, 1966) 124 – 126 & 149 - 156 . According to him they were part of the minority rights recognised in Karachi Resolution of 1931. S. Tejani, *Indian Secularism* (Permanent Black, Ranikhet, India, 2007) 234 ff.

77 See, e.g., Int'l Covenant on Civil and Political Rights, 1966 Arts. 26 & 27; Declaration on the Rights of

like several other fundamental rights in the Constitution, they have caused difficulties in their application but that cannot be a justification for discarding or undermining them. They have a principled justification for their inclusion in the Constitution of a multi-religious and multi-linguistic country like India. Any misuse of them needs to be discussed and decided in an atmosphere of genuine concern for their best utilisation in the interest of any minority community.[78] They are also a good example of group rights that have a well-established justification in political and legal theory as sine-qua-non for the exercise of individual rights.[79]

Conclusion

Going by the provisions of the Constitution and their interpretation and application by the courts, little distracts from the notion of secularism in the traditional understanding of it in terms of separation between religious and temporal. But in recent times increasing involvement of religion in public life leading to political and social tensions in the country questions, among others, on special provisions for the minorities in the Constitution are being raised. On the one hand an argument is made that in a secular state no special rights or privileges should have been given to religious minorities; on the other hand it is also argued that even political representation of minorities on the lines of Scheduled Castes or Scheduled Tribes would have helped in the secularisation and liberalisation process in the country.[80]

Secularism in traditional pluralistic societies like India, and the ones that are now growing as a result of globalization everywhere, may not have the same meaning as it has had in nation states – a separation between the religious and secular. It requires a much broader and liberal content in which each member of society in public life is treated as an equal citizen irrespective

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Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992; See, Arts. 21 & 22 of the Charter of the Fundamental Rights of the European Union, Lisbon Treaty 2007.

78 For suggestions on this issue see, P. Chatterjee, The Politics of the Governed, 133 ff (permanent black, 2004)

79 See, e.g., N. Chandhoke, Beyond Secularism, The Rights of Religious Minorities (OUP, New Delhi, 1999).

80 See, e.g., detailed discussion on this issue in historical perspective in S. Tejani, *Indian Secularism* (Permanent Black, Ranikhet, India, 2007, 3rd impression 2016) and particularly its conclusion 261ff. Also, ShaefaliJha, Rights vs. Representation: Defending minority interest in the Constituent Assembly, in R. Bhargava (ed.), '*Politics and Ethics of the Indian Constitution*' 339ff (OUP, 2008). Also, R. Kothari, Politics in India (Orient Black Swan, 2nd ed., 2012, reprint 2016) where at p. 250 he says that political involvement of all communities has led to secularization in India.

of his or her religious affiliations or beliefs. Some countries, like France, are trying to do that through the elimination of all religious identities or symbols in public life while others are achieving the same goal by keeping religion separate from the public life, as in the United States.[81]

Our Constitution does not follow either of those models because merely by separating the state from religion, the goal of social reform, especially of the majority community, could not be achieved. It is by subjecting the religion of the majority community to the power of the state to undertake required social reforms that are mixed up with religion, the state has been able to change much in our traditional society even though the state may have not yet been able to generate enough confidence of equal citizenship among minorities and among vulnerable sections of the majority community. But the Constitution empowers them to take the support, if not of the political wing in the legislature or the executive, of the independent judiciary, the custodian of the Constitution, and of the individual and group rights that it guarantees. This arrangement has initiated movement of the suppressed sections in society towards the acquisition of equality and dignity in matters that were denied in the name of religion, such as temple entry not only to Dalits but also to women.

Indubitably, much more is required to be done to give confidence to all sections of society and to each individual, including of course minorities, of equal citizenship in the country. Even though the constitutional process in this regard has been slow and subjected to great strain in recent times, let us hope that we shall overcome this crisis like we have overcome several others in the past staying within the parameters of our Constitution and the institutions it establishes.

81 Cf. P. Enderson, *The Indian Ideology*, 149 (Three Essays Collective, 2012) where he says: "Indian secularism of the post-Independence period had never sharply separated state and religion, let alone develop any systematic critique of Hinduism." For a response to his views see, P. Chatterjee, S. Kaviraj& N. Menon, *The Indian Ideology*, p. 47 -60 in particular(permanent black, Ranikhet. Year of publication not mentioned).

Appendix

Constitutional Provisions Regarding Secularism and Minority Rights

Right to Equality

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

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

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

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Article 16. Equality of opportunity in matters of public employment.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 23. Prohibition of traffic in human beings and forced labour.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Right to Freedom of Religion

25. Freedom of conscience and free profession, practice and propagation of religion.

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

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II. In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Freedom to manage religious affairs.

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

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

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

No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

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

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

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

Cultural and Educational Rights

29. Protection of interests of minorities.

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. Right of minorities to establish and administer educational institutions.

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

Article 331. Representation of the Anglo-Indian Community in the House of the People.

Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

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Volume-16, 2017

Bad Governance is a Human Rights Violation!

Why Good Governance should be Recognised as a Fundamental Right

V. Suresh*

"Human rights constitute the sap that gives life to the tree of good governance"

- Justice Michael Kirby
Former Justice High Court of Australia

Abstract

Good governance has typically been presented as a management process for ensuring transparency and accountability. This paper examines the nature of governance from a human rights perspective and argues that it is far more than a process; it is a prerequisite for a life of dignity, equality, freedom and justice. Therefore, good governance can be considered a fundamental right. This position is examined in the context of India's persistent poverty, inequality and repression co-existing with flourishing economic growth and emergence as a world power.

The author contends that conflation of the terms governance and government, together with the emphasis placed by the World Bank and others on governance as fiduciary measures, has led to this confusion. Whereas, government is an administrative structure, governance embodies concepts of equity, freedom and justice and the antithesis of discrimination, corruption and misappropriation.

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Political parties, in power and in opposition, and the role of the Supreme Court in interpreting Article 21 of the Constitution of India, are challenged for their reluctance to consider governance as a fundamental human right when doing so would enable the public, especially the poor and marginalised, to invoke this right to secure an equal place in democracy. .

Introduction

Does the fundamental right to life include the fundamental right to good governance? Conversely, is bad governance, a human rights violation?

These questions are neither rhetorical nor polemical. They arise from a context in which, even after 70 years of independence and over 6 decades of planned growth, the country is characterised by major developmental deficiencies marked by widening inequality, persistent poverty, widespread corruption, worrisome health status, a vast army of unemployable youth coexisting with massive unemployment, extensive environmental degradation and ecological damage causing major health hazards, diseases and life threatening illnesses, social and communal conflicts, devastated ground water tables and contaminated surface and running water sources and a host of other similar serious crises.

None of the issues listed is meant to belittle major strides the country has taken on many fronts, notably in urban and rural infrastructure provisioning, in improved health facilities and higher institutions of education, in the ICT revolution (Information and Communication Technology), space research and a host of other key areas. The issue is not that we have not developed; the issue is that this development has benefitted a small sliver of India's population at the cost of the vast majority of people, who are facing the challenges of having to cope with major structural and systemic problems of governance. They are systematically excluded from participation in decision-making on the type of development programmes to be undertaken in the name of their own well being, in a system that prioritises growth and development in isolated pockets of affluent social sections or politically powerful regions, resulting in inequitable development and widespread deprivation.

The Annexure attached to this articles highlights how India is ranked as one of the most corrupt nations in the Asia Pacific region and on `Ease

of Doing Business' we rank a poor 100th[1], 154th in Healthcare index, 122nd in the World Happiness Index, 131st in the Human Development Index, 168th in Literacy and 136th in Press Freedom Index.

If after 7 decades of a planned economy and investment of tens of thousands of crores in development programmes, infrastructure projects and industry, our comparative position on crucial developmental indices is still poor. The key question to ask is why. It doesn't take much effort to realise that our poor record of development is the result of a major failure of governance systems and processes, which have systematically excluded people from the ambit of decision making on crucial social and development policies, programmes and laws. Widespread corruption can exist only in a context that ensures poor transparency, denies accountability, ensures failure of social justice, denies participation to people, robs people of their dignity and functionally operates by denying democratic participation and inclusion of all sections of people.

The social, economic and cultural consequences of governance failures is a massive humanitarian crisis marked by hunger, poverty, health crises, alienation from common resources, loss of livelihoods, destruction of habitats and environmental degradation and rising inequality, all these and more constitute human rights violations. This is especially so when the victims of maladministration and destructive development projects protest and assert their rights and are met with brutal repression and police action.

The common factors that influence, affect and enhance both governance and human rights are the roles played by the state, its agencies and officials. The state or the government has near monopoly over the use of force and authority to determine both the manner in which government systems function and also whether human rights are respected, followed

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1 The irony is that the government took great pleasure in announcing that India has moved from 130th to 100th position in the `Ease of Doing Business' Index, which is said to be announced on 31st October, 2017. That India is ranked so low at 100 out of 190 countries, should be a matter of concern. (Ref.: http://www.thehindu.com/news/national/india-to-hit-ton-in-business-ease-rank/article19940995.ece accessed on 28.10.2017).

The flipside to the issue of relaxing rules for starting businesses so as to encourage foreign capital to invest in new industries India is the systematic dismantling of environmental protection laws and regimes resulting in reduced environmental safeguards. See: (i) http://www.downtoearth.org.in/news/parliamentary-standing-committee-rejects-tsr-subramanian-report-on-environmental-laws-50577; (ii) http://www.counterview.in/2017/06/govt-of-india-dismantling-eco.html; (iii) http://www.rediff.com/news/special/dismantling-environmental-laws-endangering-india/20150216.htm; all accessed on 26.10.2017

and secured in a particular state or social setting. The crucial element to be noted here is that in both contexts, the state determines policies, creates laws, determines whether its officials exercise power respecting the rule of law and constitutional scheme or whether through their actions and exercise of power, they actually become the apotheosis of good governance which is people-friendly and responsive, inclusive, transparent, accountable, fair, equitable, responsible and respects the rule of law. By the same token, the state, through its officials and agencies are also responsible for the protection, preservation and promotion of human rights.

In a sense therefore, ensuring good governance and enhancing human rights are crucial and conjoint objectives that the state and its officials and agencies have to adopt. Failure to do so results both in violations of human rights and in bad governance. Michael Kirby[2] , highlights this poignantly by pointing out that, "law is not necessarily a guarantee of justice or of the protection of human rights and fundamental freedoms. Law can sometimes be an instrument of oppression ... good governance must provide ready means to change laws which are unjust and oppressive"[3] . Madhav Godbole also highlights the intimate relationship between fundamental rights and good governance by pointing that good governance requires a, "forward-looking and enlightened constitutional framework, democratic governance, independent judiciary, freedom of press and independent apolitical, neutral and fearless civil service owing allegiance to the Constitution and rule of law and not to the political party in power". (2004, pg. 1106; see also Videh Upadhyay (2004)). It is thus apparent that both good governance and human rights are inextricably linked to both the official and political processes of government functioning. Intrinsic to this process is the role of vested political interest and the political executive on the one hand, in influencing, determining and shaping policy and administrative responses related to development and governance, and the degree of commitment to constitutional principles of fair, equitable, independent, people centric and accountability on the part of government officials on the other hand. Referred to as 'Prices of Governability' or the role of vested bureaucratic

2 Eminent jurist and former Justice of the High Court of Australia.

3 See also Michael Kirby, "Human Rights and Good Governance, Conjoined Twins or Incompatible Strangers?", Text of Chancellor's Human Rights Lecture, University of Melbourne, delivered on 3rd November, 2004.
http://www.unimelb.edu.au/__data/assets/pdf_file/0011/1727570/20041103-kirby.pdf@ 31.10.2017

interest involved in a corrupt venal, inefficient and brutal administration or to criminalisation of politics, all pointed to the fact of the important role that the state and officials of the state play in ensuring good or bad governance, enhancing or corrupting the political process and safeguarding or negating human rights (See Serah Joseph 2001, pp 1011, 1014, for the discussion of this).

Governance transcends government and is a political process

At the very outset it is important to point out two common mistakes made in discussion on governance.

The first, is the conflation of the words governance and government as inter-changeable. It is important to recognise that each refer to completely different processes. While government refers to the bureaucratic and administrative structures created by law and the constitution to administer and govern the state/country, governance refers to the "exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights meet their obligations and mediate their differences". (UNDP, 1997, Ch. 1).

The second mistake is to describe good governance as a managerial exercise to improve the efficiency and effectiveness of the functioning of government agencies, ranging from general administration, administration of welfare activities of the state, provision of infrastructure and other technical and related services like construction of roads, bridges, power projects and so on. While no doubt the necessity of improving management systems to bringing more role clarity, financial rectitude and responsibility, improved services to ensure end-user satisfaction of services provided by the government agencies and so on, governance relates to much more than these changes.

This confusion is partly relatable to the fact to the circumstances in which the World Bank for the first time articulated good governance in its 'World Development Report 1997' on 'The State in a Changing World.[4] The context was failure of project loans particularly related to structural adjustment lending to countries in Africa, more particularly in Sub-Saharan Africa. The

4 Needs citation

need was to ensure better functioning of anti-poverty schemes and to address social improvement in some of the poorest countries in the world.

From the initial 1997 report, the World Bank slowly expanded its conceptualisation of governance from the very terse formation described as "the exercise of political power to manage a nation's affairs" (Guhan, 1998, 185). The World Bank explained Africa's development problem as reflecting a crises of governance, which in turn was linked to lack of pluralistic structures and the absence of rule of law. (World Bank 1989; Hernandez-Truyol, 2004; Guhan 1998). There was a lot of internal criticism within the World Bank itself that it was starting to pursue a reform agenda, which was necessarily a political act that fell outside its domain.

However the World Bank had to deal with the issues of widespread corruption, cornering of development assistance by political elite and vested interests, with active collusion of the bureaucracy, and failure of rule of law mechanisms. Unwilling to accept the political nature of bad governance and being rooted in a market-oriented approach, which privileged the private sector over public services, demanded divestment and disinvestment of public utilities, cutting down the number of employees and a reduction in welfare funding, the Bank ended by addressing issues of transparency, accountability, responsiveness and corruption as technical issues to be addressed by injecting new funds, introducing new technologies, bringing in managerial systems developed in private sector and by progressively introducing privatisation of public services. The intention was generally never to address the systemic and structural causes producing these problems.

Considering that all aid packages of the World Bank and other multilateral institutions like the IMG, Asian Development Bank and other similar financial institutions started insisting on 'good governance' reforms as part of financial aid programs in recipient countries, such programmes ended up in promoting technical-quick-fix, managerial solutions as ways to improve service delivery rather than in addressing structural issues causing bad governance. (See Sarah Joseph (2001), Subodh Wagle and Kalpana Dixit (2007), and Guhan (1998) for longer discussion on these issues). In a very perceptive article, Thandike Mkandawire points out that in Africa the agenda of good governance became just one more instrument to ensure effective implementation of adjustment programmes, which was ensured by "introducing institutional reforms that effectively compromised the

authority of elected bodies through the insulation of policy technocrats and the creation of `autonomous' authorities," which ".... eventually weakened the state and undermined many of the post-colonial `social contracts' and that for many African economists and thinkers good governance "related to the larger issue of state-society relations and not just to the technocratic transparency – accountability mode ... The Actual use of the concept of good governance sidestepped the central concerns of the Africans and rendered the notion purely administrative"(2007, 681).

In contrast to the World Bank's formulation, the UN agencies had a more nuanced approach to acknowledging the reality that good governance cannot be divorced from the political process. One of the first documents was the 1997 UNDP document on `Governance for Human Development'. Governance was explained as "the exercise of economic, political and administrative authority to manage a country's affairs at all levels" and that it includes the mechanisms, processes and institutions through which "Citizens and groups articulate their interests, exercise their rights, meet their obligations and mediate their differences". Viewed thus, good governance is participatory, transparent, accountable, effective and equitable, which promotes rule of law. In effect good governance thus "ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of development resources" (UNDP, 1997, page 12).

Building on this perspective, the Office of the High Commissioner for Human Rights (OHCHR) came out with a set of Resolutions on the relationship between human rights and governance. Pointing out that human rights and good governance were mutually reinforcing. It emphasised that good governance is a pre-condition to the enjoyment of human rights. Good Governance was this defined as the "exercise of authority through the political and institutional processes that are transparent and accountable and encourage public participation" (OHCHR, 2007, 1-2).

UN documents point out that good governance actually encompasses many aspects including the following:

> "Full respect of human rights, the rule of law, effective participation, multi-actor partnerships, **political pluralism,** transparent and accountable processes and institutions, an efficient

> and effective public sector, legitimacy, access to knowledge, information and education, **political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance"** .and that there is there is a significant degree of consensus that "good governance relates to **political and institutional processes and outcomes** that are deemed necessary to achieve the goals of development" (OHCHR, undated).
>
> (Note: Emphasis provided to highlight the recognition of the political nature of governance processes in the resolution of the OHCHR.)

It is important to note that the benchmark to assess governance reform efforts is not measured against techno-managerial or financial terms, even though they are important achievement parameters, but on human rights parameters which are distinctly based on democratic norms of equity, inclusion, participation, social justice, empathy, giving voice to the voiceless, respecting diversity and ensuring dignity and so on. Four key principles were identified highlighting the relationship between human rights and governance:

1. Human rights perspectives spell out a set of values to guide the work of the government and political and social players.
2. By the same token, the human rights framework provides benchmarks for assessing performance or outcomes against which to hold different players responsible.
3. Human rights principles set out the ethical, moral and political framework within which to locate governance reform exercises and activities.
4. Human rights principles and standards also help to establish the context for policy formulation, review of existing laws and introduction of changed/new laws, administrative and legislative reform, budgetary allocations and related activities. (OHCHR, 2007, Introduction).

It is apparent that human rights and good governance are intricately interconnected, mutually reinforcing and inseparable. It is important to point out at this juncture that this perspective is not accompanied by a one-size fits all conceptual framework linking human rights and good governance. Since the perspective relates governance to a `sustainable development' framework and not to emphasising or giving primacy to economic and financial efficiency parameters, the importance of cultural and social specificities, historical

factors and other local issues will need to be factored into plans formulated to safeguard and promote human rights, while ensuring governance that is people-friendly, community-sensitive, equity enhancing, just and sustainable.

Governance reform measured by economic and financial efficiency parameters alone can certainly be achieved without any respect for human rights. The same was achieved during the infamous Emergency period (26th June, 1975 till 23rd March, 1977) when the government of Indira Gandhi prided itself in trains running on time, postmen delivering promptly and graft eradicated. The failure of the Supreme Court to strike down the constitutional amendment giving sweeping powers to the government, including the power to deny the rights of victims of state excess to approach constitutional courts, starkly outlines the slender string on which democracy hangs, and acts as a reminder that an Emergency can always return, albeit in new forms in changed circumstances. The issue then, is not good governance but the key values of democracy and human rights; of rule of law and enjoyment of fundamental freedoms including the right to protest and dissent, and so on.

Justice Kirby very eloquently describes the contradiction of when good governance programmes privilege economic achievements alone and do not address human rights norms, which, while improving economic efficiency and will certainly permit the free flow of capital and finance, and it will probably help many people, it will nevertheless "lack the spirit and moral quality" that is promised by the universal instruments of human rights. But while, technocratic excellence is important, it is insufficient for **"Human rights constitute the sap that gives life to the tree of good governance".** (undated, pg. 4).

Good Governance as fundamental right and part of the `Basic Structure'

Can the right to good governance be considered to be part of the right to life under Article 21 of the Indian Constitution? And, carrying that reasoning forward, can therefore the right to good governance be read to be part of the basic structure of the constitution?

These intriguing questions were raised in a PIL filed in 2004 before the Indian Supreme Court by a set of former civil servants, with unimpeachable record for rectitude, integrity and sensitivity to the Constitutional ethos. The apex court however refused to entertain the PIL as "not necessary" to declare

good governance a fundamental right would mean that the court would be dragged into examining every aspect of governance (Godbole, 2004, 1103).

The PIL sought to draw attention of the court to rampant political interference in the functioning of the civil services and politicisation of the bureaucracy, which cumulatively ended up in violating the key principles of rule of law, equality before law and equal protection of law. Emphasising that good governance essentially involved `public interest', the PIL pointed out to the increasing recognition that citizens had a right to "accountable, people-friendly, sensitive and clean government" and that good governance required a, "sound, forward looking and enlightened constitutional framework, democratic governance, independent judiciary, freedom of press and independent, apolitical, neutral and fearless civil service owing allegiance to the Constitution and rule of law and not to the political party in power". The PIL petitioners therefore sought to get the right to good governance recognised as part of right to life under Articles 14, 19 and 21 and intrinsic to the basic structure doctrine. (Godbole, 2004, 1105-06).

Expressing his disappointment on the dismissal of the PIL, Videh Upadhyay points out one of reasons for the Supreme Court's reluctance to accord implicit recognition of good governance as a fundamental right arose perhaps because the court did not see the issue of ensuring good governance as one of recognising it as an ***entitlement*** of the people, which would make it an enforceable right of citizens (Upadhyay, 2004, 1631-32).

The reluctance of the SC to accord legal recognition to good governance as a fundamental right inhering in Article 21 is ironic because the Supreme Court through an interpretative process, has been steadily expanding the scope of Article 21, to cover many rights which were not spelt out in the constitution. Thus, through a liberal interpretation of Article 21, the words, life and liberty, have been expanded to include the right to a whole range of social and economic rights including `third generation rights' covering economic, social and cultural rights like the right to primary education,[5] right to a clean environment, right to pollution free water and air,[6] right to

5 *Modern School vs Union of India* (2004 (5) SCC 583); *Superstar Education Society vs State of Maharashtra* (2008 (3) SCC 315).

6 *Subash Kumar vs State of Bihar* (AIR 1991 SC 420); *MC Mehta vs Union of India* (2003) 5 SCC 376.

livelihood, right to decent environment,[7] right against noise pollution[8] and numerous other similar rights.

The vast expansion of the scope of the fundamental right to life, under Article 21 of the Indian Constitution, is the creative manner by which the court gave life to the non-justiciable parts of the Directive Principles of state policy by reading them into the scope of Article 21. No doubt this was done through the instrument of PILs and judicial activism, but it enabled the constitutional courts to deal with a wide variety of problems faced by people, not just in terms of civil and political liberties, but caused by the nature of the development process, the type of urbanisation and numerous health hazards caused by the impact of modern changes.

Despite advancement in the jurisprudence of the right to life, a hard fact stands out: in all issues that have gone before the court involving questions of the basis of policy decisions taken by the ruling governments, especially policy decisions related to the type of development model followed, or the type of industrial expansion envisaged, the constitutional courts have generally been reluctant to even entertain such cases or to make any forceful intervention raising issues related to violation of the basic premises of good governance.

The case of rehabilitation and resettlement of oustees of the Sardar Sarovar dam across the Narmada ram illustrates the uneasiness of the court when asked to deal with issues directly questioning the larger developmental paradigm being pursued by the state; both central and state government. Even when informed that not all the project-affected persons have been properly rehabilitated and resettled according to the guidelines given by the Supreme Court itself, the Court did not feel compelled to intervene and ask the government, as the project proponents, to take responsibility for the major humanitarian crisis caused by the final submergence of several hundred villages under the rising waters of the Narmada river.

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7 *Shantistar vs Narayan*, AIR 1990 SC 630. ND Jayal vs Union of India, 2004(() SCC 362 (right to clean environment is a guaranteed fundamental right)

8 In re Noise Pollution (I to IV), 2005 (5) SCC 727 to 731.

Good Governance, Development and Democracy: Why the reluctance to treat good governance as fundamental rights?

The Annexure lists a number of human development indicators; the poor ranking of India amongst these developments highlights not just the worrisome state of social and economic development particularly affecting the most marginalised and vulnerable sections but also the continuance of chronic institutional governance failures. While not downgrading or disregarding appreciable advancement in numerous other social and institutional indicators, the fact nevertheless remains that inequality is rising, unemployment increasing and economic distress is pushing lakhs of people to leave their homes and migrate to towns and cities in search of livelihoods. These issues are not just a matter of economic calculations but reflect on the wider realities of democracy and the political process.

Several people have pointed out the intricate relations between good governance, development, democracy and the political process. Notably Amartya Sen, while elaborating on `development as freedom', points out that freedom is both the primary objective and the principal means of development. Pointedly drawing attention to the importance of political and civil rights as means to "forcefully" draw the attention of the government to general dangers and vulnerabilities, and to demand appropriate remedial action. Sen points out that "Governmental response to acute suffering of people often depends on the political pressure that is put on it, and this is where the exercise of political rights (such as voting, criticising, protesting) can make a real difference." and that the limited impact of social policies pursued in India on education, basic nutrition, healthcare, land reform and gender equity reflects not only the weakness of democratic practice in India and the ruling government but, just as much, a failure of the opposition parties for "the opposition need not have allowed those in power to get away with gross neglect" (Sen, 2006, 163-64).

The close relations between development, democracy, governance and the political process also calls to account the importance of a conceptual framework which accords recognition to the "state" as a key political player and to a range of other social and political forces. Primary to this recognition is that these divergent actors, ranging from opposition parties, trade and commercial groups to various forms of collectivities ranging from trade unions, grass roots organisations, NGOs and other identity based groups of

the most marginalised, oppressed and voiceless communities. These should be accorded importance in the process of policy and law formulation and in the administration and monitoring of implementation of laws and policies; processes that underlie the respect for and enjoyment of human rights!

Thus the essential notions underlying the expansion of concepts of human development and good governance have much in common with the way the notion of human rights was progressively expanded from the initial formulation of the Universal Declaration of Human Rights (UDHR) in 1948, to the various other instruments like the International Covenant on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (ICCPR 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966) the Right to Development (1986) and the Vienna Declaration on Human Rights (1993) and a whole host of other covenants. Central to all these human rights instruments is the recognition of the right to dignity of all human beings and the right to the kind of development that respects cultural and social contexts and enhances freedom.

Vinay Kanth highlights the close relations between development and human rights by pointing that the Human Development Index (HDIs) developed by the UN institutions to measure development, seeks to include political and civil rights and democratic freedoms within its formulation, human rights which started with an emphasis on political and civil liberties has extended into arenas far beyond including to cover issues such a education and health care, gender justice, rights of marginalised sections, rights to participate not as an administrative exercise but as central players in determining laws and policies and in protection, preservation and respect for social, cultural and economic rights. He poignantly points out that, "while human rights literature has been concerned with the analysis of duties, human development literature has emphasised the importance of institutional complementarity and resource constraint and the need for public action to address them" (2014, 8).

To summarise the widely accepted 9 essential characteristics of good governance encompassing issues of: (i) transparency, (ii) responsiveness, (iii) accountability, (iv) equitable and inclusive, (v) rule of law, (vi) participation, (vii) consensus orientation and (viii) effectiveness and efficiency; barring the 9th characteristic, which can arguably said to be relevant to the nature

of functioning of organisations and institutions, the other 8 characteristics are also key components of the universal understanding of human rights. Considering the intricate way these two concepts are interconnected and intertwined, and the fact that both governance and human rights are also related to democracy and politics, it is time that the notion of good governance is accorded recognition as a fundamental right. Along with recognition will come respect for `good governance' as an entitlement through which ordinary citizens, and more particularly, the marginalised, excluded and voiceless sections of society can claim an equal place in our democracy. In the end what people want is `democracy with development and dignity'; put differently, development achievements that are democratic and affirm the dignity of people and communities.

Annexure

India's Position in Key Global Indicators of Development

1. **India becomes no. 1 corrupt nation in Asia -** it is not the most corrupt but the bribery rates are the highest in the entire Asia pacific.

   Two detailed reports by Transparency International highlights the high levels of corruption in India and describes the sector wise corruption in Asia Pacific.

2. **India ranks 137th on Global Peace Index -** verified. Global Peace Index - http://visionofhumanity.org/app/uploads/2017/06/GPI17-Report.pdf

3. **India ranks 123rd in Economic Freedom -** It is 143rd in rank. Economic freedom - http://www.heritage.org/index/ranking

4. **India ranks 136th in Press Freedom Index -** verified. Press Freedom Index - https://rsf.org/en/ranking

5. **India ranks 168th in literacy -** It was as per the Census of India in 2011 and UNESCO report. Other index, which rates education in countries have ranked India higher. For example, Legatum Prosperity Index - http://www.prosperity.com/globe/india

6. **India ranks 100th out of 118 countries in Global Hunger Index -** Rank verified. A total of 119 countries and not 118. Global Hunger Index; http://www.globalhungerindex.org/pdf/en/2017.pdf

7. **India ranks 131st in Human Development Index -** verified.

   Human Development Index - http://hdr.undp.org/en/composite/HDI

8. **India ranks 126th out of 175 countries list in Infant Mortality Rate -** not verified. Sent the same documents for serial number 4 (serial number 4 also talks about Infant Mortality Rate)

   2016 data - http://www.geoba.se/population.php?pc=world&page=1&type=19&st=rank&asde=&year=2016

   2017 estimated data - http://www.geoba.se/population.php?pc=world&page=1&type=19&st=rank&asde=&year=2017

World Population Prospects - United Nation - 2017 revision (estimated) - Attached

9. **India Ranks 154th on Healthcare Index -** verified.

   Lancet Report under Global Burden of Disease Study 2015 - http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(17)30818-8.pdf

10. **India ranks 130th in Ease of Doing Business -** verified.

    Ease of Doing Business ranking - http://www.doingbusiness.org/rankings

11. **India ranks 122nd on World Happiness Index -** verified.

    World Happiness Report 2017 - http://worldhappiness.report/wp-content/uploads/sites/2/2017/03/HR17.pdf

12. **India ranks 123rd in per capita GDP - 124th on purchasing power parity.** World Economic Outlook database - http://www.imf.org/external/ns/cs.aspx?id=28

    Rank chart - https://knoema.com/sijweyg/world-gdp-per-capita-ranking-2017-data-and-charts-forecast

13. **India ranks 134th in Global Youth Index -** The rank is 133rd.

    Global Youth Development Index - http://cmydiprod.uksouth.cloudapp.azure.com/sites/default/files/2016-10/2016%20Global%20Youth%20Development%20Index%20and%20Report.pdf

14. **India ranks 66th in Quality of Life -** Also called the Where-to-be-born index. This rank was 66th until 2013. Now HDI ranking are being used. The other one I found was Physical Quality of Life Index which takes into account literacy, infant mortality and life expectancy.

    http://www.worldatlas.com/articles/the-where-to-be-born-index-the-highest-and-lowest-scoring-countries.html

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A Stranger to Justice

Madhurima Dhanuka, Mrinal Sharma & Tahmina Laskar*

Abstract

Three laws, namely, the Registration of Foreigners Act 1939, the Passport Act 1967 and the Foreigners Act 1946, primarily govern the entry and stay of foreigners in India. In the event of their conflict with law and subsequent incarceration, other legislation comes into play such as the Prisons Act, 1894 and the Repatriation of Prisoners Act, 2003. But no law or policy exists to govern their stay and repatriation once they complete their sentence. The absence of a definite framework leads to arbitrary, unnecessary and prolonged detention of many foreign prisoners for months and years in Indian jails beyond the completion of their sentence. Their detention contravenes the most fundamental principle of fair trial - no detention without the sanction of court.[1] All this because the repatriation process must go through no less than 32[2] desks and sign offs before the prisoner can go back home!

This paper lays down the framework within which foreign nationals are imprisoned and the challenges or barriers they face as a consequence of their detention. It describes the process that guides repatriation of foreign national prisoners. Case studies have been used to highlight gaps in the system, which often lead to inordinate delay in repatriation of such persons. This is followed briefly by a discussion on how bilateral ties impact the entire process. We advocate for streamlining the repatriation process and a review of detention policy for foreign national prisoners in India.

Disclaimer: The names of persons in all case studies mentioned in this paper have been changed for reasons of privacy.

* They are associated with the *Commonwealth Human Rights Initiative,* New Delhi.

1 Article 21 of the Constitution of India states 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

2 Homecoming: A Report on Trafficked and Smuggled Children, Sanjog Groupe Development, 2005.

Three young advocate-scholars concerned about the growing distance between justice and reality discuss real cases to study the application of Foreigners Act and look at the role of the Government of India and the respective embassies in expeditious facilitation of their return through the lens of bilateral relations between India and these countries.

Introduction

Don't talk to me in Arabic! I don't remember it anymore!' said a confused Yazid in broken English over the telephone to Rabia, his niece. Standing next to Yazid at a Correctional Home in West Bengal, one could hear Rabia's muffled sobs from the other end on the telephone. Yazid had been in an Indian jail for the last 23 years out of which his actual sentence was only for 20. The additional three long and eroding years were spent awaiting completion of formalities that would enable him to return to his home in Gaza. In all these years, he could not speak to his family leading them to believe that he is dead.

Foreign national detainees, whose embassies in India are not able to offer strong protection, often find themselves at the receiving end of the criminal justice system. Language barriers and inadequate understanding of legal system add to their vulnerability. Absence of, or delayed consular access, lack of strict nationality verification tools, restrictions on making international phone calls, inefficient government-funded legal aid and expensive private legal assistance further underline the susceptibility of such prisoners to violations. The law requires the deportation of foreign prisoners who are detained for undocumented entry after the completion of their sentence. Here again there are several hurdles, and several foreign national prisoners continue to be in detention way after the completion of their sentences due to a range of procedural issues. Numbers suggest that at the end of 2015, India had 6185 foreign prisoners. Nine of ten belonged to Bangladesh, Nepal, Myanmar, Nigeria and Pakistan.

Incarceration of foreigners: The Basics

Foreign national prisoners are those incarcerated in countries of which they do not have nationality. This term therefore covers prisoners who have lived for extended periods in the country of imprisonment, but who have

not been naturalised, as well as those who have recently arrived.[3] Globally, the number of foreign national prisoners is around 460,000. In the European Union around one in every six prisoners is a foreigner and in the Middle East the ratio is one in two.[4] With the rise of globalisation, trafficking, migration and transnational crimes these numbers too are on the rise.

There are several types of foreign national prisoners. Firstly, those who have travelled between countries for committing an offence such as smuggling of drugs or gold; secondly, those who entered the country on valid documents, but have overstayed their visa period or committed an offence; thirdly, long term residents in a country, who have not yet been granted citizenship for various reasons; fourthly, illegal immigrants, i.e. those who enter the country primarily for economic reasons and are apprehended. India is among the very few countries where illegal immigration is a criminal offence and illegal immigrants can be convicted and imprisoned alongside prisoners convicted of internationally recognized criminal offences.

Foreign prisoners are also recognized as a category with special needs in the *UN Handbook on Prisoners with Special Needs.*[5] This handbook states that 'despite the high proportion of foreigners in prisons worldwide, in the vast majority of countries there are no policies or strategies in place to deal with foreign national prisoners'. Though the *United Nations Standard Minimum Rules for Treatment of Prisoners (UNSMR)* doesn't specifically lay down provisions for foreign national prisoner, the *European Union (EU)* has implemented some policies to address the special needs of foreign prisoners, and place them at par with other prisoners. The Council of Europe, Committee of Ministers, Recommendation No. R (84) 12 states as below,

'13. Foreign prisoners, who in practice do not enjoy all the facilities accorded to nationals and whose conditions of detention are generally more difficult, should be treated in such a manner as to counterbalance, so far as may be possible, these disadvantages.'

Additionally the model agreement on the transfer of foreign prisoners and recommendations, which was adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders puts forth recommendations for the treatment of foreign prisoners, which try to place foreign prisoners at par with the rest. This is reproduced below.

3 http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

4 http://www.prisonwatch.org/foreign-national-prisoners.html.

5 http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf.

Recommendations for the Treatment of Foreign Prisoners[6]

1. The allocation of a foreign prisoner to a prison establishment should not be effected on the grounds of his nationality alone.

2. Foreign prisoners should have the same access as national prisoners to education, work and vocational training.

3. Foreign prisoners should be eligible for measures alternative to imprisonment, as well as for prison leave and other authorised exits from prison according to the same principle as nationals.

4. Foreign prisoners should be informed promptly after reception into a prison, in a language which they understand and generally in writing, of the main features of the prison regime, including relevant rules and regulations.

5. The religious precepts and customs of foreign prisoners should be respected, with reference, above all, to food and working hours.

6. Foreign prisoners should be informed without delay of their right to request contacts with their consular authorities, as well as of any other relevant information regarding their status. If a foreign prisoner wishes to receive assistance from a diplomatic or consular authority, the latter should be contacted promptly.

7. Foreign prisoners should be given proper assistance, in a language they can understand, when dealing with medical or programme staff and in such matters as complaints, special accommodations, special diets and religious representation and counselling.

8. Contacts of foreign prisoners with families and community agencies should be facilitated, by providing all necessary opportunities for visits and correspondence, with the consent of the prisoner. Humanitarian international organizations, such as the International Committee of the Red Cross, should be given the opportunity to assist foreign prisoners.

9. The conclusions of bilateral and multilateral agreements on supervision of and assistance to offenders given suspended sentences or granted parole could further contribute to the solution of the problem faced by foreign offenders.

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6 Adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, A/CONF. 121/10, 25 April 1985, Annex II.

Foreigners in Indian Prisons

Foreign national prisoners constitute roughly one percent of the total prisoner population in India.[7] This number was placed at 6,185 in 2015. Among these, nine out of ten are from Bangladesh, Nepal, Myanmar, Nigeria and Pakistan.[8] 63 percent of these prisoners are lodged in West Bengal and the rest are distributed across Rajasthan, Punjab, Maharashtra, Andaman & Nicobar Islands, Uttar Pradesh, Andhra Pradesh and Delhi. As with other Indian inmates, more than half await the completion of their trials. Lack of family support, social capital, awareness of legal processes and consular access, multiplies their vulnerability.

Often, a substantial number of these have to remain in prison even after completion of their conviction period, before they can return to their home country. The process of release can take anything from six months to six years. Unfortunately, this peculiar category of prisoners does not find mention in the official statistics of the National Crime Records Bureau (NCRB). For instance, at any given time prisons in West Bengal have around 500-650 such overstays mostly Bangladeshis (known as Jankhalash prisoners).[9] This accounts for almost three percent of its total prison population - the same percentage as the overcrowding in West Bengal's prisons.[10] According to data collected by the Commonwealth Human Right Initiative (CHRI) through the Right to Information Act 2005, as of 31st December 2016, there were roughly 619 overstays in West Bengal's prisons, all of them from Bangladesh accounting for a double fold increase since 2011 when CHRI's findings indicated 259 such prisoners in West Bengal.

Similarly, NCRB data shows that at the end of 2015 there were 113 undertrials and 97 convicts from Pakistan lodged in prisons in India.[11] As per a report submitted in the Supreme Court, the number of Pakistani prisoners in 2017 was around 135, of which 98 were awaiting consular access, two prisoners are awaiting their repatriation to Pakistan and 35 are awaiting their national status to be confirmed.[12] The majority

7 Tables 3.17-3.21, Prison Statistics of India, 2015.

8 Tables M9 and M10, Prison Statistics of India, 2015.

9 www.wbcorrectionalservices.org. Data as on April 2016.

10 ibid.

11 Prison Statistics India 2015, National Crime Records Bureau. The total figure may be higher since a large number are detained under preventive acts and are classified as detenus.

12 http://www.hindustantimes.com/india-news/135-pakistani-fishermen-currently-in-indian-jails-foreign-office-report/story-3cUfCOG3lgw4nQYERKZ9UL.html.

of these are lodged in jails in Rajasthan and Punjab.

Ironically, nearly 70 percent of foreign prisoners in India are incarcerated for immigration related offences, i.e. for crossing the Indian border without proper documentation or for overstays. Many spend years in prison due to lack of documents to prove their nationality. This prompts a question on the practicality of prosecuting undocumented migrants and housing them in Indian prisons.

Key Barriers

While prisoners in general suffer from neglect and apathy from others, this is doubled for foreign national prisoners. Dissimilarities in language, culture, customs, laws and procedures pave way for multifaceted difficulties throughout the course of their detention. Additionally, 'these prisoners have hardly any access to rehabilitation and receive practically no help planning for their return to society. They are excluded from almost everything they need in order to have any chance of a crime-free future'.[13] While the government seeks to return foreign prisoners back to their home countries by repatriation or deportation processes, unfortunately this removal process is painfully slow and endless in some cases, such as the case highlighted at the end of this paper.

Even though there are a substantial number of foreign nationals in Indian prisons, there are no special provisions that govern their detention or afford them special facilities. The Model Prison Manual 2016[14] does not contain a dedicated chapter on treatment of foreign national prisoners or set out a separate regime for them. Foreign national prisoners find mention only with reference to contact with the outside world, mainly permission to send letters to their families at their own cost, and contact with their consulates.

Foreign prisoners are often discriminated against and considered strangers by other prisoners and prison staff. Language barriers and inadequate understanding of the legal system are the primary causes for this. Absence of or delayed consular access, severance of familial ties due to restrictions on making international phone calls/sending letters, and lack of effective legal representation further underline the susceptibility of such prisoners to

13 Lucy Slade, Foreign National Prisoners; best practice in prison and resettlement, 2015 http://www.prisonwatch.org/assets/best-practices-fnp-2015.pdf.

14 http://bprd.nic.in/content/423_1_Model.aspx.

discrimination and right violations.

The following sections discuss the barriers faced by foreign national prisoners both while in detention, and upon completion of their sentence. The knowledge of these barriers comes from our experience at the CHRI in dealing with close to 100 individual cases of foreign nationals in prisons, and also from effectuating repatriation of over 300 such prisoners through strategic litigation. Such cases are regularly brought to our notice by state functionaries, as an international non-profit organization based in India that works to facilitate repatriation of foreign nationals.

Barriers when in prison

Usually foreign nationals who are imprisoned are not able to adapt to prison life as well as Indian prisoners can. The diet, weather conditions, language etc. cause severe hardships, meaning that foreign nationals suffer more than Indian prisoners and subject them to harsher conditions, both mental and physical. Meagre or no access to family, unfamiliar food, language and living conditions all add to the stress they face.

a) **Contact with family:** While the Prison Act and the state jail manuals contain straightforward provisions to facilitate contact with family members for prisoners in general, the procedures for foreign nationals are quite laborious and long drawn. In addition if their family members are located in other countries, all communications between the foreign national and his/her family must always be routed through their consulate. The prison department cannot directly communicate with the embassy without permission of the Ministry of External Affairs (MEA) and state home departments. This often leads to severance of ties with family, which poses huge problems at the time of release and repatriation of prisoner.

   The importance of maintaining contact with family for prisoners is well established. In *Francis Coraille Mullin vs. The Administrator, Union Territory of Delhi,*[15] the Supreme Court of India had categorically stated that 'As part of the right to live with human dignity and therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison

15 AIR1981SC746a.

regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Article 14 and 21, unless it is reasonable, fair and just.' Also in *Sunil Batra v Delhi Administration,*[16] too the importance of family contact was highlighted. The court stated that, 'subject to such considerations of security and discipline, liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected.'

b. **Consular Access:** While most police and prison manuals in India contain provisions for consular access, experience shows that most of the foreign prisoners are not afforded the opportunity to meet their consular representatives upon their arrest or subsequent detention.

India is state party to the *Vienna Convention on Consular Relations 1963*. As per Art 36, whenever a state or local law enforcement agency arrests or detains a foreign citizen, the agency must ask that citizen if he or she wants his or her embassy notified of the arrest. If they do, the agency must notify the foreign embassy or consulate without delay. These agencies must allow provide meaningful access by foreign consular officers to their arrested or detained citizens consistent with their security regulations. Additionally, officers at the prison where he/she will be detained must also notify the relevant department in the government to convey information of detention and current place of custody to the consulate. Upon receipt of such information someone from the consulate is likely to visit the defendant in the place of detention.

There are many ways in which consular officials are of assistance in this scenario. Firstly, they can verify the nationality of the person and then help establish contact with his/her family. Secondly, consular officials are able to speak the defendant's language, and can help the person understand nuances of the legal system of the country.

An intimation to the consulate representative cannot be sent directly to the embassy and has to be routed through the relevant state home departments, then to the Ministry of External Affairs, which is then permitted to share the information with the embassy. This causes serious delays in transmitting of information and subsequent consular access. Moreover, most prisoners know nothing of this right despite it being incorporated in the police and

16 (1978) 4 SCC 494.

prison manuals of many states. Even when they do, embassies often refuse to acknowledge the prisoner as their own national, without conducting proper nationality verification tests. Thus, prompt access to consular services is a barrier that needs to be addressed when dealing with foreign national prisoners.

c. **Prison life & access to law:** Language barriers, dietary patterns, cultural differences, and lack of recreational or rehabilitative activities make it difficult for foreign prisoners to adapt to prison life. Diet patterns vary across states, thus restrictive diets, such as those which prohibit intake of meat can lead to discontentment in prisoners. Getting bail is difficult and parole rules generally do not apply for them, this often inculcates anger and tendency to resort to violence. Additionally, lack of knowledge of the legal framework, legal procedures and lack of resources to hire services of competent lawyers leads to unnecessary detention adding to their woes.

Barriers after completion of sentence

As a consequence of committing a crime in foreign land, foreign prisoners are required to be deported back immediately upon completion of their sentence. But in reality, they remain in detention due to unnecessary obstacles inherent in the process. We list below no fewer than six barriers that delay repatriation process:-

a) **Lack of formal framework:** Although immigration is a Union subject, there is no centralised time-bound procedure assisting the states in ensuring that prisoners are timely repatriated. Till date only nationality based Standard Operating Procedures (SOPs) have been issued but these also do not provide a comprehensive framework detailing the procedures for repatriation in its entirety.

The existing process of repatriation of a prisoner envisages coordination of multiple stakeholders at various levels of the government both in India and the country of the prisoner. This often results in a long-winded trail of preparation of documents and seeking permissions. In India, the multiplicity of governmental desks is attributed to the distribution of power that categorizes prisons under the state list and

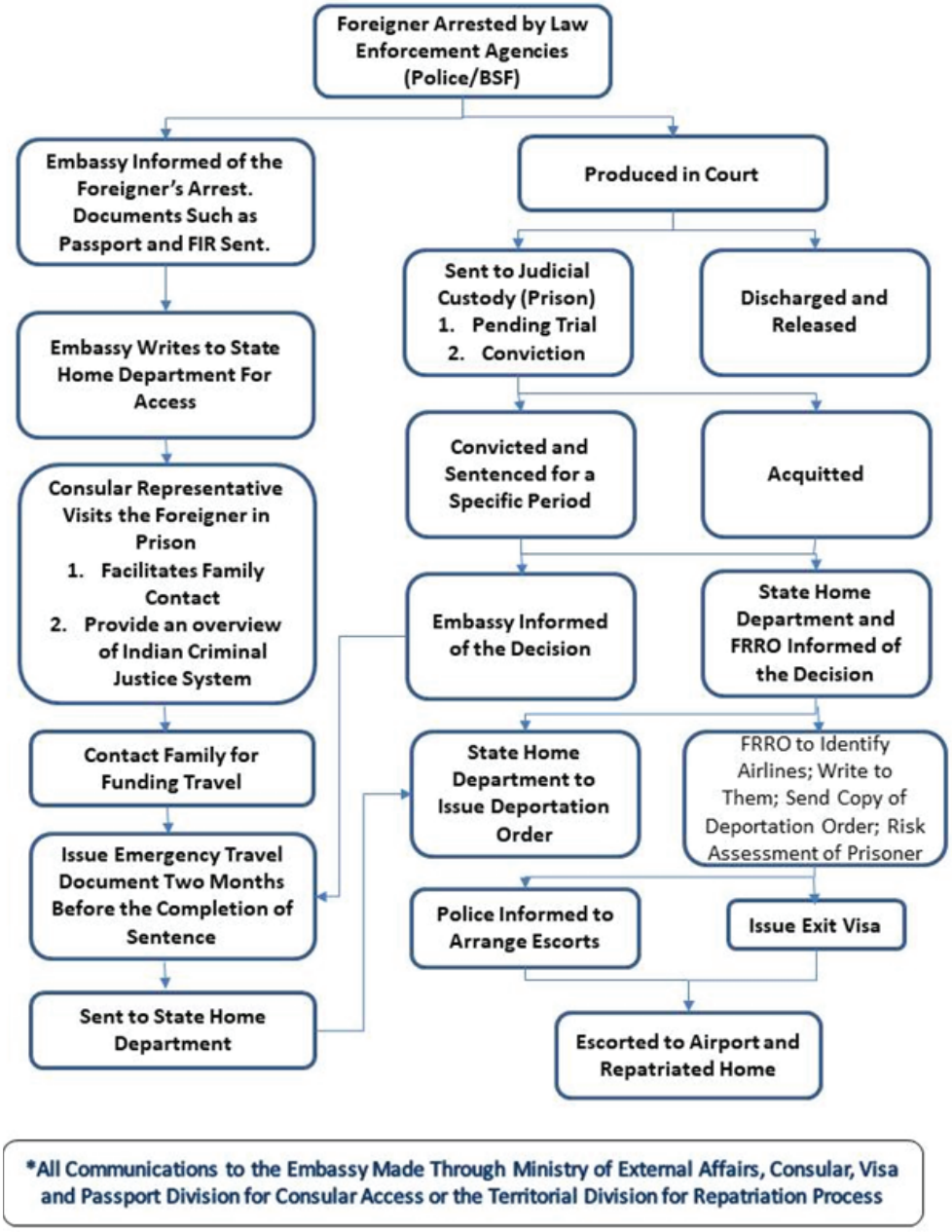
foreigners under the union list.[17]

The repatriation of a foreign prisoner requires the involvement of both central and state governments, specifically, two divisions of Ministry of External Affairs (MEA), viz. Consular, Passport and Visa division and the respective territorial division[18] ; Foreigners division of the Ministry of Home Affairs (MHA) and State Home Department; Home Secretary or Jail Secretary; Bureau of Immigration (BoI) and Foreign Registration Regional Officer (FRRO) of the state; Criminal Investigation Department (CID), Intelligence Bureau (IB); Superintendent of Police of the district where the prisoner was arrested; and Superintendent of the prison where the prisoner is lodged. A corresponding procedure similar to one mentioned above also exists in the country of the prisoner which is followed to complete the nationality verification process of an individual.

17 9(Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention). 10 (Foreign affairs; all matters which bring the Union into relation with any foreign country); 11 (Diplomatic, consular and trade representation); 17 (Citizenship, naturalisation and aliens), 19 (Admission into, and emigration and expulsion from, India; passports and visas) of Union List and 4 (Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions) of State List.

18 The Ministry of External Affairs has separate division representing a particular region. For more information please visit http://www.mea.gov.in/divisions.htm.

Process from Detention to Repatriation



b) **Delay in nationality verification:** Lack of awareness of rights often means that foreign prisoners are stripped of their travel documents upon arrest, never to be heard or seen again. This results in inordinate delays in nationality verification with some consulates refusing to move without copy of the passport. Processes have to be initiated to procure the documents from the court or police *malkhana,* which in some cases takes years before the documents are located. The nationals of countries that do not have diplomatic or consular representation in India find themselves in the deepest layer of limbo.

c) **Delay in obtaining Emergency Travel Certificate (ETC):** In case the person doesn't have a valid passport, the embassy must be contacted for issuance of an emergency travel certificate. An ETC is generally valid for a month within which the outbound travel must be made. However, embassies first conduct nationality verification before issuance of ETC. This often takes time, marred by slow communications between embassy and prisons, given the necessity of routed it through the state home department as well as MEA.

d) **Lack of funds to support travel:** Section 3(2)(cc) of the Foreigners Act 1946 requires foreigners to 'meet from any resources at his disposal the cost of his removal from India'. Further, Para 14 of the Foreigners Order 1948 allows the Central Government to 'apply any money or property of the foreigner in payment of the whole or any part of the expenses of or incidental to the voyage from India…until departure…' While the law clearly places the responsibility of funding the travel on the prisoners, in reality they are often left with no money after paying for their legal representation and fines. In very rare cases, embassies intervene to assist the prisoner but that is not indicative of a uniform practice. Many countries that have on-going humanitarian crises allocate budget for voluntary repatriation of their nationals from other countries, which they often use to fund the deportation of their nationals as well, for example Afghanistan and Palestine. Others contact the family of the prisoner or seek such funds from the prisoner. For most part, it is an unrealistic expectation since they are detained and not allowed to work.[19] Contact with family is negligible because of restricted means

19 Section 14 of Foreigners Act that criminalizes undocumented entry, visa overstay or entry into a restricted area provides for simple imprisonment. Simple imprisonment does not involve working inside prison.

and excessive regulation. Thus, some prisoners spend months or years waiting for charity money from others to enable them to return back.

e) **Obtaining flight risk assessment/clearance from airlines:** Countries, when making arrangements with an aircraft operator for the removal of a deportee, must make available the following information as soon as possible: a) a copy of the deportation order; b) a risk assessment by the State and/or any other pertinent information that would help the aircraft operator assess the risk to the security of the flight; and c) the names and nationalities of any escorts.[20] This clearance must usually be received by the aircraft operator 24 hours prior to travel,[21] and is usually obtained by the FRRO representative. However, there are often delays in receiving clearance, and there have been instances where airlines refuse to allow boarding at the last moment leading to confusion, delay and loss of flight ticket money, adding to the woes of the prisoners. One of the most important reasons behind this gap is lack of instructions issued to stakeholders on this aspect.

f) **Non-implementation of Repatriation of Prisoners Act:** India enacted the Repatriation of Prisoners Act in 2003. The rules came in 2004. It purports to allow foreign prisoners to serve the rest of their sentence in their home country. This allows them to be in closer contact with their family increasing the chances of rehabilitation. Until now, India has signed transfer agreements with 42 countries. According to the Prison Statistics of India, published annually by the NCRB[22] , two-third of foreign prisoners in India are from Bangladesh followed by Nepal, Myanmar, Nigeria and Pakistan. Prisoners from these countries form more than 90 percent of the foreign prisoner population in India. But out of the 42 countries, India does not have an agreement on transfer of sentenced prisoners with any of them apart from Bangladesh. Further, India has been proactive in having agreements with countries where maximum number of Indian prisoners are lodged. Out of the top ten

20 5.19, Deportees, Chapter 5, Annex 9, Convention on International Civil Aviation Facilitation International Standards and Recommended Practices.

21 ibid.

22 Government of India, Ministry of Home Affairs, National Crime Records Bureau (2015), 'Prison Statistics of India'; New Delhi. Available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/PrisonStat2015.htm.

countries,[23] India has agreements with six[24] of them. Such proactive approach is required by other countries towards their nationals who are stuck in the procedural quagmire of foreign countries.

Impact of bilateral relations

Another important aspect that needs to be discussed with regard to foreign national prisoners is the impact of bilateral relations between countries over processes and the time it takes to send a foreign prisoner back home. Even though international law requires that foreign policy play no role in fulfilling humanitarian obligations and promises, the reality is far from it.

Our experiences show that delays are not heard of when it is a British or and American national. However, if it's a Bangladeshi, even with all of one's might, verification can take many years.

In India, more than half the foreign national prisoners lodged in prisons are Bangladeshis followed by Nepalese, Burmese, Nigerians and Pakistanis. Excluding Nigerians, 90 percent of the population are from south Asian countries that share borders with India. We discuss issues specific to prisoners from Pakistan and Bangladesh in this section:-.

Pakistan - Issue of Fishermen:

Pakistan and India frequently arrest fishermen from each other's countries for violating territorial waters. These violations are often inadvertent as fishermen have little knowledge of maritime boundary between the two nations and end up trespassing. This occurs despite regular awareness camps, Community Interaction Programmes that are conducted by the Indian Coast Guards in coordination with the State Fisheries Department, to educate the fishermen about the limits of the International Maritime Boundary Line (IMBL). Additionally, given the nature of ties between both countries, consular access is either granted belatedly or often forgotten.

Upon completion of their terms, release takes place only after both governments agree to release them, involving a long drawn bureaucratic process. Release of fishermen between the two nations is referred to as

23 Saudi Arabia – 1896, UAE – 764, Nepal – 614, USA – 595, Pakistan -518, Kuwait – 325, Malaysia – 293, Bahrain –
235, Singapore – 147 and Bangladesh – 130.

24 Saudi Arabia, UAE, USA, Kuwait, Bahrain and Bangladesh.

a Confidence Building Measure (CBM) or humanitarian gestures at times before major diplomatic negotiations. In 1997, 193 Indian fishermen were exchanged for 194 Pakistani fishermen. Similarly, in 2001, 157 Indians were released for 160 Pakistanis. Hundreds of fishermen were also released in 2005 and 2006 in the lead up to bilateral talks. Sometimes there have been unilateral releases. In 2017 Pakistan released 438 Indian fishermen as a goodwill gesture in January and 78 in July.[25]

The Bilateral Protocol in 2008[26] claims to have streamlined information sharing between the two nations. Under this, lists of prisoners, including fishermen, are exchanged on first day of January and July, every year. However, a large number of prisoners remain languish in each other's jails despite bi-annual repatriations.[27]

In January 2008, India and Pakistan set up the India-Pakistan Joint Judicial Committee on Prisoners, which comprised retired judges from both countries.[28] The committee worked hard to seek early repatriation of prisoners who have completed their sentences in the other country's jail and also ensure their humane treatment. It met every six months and visited prisoners in both countries. It discussed issues such as health and food of the prisoners and the need to evolve a mechanism for humanitarian treatment of women, the mentally challenged, juvenile prisoners, and so on.

The last time it met, the Committee made recommendations, which included advise on the implementation of the 'Consular Access Agreement' of May 2008, signed between two governments, be in letter and spirit and that consular access must be provided within three months of the arrest

25 Umar Farooq, The Lost Fishermen of India and Pakistan, The Wall Street Journal, July 12 2013 Available at: https://blogs.wsj.com/indiarealtime/2013/07/12/the-lost-fishermen-of-india-and-pakistan/.

26 PTI, Three hundred one Indian fishermen lodged in Pakistan jails: Sushma Swaraj, The Indian Express, New Delhi, March 16,2017. Available at: http://indianexpress.com/article/india/mea-sushma-swaraj-india-pakistan-jail-fishermen-rajya-sabha/.

27 PTI, Three hundred one Indian fishermen lodged in Pakistan jails: Sushma Swaraj, The Indian Express, New Delhi, March 16,201. Available at: http://indianexpress.com/article/india/mea-sushma-swaraj-india-pakistan-jail-fishermen-rajya-sabha/.

28 Jatin Desai, Fishermen in troubled waters, The Hindu, May 23, 2016 Available at: http://www.thehindu.com/opinion/op-ed/indiapakistan-joint-judicial-committee-on-prisoners-fishermen-in-troubled-waters/article8633290.ece.

and not after completion of the prisoner's sentence.[29] It also advocated a mechanism for compassionate and humanitarian consideration to be given to women, juvenile, mentally challenged, aged and prisoners suffering from serious illness/permanent physical disability. The Committee also noted that the prisoners involved in minor offences like violation of the Foreigners' Act, visa violations and inadvertent border crossings, deserved compassionate treatment by both sides.[30]

The two countries, on an alternating basis, host the committee meetings; they have met seven times, the last convened by India from 25-30 October 2013. However there have been no meetings in the past 4 years. This is problematic. During the meeting of Foreign Secretaries of the two countries on the side-lines of the *Heart of Asia- Senior Officials Meeting,* in New Delhi on 26th April 2016, India suggested that both sides should take steps to address humanitarian matters, including scheduling another round of visits by the Judicial Committee.[31] The committee system needs to be revived to ensure speedy and timely return of fishermen. It is time that these prisoners, who are victims twice, first of poverty and circumstance, and of a geo-politics, are not held hostage to endless bureaucratic processes. The dialogue now should also be focused on evolving a policy of no arrest on straying fishermen, given their vulnerability.

a) Bangladesh

Bengali speakers form the third largest linguistic group in Asia, after Chinese and Hindi speakers.[32] Historically, the language and its speakers have also been identified with colonial imperialism particularly in Assam, a state in the north-east of India. While Bengali is the key language behind the annual celebration of United Nations' (UN) International Mother Language Day on February 21, which commemorates language diversity worldwide, it has also

29 Stated by Smt. Sushma Swaraj, Union Minister for External Affairs in a reply to a starred question in Lok Sabha on April, 27, 2016. Available at: http://164.100.47.190/loksabhaquestions/annex/8/AS46.pdf.

30 Ministry of External Affairs, Joint Statement on Sixth meeting of the India-Pakistan Judicial Committee on Prisoners to Pakistan, May 03, 2013. Available at: http://www.mea.gov.in/bilateral-documents.htm?dtl/21647/Joint+Statement+on+Sixth+meeting+of+the+IndiaPakistan+Judicial+Committee+on+Prisoners+to+Pakistan.

31 Stated by [Gen. (Dr.) VK Singh (Retd.)], Minister of State in the Ministry of External affairs in a reply to a unstarred question in Lok Sabha on February 08, 2017. Available at: http://www.mea.gov.in/lok-sabha.htm?dtl/28034/QUESTION_NO1132_INDIAN_FISHERMEN_ARRESTED.

32 Pg. 280, Myron Weiner, The Political Demography of Assam's Anti-Immigrant Movement, Population and Development Review, Vol. 9, No. 2 (Jun. 1983).

been the key cause behind revolutionary movements in Assam that resulted in large-scale civil conflict and violence.[33]

Assam witnessed a volatile movement against undocumented immigrants between 1979-85. Its rapidly changing demographics, which couldn't be explained by growth in its natural population, had fuelled the sentiments of Assamese against Bengali Muslims, many of whom had legally migrated and had been residents of Assam for decades. The unexpected, large increase in population[34] plausibly attributing to the influx of illegal migrants from then East Pakistan, now Bangladesh, added fuel to the fire. What aroused the anxieties of Assamese even further was the decline in the proportion of Assamese and spike in the proportion of Bengali speakers. This was a pivotal moment that changed the face of politics in Assam, mostly because it broke the long-standing alliance between Assamese and Bengali Muslims and strengthened the ties between the latter and Bengali Hindus, further fostering a climate of alienation for Assamese. By this time, the question of ethnicity and migration had become central in this region.

Various ethnic groups viewed the state government as an instrument by which to extend, consolidate or transform their position in the economy and social system. As a result, in the 1980s, the Assamese population called for a boycott of the state assembly election, citing a dispute in electoral roles since they contained the names of large numbers of people who had entered the country illegally. Allowing them to vote, they asserted, would confer citizenship on them. Despite simmering tension in the valley, central government decided to go ahead with the elections, leading to massacres in Nellie and Gohpur, besides an extremely low-voter turnout.

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33 Ibid. 'Boro tribals attacked Assamese villages at Gohpur in Darrang district, and Assamese attacks against Boro villages quickly followed. But the worst killings took place in Nellie, a region along the southern bank of the Brahmaputra, 45 kilometers from Gauhati, containing thousands of Muslim migrants from Mymensingh district in Bangladesh. Army units arrived in the villages to find bodies everywhere and thousands left homeless as a result of arson. Officials estimate the death toll at Nellie, Gohpur, and other affected areas at more than 4,000.3 Another 280,000 are in refugee camps, and thousands more fled to West Bengal.'

34 Ibid. 'According to government estimates the population of Assam increased from 14.6 million in 1971 to 19.9 million in 1981, or 5.3 million (36.3 percent). Had Assam's population increased at the all-India rate of 24.7 percent the population increase would have been 3.6 million. Moreover, according to the Sample Registration of the Government of India, the natural population increase of Assam was .5 percent less than the all-India figures in 1970-72 and 1.2 percent less in 1976-78. On the basis of these figures we can estimate that the immigration into Assam from 1971 to 1981 was on the order of 1.8 million.'

The main demand of the Assam movement was detection and expulsion of foreigners in the state. Addressing this demand, the Illegal Migrants Determination Tribunal (IMDT) Act was enacted in 1983. The IMDT defined foreigners as those who settled down in Assam after March 25, 1971, and puts the onus, of proving that he/she is a foreigner on the one who denounces a person; unlike the Foreigners Act that places the burden of proof on the foreigner to prove that he or she is an Indian national. Because of this stipulation many considered the legislation ineffective.[35] The experience of 22 years, the period of its operation, proved them right. Five tribunals set up under this act in the districts bordering Bangladesh from January 1983 registered 423,021 cases, dealt with 65,000 cases and had disposed of 23,420 cases and had till January 2005 declared 12,424 persons illegal migrants. Only 1,538 of them had been deported.[36] Most of the detected immigrants were housed in one or other of the six detention centres that functioned on a makeshift basis; that too inside jail premises of Goalpara, Kokrajhar, Silchar, Dibrugarh, Jorhat and Tezpur. Considering the inefficiency of the entire detection and expulsion mechanism laid down by the Act, Sarbananda Sonowal, a student turned Asom Gana Parishad (AGP) Member of Parliament (MP) and current Chief Minister of Assam filed a Public Interest Litigation in the Supreme Court seeking repeal of the Act. On July 12, 2005 the Court struck down the Act and held it as unconstitutional. [37]

This imparts urgency to the question: Has it brought the issue of undocumented immigrants to an end? As per records available, there at present 489 detainees, of whom 28 are convicted Afghanistan nationals and the rest, Bangladeshis, lodged in the six detention centres attached to the respective jails in Assam. This includes those declared foreigners by tribunals along with those convicted under various sections of the law, including the Foreigners Act.[38] Political parties continue to resort to this issue to gain popularity and make unrealistic claims.[39] It still remains a sensitive political issue in not just Assam but also in West Bengal and the other north-eastern states.

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35 Pg. 154-55, Bhattacharyya, Hiranya Kumar (2001): The Silent Invasion: Assam versus Infiltration.

36 Walter Fernandes, IMDT Act and Immigration in North-Eastern India, Economic and Political Weekly, Vol. 40, No. 30 (Jul. 23-29, 2005), pp. 3237-3240.

37 Sarbananda Sonowal v. Union of India & Anr., Writ Petition (Civil) 131 of 2000.

38 The Assam Tribune (Guwahati), April 29, 2016, Full-fledged Detention Centre in State Soon.

39 Indian Express (Guwahati), March 25, 2016, BJP's Assam Vision Document Promises Crackdown on infiltration.

In August 2015, after decades of negotiations, India and Bangladesh signed a long-standing land boundary agreement.[40] This was a landmark moment, especially since it had been pending for over four decades. The India and Bangladesh border was demarcated in a complicated fashion, creating enclaves and counter-enclaves. The residents of these areas were de-facto stateless. In the absence of specific legislation dealing with statelessness in India and Bangladesh, residents found themselves in a procedural quagmire that criminalised their movement from one enclave to another. While movement was important for them to achieve basic facilities and amenities, this resulted in inadvertent border crossings and indiscriminate arrests of many under the colonial Foreigners Act of 1946. It is small wonder that 98 percent of the foreign prisoner population in West Bengal belong to Bangladesh and almost all the overstaying prisoners are also residents of Bangladesh.

Strangely, despite having complex border demarcations and otherwise significant refugee population from various neighbouring countries, the Foreigners Act of 1946 does not recognize the various layers of personhood that is found in India. It must be noted that 80 percent of the world's enclaves were with India and Bangladesh. Even then, India has some of the most simplistic legislation in the world on undocumented migration and informal border crossings. Unlike many countries, it criminalizes unregulated entry. The United States of America, despite witnessing a high incidence of undocumented immigration and overstaying of visas, does not criminalize such presence. It recognizes that undocumented immigrants face countless problems with regards to employment, education and accomplishment of other basic needs in life and it sanctions only civil penalties for violating its immigration laws.[41] India, on the other hand, prosecutes undocumented entry and houses such immigrants with persons charged with murder, rape and other serious criminal offences in adult prisons.

It is well known that cooperation between India and Bangladesh has increased in the last few years on issues such as terrorism, nuclear cooperation and defence.[42] Many may not know that India and Bangladesh had signed and ratified an Agreement on Transfer of Sentenced Prisoners

40 Lok Sabha Unstarred Question No. 1748, Land Boundary Agreement with Bangladesh Answered on May 4, 2016.

41 8 U.S. Code § 1325 – Improper entry by alien; Arizona v. United States 67 US(2012).

42 Transcript of Media Briefing by Foreign Secretary on visit of Prime Minister of Bangladesh to India (April 08, 2017) available on the website of Ministry of External Affairs, Government of India.

in 2010. But in the last seven years not even a single transfer has taken place either from Bangladesh or India, even though Bangladeshi prisoners form roughly 70 percent of the total foreign prisoner population in India. It only goes to show that prisoners do not form a constituency either in Bangladesh or India, leaving them to rot in prisons for indefinite periods. During the recent visit of Sheikh Hasina, the Prime Minister of Bangladesh to Delhi in April 2017, 22 pacts were signed between both the countries, however the issue of prolonged detention of Bangladeshi prisoners and the slow pace of repatriation did not form part of the agenda.[43]

Conclusion

India's policy with regard to foreign national prisoners is polarised. It is a country that generously hosts thousands of refugees but also a country that demonises immigrants for political and cultural gains. Its immigration system, as it stands, is ad hoc, extremely politicised and byzantine. Ideally there would be a single thread that governs the stay, entry and removal of foreigners. In reality, however, it is a chaotic network of systems that intricately intertwines immigration law and criminal law making it complicated. Thus, there is an urgent need to review and revise the existing guidelines that govern the detention and deportation of foreign nationals in India, otherwise there will be many more cases of overstay and unnecessary detention similar to those highlighted in the sections above.

Moreover, there are urgent ethical and practical reasons to establish strategies to address the special needs of foreign national prisoners. Firstly, to ameliorate the harmful effects of imprisonment in a foreign country and assist with their resettlement; secondly, to improve prison management, reduce tension and create a climate in prisons that is conducive to the rehabilitation, not only of foreign nationals, but also of others who share the same environment. Existing prison manuals as well as the Model Prison Manual 2016 need to be revised and amended to accord special measures of treatment to foreign prisoners. Until this is done, these barriers will continue to restrain, dictate and govern the life of a foreigner in Indian jails.

43 ibid.

Case Studies

Ghalib, 12 yrs, Bangladesh, Overstay period: 5 yrs

Rahida, a widow from Bangladesh thought her 12-year-old son Ghalib was dead as she did not hear from him for five years. All this time, he had been lodged in an Observation Home in West Bengal awaiting nationality verification. It took the collaborative efforts of the governments of both countries, civil society and the media to help him go back to his mother.

Valerio, 52 yrs, Ukraine, Overstay Period: More than14 yrs

Valerio, a Ukrainian national came to India in 2003 to practice Buddhism at a monastery in West Bengal. He overstayed his visa, and a visit to the authorities for visa extension led to his arrest, conviction and a penalty of one year in jail. At the time of writing he is still in a prison in West Bengal, and even after 13 years of completion of his sentence he refuses to go back, as he no longer has family ties in his home country. He has written several requests to the government seeking asylum, which have been turned down. Had there been ways to ensure family contact then earlier, he might not be afraid to go back home today.

Antonio Barga, 45 yrs, Cameroon, Overstay Period: 2 yrs

Antonio Barga had lost all hope. He underwent trial before being convicted in 2015, of committing forgery. His sentence was off-set by the period he had already served as an undertrial in prison. However, he spent two years in Alwar Detention Centre, Rajasthan unable to reach his embassy because the Cameroon regional diplomatic mission is in China. His sister, CHRI, the Ministry of External Affairs, the Rajasthan government and the Cameroonian government all came together in a unique alliance to enable Antonio to go home.

Alan Bernard, 32yrs, Nigeria, Overstay Period: More than 3 months

Alan served time at the Presidency Correctional Home in Kolkata and completed his sentence on April 9, but is still being held at the prison because he cannot raise the money required to fly him back to Nigeria. Although the Nigerian High Commission in New Delhi verified his nationality and subsequently issued him an Emergency Travel Certificate, which would enable him fly to Nigeria, the commission is unable to pay for the travel tickets. He remains detained in the correctional home at the time of writing.

Yazid, Palestine, 50 years, Overstay Period: 3 yrs

After spending 26 years in jail, Yazid's Emergency Travel Certificate was issued and tickets were booked on Emirates Airlines by the Embassy of Palestine. Police escorts were arranged and his earnings in the jail were converted into US currency for making purchases during transit. He was escorted to Kolkata Airport but was refused permission to board the Emirates Aircraft considering his deportee status. Even though he had paid what he owed to the state, his criminal record acted as a barrier to his return to Palestine. Eventually, he had to be taken back to jail. He waited another few months before he could finally go back.

Sayeda Bibi, 38 yrs, Bangladesh, Overstay Period: 2 yrs

Thirty-eight-year-old Sayeda Bibi had to wait for two years before seeing Shama and Bilal, her five year old and seven year old children after she migrated to India seeking a better life.. She was mentally unstable at the time. The court understood her plight and sent her to a Shelter Home. With the help of psychologists and other counsellors in the Home, she recovered but it took the collective efforts of CHRI, the Bangladesh media and the counsellors at the Home to facilitate her return to her children. Tired of struggling to preserve the hope of seeing her children one day, Sayeda said, 'Coming here is easy, going back, difficult'.

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Some Reflection on Justice D.M. Dharamdhiari's Human Values and Human Rights

*Upendra Baxi**

Abstract

This conversation offers a series of reflections on Justice Dharmadhikari's recent publication. His Lordship's work offers sustained wisdom on a vast array of themes, especially on human rights and spirituality—a theme at best relegated to affairs of multi-faith dialogue. Access to justice according to law and beyond the law is an important motif that should guide judicial and law reforms if human rights are ever to be fully realized. Constitutional secularism and peaceful co-existence of all faiths and opinions here emerge as core human rights norms and standards.

Introduction

Not that it needs to be at all said but it is a joy to introduce this book of addresses, articles, and some decisions by Justice D.M. Dharmadhikari. This second, and expanded, edition should prove indispensable to those who struggle for constitutional equality and justice.

At the outset, we may note that not all Justices are *dharmadhikaris* (upholders of Dharma); most are *nynayadhish* (administrators of justice according to law).The distinction is not facetious; all kinds of Justices are equally necessary. This much is recognised even by Justice Krishna Iyer, who makes a distinction between legal 'missionaries' and shopkeepers of justice' (Baxi, 2013). But on reading Justice Dharmadhikari's book one is able to say that judicial inclination (better still a disposition) towards maintenance of core human rights standards and norms is not merely indispensable to

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doing justice according to law but also the accomplishment of constitutional justice, especially as it proves 'elusive' to the millions of suffering and rights-less Indian citizens (Nainar and Uma, 2013; Frarast, Jha, 2016).

Justice Dharmadhikari had a long and luminous, judicial carer including the Chief Justice-ship of the Gujarat High Court and the judgeship at the Supreme court of India. He was the Chair of Madhya Pradesh Human Rights Commission; it a matter of some wonder that a human rights challenged state was the first to enact HRC Act, even before the announcement of the NHRC!

This is a wise and well-informed book, packed with information and insights about human rights oriented governance and justicing in India. It has 27 articles and speeches in human rights (Part 11), 7 on judiciary (Part 11), 2 general articles (Part 111), and 5 judgments (Part V). These furnish foundational documents as well as wise reflections on the nature, scope, and itineraries of human rights in India and glimpse of the future of Indian constitutionalism as it relates to the appearance and reality of human rights. The book offers a magisterial survey and represents an authoritative voice.

And it also gives us some snippets of His Lordship's decisions. The opinion of Chief Justice Dharmadhikari (for himself and Justice P.B. Majumdar) regarding Gujarat earthquake relief is a *locus classicus* on the subject; most commendable remain His Lordship's observations concerning civic participation which should be considered by governments as an ally rather than adversary (389-400). Equally important remains his concurring opinion concerning 'human values in education' (401-413). His valiant dissent in the Tehri Dam Case remains notable for its invocation of the precautionary principle and the *paripassu* standard as integral values of constitutional conceptions of development in India. One wishes more decisional wisdom was here included.

Human Rights and Spirituality

The volume adds a new dimension: spirituality. Pages 379-366 seek to provide some approaches to an answer to the following questions: What may be said to be the relation and the distinction between 'religion' and 'spirituality'? Is spirituality to be confined to religion and religious practices or is it a discrete civic and republican virtue and a value? Is 'spiritualism' a force of good conduct that may make law and rights unnecessary in the

future? Allied is the question: How may we translate justice into a public virtue of compassion?

The learned Justice draws many distinctions between 'religion' and 'spirituality' but the core of the distinction lies in the social programmes of what he calls 'Adhayatmic Chetna' (spiritual awakening) (382). While the rule of law "is necessary for an ordered society", so is "rule of love and compassion". He recalls the Gandhian thinker of "his own family"—Acharya Dada Dharmadhikari—who maintains that the "law is heartless" and "for dispensing justice, we require the medium of compassion" (386). The learned Justice is himself fond of quoting Mohandas Gandhi who rightly counselled us to punish the sin and not the sinner. How this is to be ever accomplished should be a subject of criminology, penology, and victimology as integral aspects of human rights in the system of administration of criminal justice.

From all this follows Justice Dharmadhikari's exhortation that while human rights are important, equally important are the duties of every citizen who is conscious of his duties to other citizen; in this way, says the learned Justice, "rights of all citizens get naturally protected" (382). Harmonious balance between rights and duties, and the combination of the rule of law and love, is explicit, in many contexts, throughout this work. How is this balance to be achieved, especially when the constitutional human rights are in conflict and the Fundamental duties are disharmonious with each other? And, indeed, when these rights conflict with duties what juridical magic may we expect the judicial interpretation to perform?

I get the feeling that what the learned author means additionally by 'spiritualism' is nothing other than justice. Indeed, he observes: "To bring spiritual content in justice administration, judge must be both a legally aware person and a spiritually enlightened human-being" (364). There may not be a human right to 'spiritually enlightened' judicial beings, but it is not an unreasonable expectation of our justices. Such enlightenment however forbids blind justice according to the dominant or subaltern faith but draws all that is good from the world religions. This is what constitutional secularism is all about, as the learned author also highlights it (266-275).

The mutual impact of spirituality and human rights adjudication is a subject of great importance and more work on this is certainly needed. The international law of human rights uses two religious expressions: the first is the term 'realization' and the second is the expression 'covenant'. No doubt,

one must trace their origins and growth points in the Judaic and Christian traditions but these articulations are common to all faiths. But this, we should also acknowledge, remain central to all living faiths.

Judicial Independence and Human Rights

Recalling Justice Hidayatullah, the learned author rightly observes that judicial independence is a "cherished ideal of a democracy governed by rule of law" and it is, as a practice of governance, "firmly ingrained in our democratic culture" (314). However, the two 'As'(as I put it) are deeply intertwined-- autonomy does not make complete sense without accountability but neither does the talk of absolute autonomy.

Justice Dharamadhikari stresses eloquently the factors of accountability; such as enhancement of "the quality of judiciary", "putting in place necessary mechanisms to discipline judges at all levels", "appropriate action against the dishonest, unethical and irresponsible judges of superior courts", vast improvement in "work culture" and in-house judicial training (315). To this vast agendum, one may add the importance of continuing judicial education of High Court and the Supreme Court: if the former is partly served by the National Judicial Academy, the latter is not catered to by any training institution. Overall, Justice Dharmadhikari makes sage exhortations and some progress has been made, though more obviously needs to be done in a fast-forward setting.

The learned author is quite sensitive to the need for learning right lessons from other societies. What I call COCOS; comparative constitutional studies (Baxi, 2013) commands his attention when he refers to Pakistan judiciary and its "non-violent war for establishing constitutional democracy" (319; see also Baxi, 2011). And he celebrates "happy indications for nurturing a hope that that men in black robes would not disappoint the people of this country" (319).

Justice Dharmadhikari has always held the view that district judiciary should have a distinct role to play in the promotion, preservation, and protection of human rights. His reasons for this are eminently well stated (37-249). Indeed, the Indian Codes allow a considerable latitude to District judiciary. But the writ jurisdiction is confined to High Courts and the Supreme Court. He thinks that it is "high time that the constitutional remedy provided in Art. 32 … be also made available to Sessions Courts" and proposes to this end a suitable amendment to its Clause3 (283). This eminently sage advice

has been long ignored—such are the habits of governance!

I may add that since access to the judiciary has recently been declared as a constitutional right, unconscionable judicial delays are also to be held as rights-violative. As late as 2012, Brij Mohan Lal v. Union of India affirmed[(2012) [5 SCR 305 at 399] that "it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to Justice" so that "every person is able to receive an expeditious, inexpensive, and fair trial". No doubt, the context in which these observations were made related to judicial appointments in fast track courts; but even here the court explicitly negatives the argument that "financial limitations or constraints" may make this constitutional and "basic fundamental human rights" defeasible. The problems of judicial workload and disposal are considered primarily as pertaining to administration of justice, as technical and policy matters; but denial or deferment of access to justice also violates constitutional human rights and their interpretation by demosprudential adjudication (Baxi, 2016). It is also maintainable that right to expeditious and equitable trial is also integral to the idea of human rights and human rights law and jurisprudence (see, e.g, Baasiouni 1993; Allen, 2004, Davidson, 2010). Baasiouni draws explicit support from the concept of fair trial that necessarily (id.at 235; 244-245).

Justice Dharmadhikari is sensitive to the fact that the autonomy of the legal profession is a democratic asset and crucial to the maintenance of judicial independence. Most of the Justices arise from the legal profession. Yet when Justices or the executive- legislative combine seem to act against the profession, they regularly recourse to strikes—making the legal profession in India very striking indeed! I had an occasion (in the 80s to study many legal professions in India (for Sulkhanai Devi Mahajan Memorial Lectures) to empirically study this matter. I found that there were many kinds of lawyer's strikes but they fell within two broad ideal types: other-regrading and self-regarding. The former occurs where some ideal of justice is invoked for mass social action; the latter when only individual or group interests are at stake. Strikes under the banner of justice often really round the slogan:"Independence of Judiciary is in Peril" (as for example, in arbitrary appointments of judges, unprincipled transfers of high court justices, non-elevation of a particular justice well esteemed for being upright by the Bar, judicial corruption, and formation of High Court benches in far flung areas). Strikes of the second kind are often guild strikes aimed to safeguard the privileges of the Bar or impunity from

law (tax raids, police excesses, practices of long arguments and adjournment, and law reform proposals which are perceived to be against the interests of a section of the Bar).

Justice Dharmadhikari is firmly of the view that lawyer's strikes should be banned as he joins a concurring Supreme Court opinion (for Justice M.B. Shah). He agrees with the observations of the Court that a lawyer is not liable for sanction by the Bar Council for unheeding such a call. The courts, it held, "must not be privy to strikes or calls for a boycott. However, in certain cases where "dignity or integrity or independence of the Bar and/or the Bench" seem to be affected, the Bar Council stands mandated to give supporting reasons to the chief judge who has to issue a binding decision in the matter.

That such procedure has not been followed, and lawyers' strikes continue to happen is regarded by Justice Dharmadhikari as a regrettable failure of compliance with Court's orders. But it also needs to be realized that the order itself was shot through with ambivalence: on the one hand the prohibition was enunciated in all-encompassing terms but, on the other, it remained open to 'justified strikes', provided the justification was endorsed by the relevant chief judge. The more general question is whether the right to strike is an internationally and constitutionally affirmed human right to carry on any profession, trade, or business and is capable of reasonable restrictions on specified grounds. If the latter, the question surely engages the prohibition/abrogation dichotomy.

How may be the Method of Judicial Appointments Relate to Judicial Independence?

Justice Dharmadhikari has always stressed the virtue of "co-operating with other organs of the State to uphold the constitutional values" (319). Co-operation is not at issue; limits of such co-operation are. The entire purpose of enshrining fundamental rights beyond the reach of Parliament is that it cannot deny judicial review through post-*Maneka* due process standard of 'reasonableness' of restrictions on rights it may choose to impose. What constitution contemplates is limited government and responsible sovereignty.

The chapter dealing with "Judicial Independence and Accountability" {289-319) has not been revised in the light of the NJAC decision and is accordingly silent on the new jurisprudence which has constitutionalised both judicial recusal and rectitude (Baxi, 2016). But it adequately discloses

the view of Justice Dharamadhikari that had he continued to be on the High Bench, he would have dissented from the NJAC decision. Discussing in detail the recommendations of constitutional review committee and the Constitutional amendment bill 2003, the leaned author finds no threat to the independence of judiciary were the Law Minister were to be a part of the appointment procedure. He clearly says: "His presence in the Commission will not in any way impinge on judicial independence" (295). The Union Law Minister, it is further said, is "not a stranger to the appointment process" is consulted, presumably on behalf of the Collegium, "in order to expedite the whole process" (Ibid) and the "rhetoric" of judicial independence may not be "carried too far" to "exclude the participation of the political executive altogether in the appointment process"(296). At the same moment, the Justice recognizes that "a combination of the Law Minister and an executive nominee may open up doors of confrontation and may create avoidable friction in the working of the selection body" (295).

This wisdom is no more than an apologia for the NJAC, in all its versions. It does not the account of the fact that the Government is the largest litigant and that a Law Minister shapes litigation policy; a factor that weighed enormously with the four justices in the NJAC decision. Further, it may be borne in mind that it is not even a constitutional or political convention that only eminent members of the Bar may be appointed as Union Law Minister. Who shall be appointed, as a Minister remains, rightly, a prerogative of the Prime Minister, which may not be constitutionally reviewed. It is also true that party discipline and political loyalty will trump professional obligations of a lawyer. It is no disrespect to any incumbent, or future, Union Law Minister for the Supreme Court to say that the power of appointment of justices shall solely vest with the judicial collegium.

The idea, shall we say, of an executive-*mukt* (free) judicial appointment is declared, by NJAC decision, as legitimate judicial interpretive domain sanctioned by the Constitution. Accordingly, Justice Dharmadhikari is entirely justified when he observes that although unique in the annals of world judiciary, it is "to the credit of the Indian people that the decision of the Apex Court devising a unique method of selection of judges by means of constitutional interpretation has found willing acceptance any successive Governments. The Union of India did not ask for a review or reconsideration…when the Presidential Reference was being considered by the Court in 1998" (293). But this does not mean that the system of Collegium may not be improved

and Justice Dharamadhikari makes a large number of suggestions in this regard, especially the "worth and credibility" of would-be Judges of the High Courts; in a mild reproach, Justice Dharmadhikari says this has been "turned out to be incorrect" and it must always be remembered that the "calibre of the Judges of High Courts will have a direct bearing on the calibre of Judges chosen to the Supreme Court" (297-298). He makes also certain precious suggestions concern in the functioning of the Collegium"(298-300).

What Are Human Values?

Which values shall guide the creation of "a disciplined democratic society"(60)? This sovereign question is sought to be answered by a careful elaboration of "spiritualism" and constitutionalism. Some would regard this as an unholy mix but Justice Dharamadhikari makes the twin appear as natural, effortlessly quoting from Hindu scriptures, god-persons, social reformers, and the Indian Constitution. Perhaps, one sentence indicates why values are necessary: "What ails our democratic society is not the structure of it but the negative mind set [sic] of the people" (68).

Both spiritualism and constitutionalism accentuate equality; if all religions preach radical equality of all souls, the provisions of the Constitution relentlessly pursue the democratic principle of equality of all citizens and persons. It would be wrong to read one as independent of the other as the "humanistic legacy" of "Great Saints of India" has "directly or indirectly crept into the constitutional provisions…" (68-69). And it teaches us to move away from the motto "everyone unto himself" to "concern for others" (71; italics in the original). Further, unless "we develop concern for the next individual is not possible to achieve human development… (72). "attitudinal change to respect for fellow human beings and work foe human development" is needed for the captains and soldiers of the government as well (73).

This is desperately needed advice and one hopes for greater human rights responsibility in tasks of governance, obedience, and resistance, which shape the future(s) of human rights. However, it is one thing to enunciate values and another to follow these in public life. The question is not merely of morality or ethics but one that has also to address conflicts of values, as happens in some situations where conflicts of human rights and religious persuasion or even commandments occur.

I do not think that these conflicts are specifically addressed in this

luminous work. Its revised edition, in 2017, does not take on the conduct of Sri Sri Ravi Shankar and the Art of Living (AOL). We all know how the contestation evolved; but briefly put the record shows that the World Culture Festival was held (March 11 to 13) in a controversy about harm done to the local ecology and disturbance of the farmers and their crops. The NGT had imposed a fine on AOL for organising the event in the flood plains of Yamuna. The Festival attracted 172 leaders from across the world and over 3.7 million people from 155 countries. The seven-acre stage, on which the event was hosted, was built in 50 days, and dismantled in 28.

The AOL behaved as an ordinary litigant, which it was of course entitled to do. A report by experts submitted to the NGT claimed that it would take 10 years and Rs 13 crore to reverse the damage done to the area. The AOL is said to have denied the claims and called the report of experts to the BGT a biased report (due to the alleged proximity of the petitioner to the expert panel). Sri Sri Ravi Shankar also complained of denial of natural justice; he is widely reported to have said: "The NGT can never get over the blot it has brought on itself by delaying natural justice to The Art of Living and allowing its own committee to malign the law-abiding organisation in the media. The Art of Living had obtained all the necessary permissions including one from the NGT. The NGT had the application file for two months and they could have stopped it in the beginning. It defies all principles of natural justice that you give permission and slap a fine for not violating any rule."

My purpose is not to here trace the history of claims and counter-claims; nor it is to analyse the performance of the NGT (see for a sustained analysis, Gill, 2017; Sahu, 2014; Shrotria, 2015). Surely, at issue is the right to culture (and even religion) versus the right to the integrity of environment. It is unthinkable, however, that the former dictated as the only choice the already endangered Yamuna floodplains and that a great damage will ensue by such a massive congregation. Neither right is absolute but surely anthropogenic harm must be taken very seriously, which the NGT did.

The narratives of contention and conflict will ultimately emerge before the Supreme Court of India. But I do wish to point out that the litigation stances seem to conflict and, even contradict, the elaborate articulation, indeed sermons, of its founder (some of which are movingly quoted in this book (at pp.68-71). The book under review, which provides a magisterial survey of the Indian Supreme Court led environmental jurisprudence, could have benefitted also by the comparison of ways in which the NHRC and the

NGT have handled environmental disputes brought before it (see Shotria, 2015).

Towards a Conclusion

The legal community does not encourage critical self-reflections by retired Justices. Rather, they are sucked in the wilderness of private arbitration, government led Tribunals, Commissions', or commissions of enquiry. Self-reflections are an extremely important resource for any meaningful internal, or external, reforms in the judicature. These also constitute narratives of how our justices have struggled to translate the rhetoric of human rights into reality. Justice Dharmadhikari has exemplarily discharged his duties to society by this anthology. One hopes that this example will be more widely followed because the love for the future is best pursued by a detailed understanding of what has gone before.

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Climate Change and Human Rights

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Abstract

This note addresses the implications of the human rights framework for the question of climate justice. There is an increasing emphasis on the centrality of this framework to ethical thought about climate change, and this is manifested in a succession of resolutions adopted by the UN Human Rights Council connecting climate change to the violation of human rights. However, the benefit of the human rights framework in the context of climate change is limited if we adhere to the prevalent legalistic conception of human rights that sees rights as claims against duty-bearers. Conceiving human rights as enabling conditions for achieving the goal of a decent life is a more productive framework. In the following section, the two philosophical conceptions of human rights are discussed. Subsequently, we compare their value in addressing the normative challenges raised by climate change.

Introduction

There are a number of potential normative frameworks that may be employed in evaluating the threat posed by climate change. Traditionally, analysts, especially those from the developed world, have emphasized an economic framework, one that evaluates climate outcomes based on an aggregation of costs and benefits.[1] The equity-based framework offers a contrasting approach, one that focuses on the extent to which climate change and climate policy will mitigate or exacerbate significant pre-existing global inequalities (World Resources Institute, 2015).

In recent years, the human rights framework has emerged as an influential contender for a normative approach to climate change. There is

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1 Nicholas Stern's report for the Government of the United Kingdom on the economic costs of climate change is an archetype of the cost-benefit normative framework (Stern, 2007).

a growing recognition that climate change poses a threat to a number of fundamental human rights -- the rights to life, health, shelter, food security and self-determination, among others. The significance of the human rights approach to climate change was given an official imprimatur when the United Nations Human Rights Council issued two resolutions in 2008 and 2009[2] acknowledging the causal linkage between climate change and violations of human rights.

The human rights approach has many attractions. Unlike the aggregate cost-benefit approach, the human rights framework is sensitive to issues of exploitation. Simply focusing on maximizing some aggregate measure of economic welfare might lead us to ignore debilitating costs imposed on sub-populations, especially marginalized sub-populations. The human rights approach, with its disaggregated evaluation of outcomes, guards against this eventuality. It helps ensure that any steps taken to mitigate the global impact of climate change do not further impoverish those who are already among the most vulnerable.

There are pragmatic attractions to the human rights approach as well. International climate action faces an enforcement problem. Constructing an international legal architecture to enforce compliance with climate goals has thus far proved impossible. However, if climate change is conceptualized as a human rights issue, the already existent architecture of international human rights law might provide an additional redressal mechanism outside the climate negotiation process, especially for states (or non-state parties) that do not have significant sway in climate negotiations.

However, the human rights approach faces significant challenges as well. Traditional legalistic conceptions of human rights require the establishment of a specific causal link stemming from a rights violator in order for there to be a rights violation. In other words, demonstrating a rights violation requires one to identify some action (or inaction) by the purported violator which has a clear causal connection to the purported rights violation. Given the diffuse and global nature of climate change, tracing back chains of specific causation to pinpoint a violator is often impossible. Without a clear framework for imputation of responsibility, the traditional human rights approach may be stymied.

2 Resolutions 7/23 and 10/4.

In addition, the human rights approach must contend with potential conflicts between rights. In acting to correct certain violations of rights, it is possible that a state may end up breaching other rights (Lewis, 2016). This issue is particularly relevant when considering actions taken by developing countries. The responsibility of developing nations to respect human rights by mitigating greenhouse gas emissions must be balanced against the human right to development possessed by the citizens of those nations. Significant reductions in emissions within a short time period, and without adequate supplementation by green energy, will slow the growth and development of developing economies, potentially leading to a violation of citizens' right to enjoy a certain threshold level of development.

Adequately addressing these concerns requires us to recognise that there are in fact two competing normative accounts of human rights. The prevalent deontological conception sees rights as claims, engendering duties to protect, fulfil and respect. An alternative view, more consequentialist in nature, conceives rights as expressing a minimal threshold of entitlements for a life of dignity and autonomy. In this paper, I argue that the latter consequentialist conception of human rights provides a more compelling and productive framework for thinking about climate change. By focusing on a holistic evaluation of an agent's circumstances – rather than a specific action (or inaction) by a duty-bearer – allows us to successfully navigate some of the challenges faced by the human rights approach and to fully reap its benefits as a tool for normative analysis.

The Human Rights Framework: Rights as Side Constraints vs. Rights as Goals

Rights are standardly conceived as legitimate or valid claims.[3] A claim is a relation of duty between two or more agents, the claimant or right-holder and the duty-bearers. If right-holder *A* has a claim that parties *B* and *C* act in a certain manner (or refrain from certain actions), that means that *B* and *C* have a duty to *A* not to act in that manner (or a duty to refrain from those actions). As an example, if I have a right to a wage for the labour I perform at my place of employment, it means I have a claim that my employer performs a particular action; pays me my wage regularly. And this claim means that my employer has a duty to pay me my wage regularly, as long as I am an

3 For example: "To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles." (Feinberg, 1980, p. 155)

employee.[4] In this example, my possession of the right is a consequence of some circumstance specific to me, not shared by all other individuals. The relevant circumstance is the fact of my employment. Individuals that are not employed at my place of work have no claim that requires my that employer pay them a wage. They do not share the relevant circumstance, so they do not possess the right in question.

Human rights are rights that do not arise from any particular qualifying circumstance; they are rights possessed by every person simply by virtue of their humanity. The Universal Declaration of Human Rights (UDHR) says that rights apply to "all members of the human family". Implicit in this statement are two significant normative claims. The first implication is that human rights are genuinely universal, independent of a person's nationality, culture, religion or any other contingent circumstance. As a consequence, human rights cannot be interpreted as a legal creation with an existence dependent on fiat, since that would restrict the possession of these rights to those who live under the authority of a regime that recognises them. Instead, human rights must be seen as moral claims that hold irrespective of whether they are legally recognised and enforced.

The second implication is that the bearers of human rights are individual humans. Each and every person independently possesses all human rights. For this reason, the human rights framework is often deployed in opposition to more aggregative normative frameworks, such as utilitarianism. Aggregative moralities focus on some social good, aggregating over individuals, and the pursuit of this overall social good might license trade-offs that sacrifice the interests of some individual or set of individuals. Human rights place limits on the extent of sacrifice that can be licensed. In general, if the trade-off involves the violation of an individual's human rights, the rights of the individual take moral priority over the social good. Human rights are often seen as protections for individuals in the face of broader society-wide political and economic considerations.

If human rights are to be understood as claims and individuals are the right-holders, then who are the duty-bearers? Claims, after all, are relations

4 According to the classic Hohfeldian analysis of rights (Hohfeld, 1919), all rights are some amalgamation of four elements – claims, privileges (or liberties), powers and immunities. However, it is often argued that all these elements ultimately manifest as claims. For instance, the liberty-right to associate with whomever one chooses manifests as a claim that the state (and perhaps certain non-state actors) not intervene to prevent a chosen association. Hohfeld himself says that "in the strictest sense", all rights are claims (Hohfeld, 1919, p. 36).

between multiple parties. A right possessed by one party is analysed in terms of the duty or obligation generated in another party. The UDHR has something to say about the duty-bearers as well; it suggests that human rights confer duties on "every individual and every organ of society". So, it would seem that it is not just the possession of human rights that is universal; the duties engendered by human rights are universal as well. However, if one reads through the list of rights in the UDHR, while some clearly confer duties on all individuals, the right to life, for instance, others confer duties only on the particular state of which the right-holder is a citizen. An individual's right to education cannot plausibly be read as a claim that confers duties on all other individuals. The proper duty-bearer in this case would arguably be some particular State, which is obligated to provide the individual with the resources necessary to achieve an adequate education. Individuals or other States do not share this obligation.

The distinction between negative and positive rights is relevant here. Negative rights are generally regarded as prohibiting certain forms of interference. A right to free speech would be an instance of a negative right, as would a right against arbitrary arrest. A positive right, on the other hand, is an entitlement to receive certain goods or services, such as a right to food or a right to housing. From the perspective of rights as claims, one might understand the distinction in terms of the duty conferred by the right – negative rights confer duties of inaction whereas positive rights confer duties of action. However, this simple schema is complicated by the fact that negative rights can in fact confer duties of action on certain parties (Holmes & Sunstein, 1999). My right to life means that other individuals have a duty of inaction; that is, not to act in a manner that would seriously jeopardize my life. But my government has a duty of action as well; a duty to maintain a mechanism of enforcement to protect me against threats to my life.

In order to capture these important distinctions in the nature of the engendered duties, it is now standard in international human rights theory to speak of three different kinds of duties that are associated with rights; duties to respect rights, duties to protect rights and duties to fulfil rights. The obligation to respect rights simply means that the duty-bearer cannot act in a manner that violates or contributes to the violation of the right in question. The obligation to protect rights is stronger; the duty-bearer must not simply refrain from violating action themselves, they must also take action to ensure that the right-holder does not suffer a violation of rights from a third party's

actions. The obligation to fulfil rights is particularly relevant in the context of positive rights. The duty-bearer must take action to ensure that the right-holder is provided the goods and services necessary to enjoy the right in question.

It appears, therefore, that human rights are constellations of claims, targeting different duty-bearers. A negative right consists of both a respect-claim, for which the duty-bearers are plausibly all individuals and organs of society, as well as a protection-claim, for which the duty-bearer is generally the right-holder's state. While every agent is morally enjoined to avoid certain actions in order to respect the right, the State is also enjoined to engage in certain action to protect the right. For a positive right, the State is subject to both a protection-claim and a fulfilment-claim, while all agents are subject to a respect-claim, prohibited from acting in a way that would prevent the right-holder from enjoying access to the goods and services provided pursuant to the positive right.

The conception of rights as claims lends itself to a particular theoretical perspective on the normative foundation of rights, a perspective that has been prominently championed by Robert Nozick (Nozick, 1974) and Thomas Nagel (Nagel, 1995) in recent years, but whose roots date back to the work of Immanuel Kant. Following Nozick, I refer to this as the rights as side-constraints, approach. According to this approach, the moral basis of human rights lies in the special and equal respect owed to all people by virtue of their humanity. This obligation of respect is reflected in constraints on how one may treat others; one must treat them in a manner concordant with their status as autonomous individuals with their own independent interests, and one must particularly avoid subordinating recognition of this status to the fulfilment of one's own interests. These constraints on action engendered by respect for human dignity and autonomy are the duties incumbent on any agent when interacting with a person, and the claims associated with these duties constitute human rights.

It is evident how this approach grounds rights as relations between right-holders and duty-bearers, and therefore as claims. Rights simply are moral constraints on the activity of agents with regard to the right-holder. The emphasis is entirely on the actions of the duty-bearer. In fact, in the absence of a duty-bearer, there is no right. It would make no sense, on the rights as side-constraints view, to assert that a person had a particular right

without simultaneously identifying a duty-bearer for that right. One cannot even first assert a right and subsequently enquire into who has the duty to respect, protect or fulfil the right. This would imply some non-deontological residue to the right, an element of the right that is prior to ascription of duties. However, if the right is just an expression of constraints on the duty-bearer's actions, there is no such residue. Rights, at their very root, are a relation between right-holders and duty-bearers.

There is, however, an alternative approach to conceptualising rights, one that does not centre the concept of duty. This approach begins by identifying a threshold standard of living, a basic set of goods that is necessary for a person to enjoy a life of genuine autonomy and dignity. Human rights are conceptualised as the enabling conditions required for people to be able to live such lives. Let us take a person's right against physical assault as an example. On the side constraint view, this expresses a duty shared by all agents to respect the person's bodily autonomy by refraining from physically assaulting the person. On the second view of rights, the right against physical assault expresses one fundamental condition of a decent life; a person must have security against physical violence. In this case, the duty is not regarded as fundamental. If there are any duties, they emerge from our obligation to ensure that people live decent lives. However, establishing that people are entitled to such lives can be prior to identifying any particular duty-bearer who has that obligation.

This approach is usually referred to as the instrumental or teleological conception of rights in literature, since rights are supposed to be instruments for enabling some other good; a life of dignity and autonomy. There are many versions of this view in the literature. A prominent defender of one version of the view is Amartya Sen. Sen refers to instrumental rights as "rights as goals", and he argues that human rights enable capabilities that are vital to a decent life (Sen, 1982). The violation of a right is bad not because it disrespects the right-holder's status as an autonomous person, but because it deprives the right-holder of a capability that is vital to her ability to live a life of dignity. As Sen points out, on this conception, a right is not a claim. It is not a relation between two or more parties. It is, rather, a relation between a right-holder and a capability. It expresses the fact that the right-holder has an entitlement to that capability. That entitlement may confer upon some other agent a duty to help provide the capability, or to refrain from depriving the right-holder of the capability, but that duty is not prior to the right. It is a

consequence of the right. It does not constitute the right.

This approach to rights blurs the distinction between negative and positive rights. The distinction is best understood in terms of the distinctive duties associated with each type of right. However, the instrumental approach de-emphasizes duty in its conceptualization of rights. It emphasizes the provision of capabilities necessary for a certain quality of life, and from that perspective, all rights are essentially positive. To say that an individual is entitled to a right is to say that there is an ethical imperative to provide the individual with the material, social and psychological bases that enable human flourishing.

As I will argue in the next section, this instrumental perspective, or the rights as goals approach, is much better suited to dealing with the ethical challenges involved in climate action. One of the difficulties in deploying a rights-based framework in the context of climate change is that the causal connections involved are complex, and the structure of responsibility is diffuse. It is often difficult to conclusively identify a duty-bearer for the protection of fulfilment of certain rights. The side constraints approach cannot acknowledge a right without simultaneously identifying a duty-bearer. The rights as goals approach, on the other hand, allows us to first establish the particular entitlements that people have and then work out a just mechanism to provide them with the relevant entitlements. As we will see, this approach is better suited to handling the complex issues of climate justice.

The Impact of Climate Change on Human Rights

The UN Human Rights Council unanimously adopted a resolution in June, 2016 that lays out the human rights implications of climate change. The resolution speaks of the threat posed by climate change to the ability of individuals, especially individuals in vulnerable situations, to fully enjoy their human rights, specifying the rights to life, food, health, housing, self-determination, safe drinking water, sanitation and development. There are various causal pathways that might connect climate change to threats to the enjoyment of these rights, and they have been summarized in the IPCC's Fifth Assessment Report (Smith, et al., 2014).

Shifting weather patterns, increasingly frequent extreme events and increased variability in temperatures are likely to have some detrimental impact on human health and increase mortality risks. Negative impacts of

climate change on food production in many regions of the world will impact food security. In the absence of adaptation, the livelihoods and material assets of vulnerable populations will be at risk from factors such as rising sea levels, flooding, heat stress and extreme precipitation. There are also potential adverse impacts on infrastructure in both urban and rural areas, with climate stressors impacting clean water supply and sanitation. These are just some among the many right-threatening consequences detailed in the report, many of them with high confidence.

In response to these causal linkages, it is frequently argued that climate change should be treated as a human rights issue. In its 2016 resolution, the UN Human Rights Council adds its voice to this chorus, recognising "that climate change poses an existential threat that has already had a negative effect on the fulfilment of the Universal Declaration of Human Rights". And indeed, there is little doubt that in the absence of adequate mitigation and adaptation, climate change will have (and plausibly already has had) some significant influence on the ability of all people to fully enjoy their human rights.

However, a human rights-centred approach to climate change would not merely acknowledge that rights violations are among the many deleterious effects of climate change. It would also assert that a focus on human rights provides a productive foundation for thinking through the ethical challenges of climate change. There has already been considerable work done attempting to articulate, theorize and resolve these challenges. Does the human rights approach provide us with a better conceptualization of the problems than other approaches? Does it provide a promising framework for resolving those problems, for translating theory into action?

Proponents of a rights-based approach have suggested several benefits to this approach in terms of reconceptualising how we think of climate justice. Principal among these advantages are[5] :

a) The rights-based approach emphasizes individual human suffering, and thus provides a powerful motivational argument for climate action, one that connects to our obligations more deeply than abstract considerations of ecological transformation and societal costs.

b) By focusing on individuals and their rights, we can emphasize the

5 For greater discussion and defense of these points, see (Limon, 2009) and (Caney, 2010).

disproportionate impact of climate change on socially vulnerable populations; the poor, women, children, the elderly. The differential impact of climate change can be hidden by aggregate considerations but it is revealed when we consider individual rights.

c) There are extensive pre-existing judicial and administrative structures that deal with the protection of human rights, both at international and national levels. These mechanisms could be leveraged to support climate policy-making, and to construct systems of enforcement.

d) The rights approach, unlike the cost-benefit approach, does not permit trading off the rights of certain individuals for some purported over-arching social good or to minimize the cost of climate policy. In particular, unlike an aggregate analysis, a rights-based approach will not endorse sacrifices made by the disadvantaged to benefit the advantaged.

However, many of these potential benefits are somewhat hamstrung if we adopt the side constraints approach that treats rights as claims. Existing judicial structures that deal with human rights issues tend to be based on this very notion of rights. Prosecution of rights in courts, whether international or national, usually involves asserting a claim against some identified duty-bearer. This inherently favours the side constraints approach to rights. On this conception, a right is an expression of a constellation of duties; duties to respect, to protect and to fulfil. Corresponding duty-bearers must be identified. This is a particularly thorny issue when one thinks about the latter two categories; duties to protect rights and fulfil rights But even the first, most innocuous set of duties, the duties to respect human rights, face special complexities in the context of climate change. These duties would ostensibly require states to refrain from actions that cause a breach of human rights. However, the complex nature of climate change muddies the question of what exactly this obligation entails for any particular state. In order to impute responsibility for a rights violation to a particular action, one would have to establish a plausible causal link between the action and the violation. Furthermore, this would have to be *specific* causation, linking that particular action to the purported violation, rather than just actions of that specific type. While there is good evidence for some causal chains connecting the general phenomenon of climate change to rights threats, the causal linkage is quite significantly complex. In virtually all cases, climate change is just one among a myriad of factors that collectively contribute to the purported rights

violation. In many cases, there is no reliable understanding of the effect size of climate change as opposed to other, non-climatic stressors. Even if climate change is identified as a clear contributor, one cannot trace back the causal chain to identify a specific group of agents responsible for those particular impacts. A report released in 2014 by the Office of the High Commissioner for Human Rights (OHCHR) at the UN concedes this point, saying that the "physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harms often cannot clearly be attributed to acts or omissions of specific states."

Since the claim-based approach to rights requires identification of a duty-bearer responsible for every particular rights violation, the diffuse and collective character of the causes leading to these violations would severely undermine any attempt at resolving the claim using existing mechanisms. Furthermore, the constraint based human rights framework focuses on resolving a rights violation by altering the duty-bearer's particular action that constitutes the right violation. In the context of climate change, the response to a claim that a particular State is violating human rights by excess emission of carbon would be for the state to cut down on its emissions. However, even if climate change is a contributor to the problem, the most effective solution need not involve explicit climate mitigation. As an example, the IPCC report, in its discussion of the health impacts of climate change, explicitly acknowledges that the most effective means of alleviating some of those impacts is through improved public health services, sanitation and poverty alleviation.

When it comes to the duties to protect and fulfil, the problem of finding appropriate duty bearers is even sharper. Traditionally, in the human rights regime, states are the primary duty bearers for the protection and fulfilment of the rights of their citizens. However, given the global nature of the climate problem, the difference in historical responsibility between the developed and developing world, and the fact that effective mitigation requires international co-operation, this model will no longer work. However, while international law has strong norms requiring one state to respect the rights of the citizens of another state, it has not developed norms for the conditions in which one State is required to protect or fulfil the rights of the citizens of another state. The OHCHR has attempted to articulate legal obligations of States towards one another, but the legal obligations to protect and fulfil remain weak, only speaking of requirements to help in emergency situations like disaster

relief and assistance to refugees. These minimal obligations are completely inadequate for addressing the issue of climate justice.

If one conceives of rights as goals, however, the identification of a rights violation need not wait on an imputation of responsibility to some particular duty-bearer. Rights violations are simply failures to ensure that certain individuals attain the requisite threshold for a decent life, irrespective of the cause. Furthermore, a rights violation need not be tied to some particular act or omission, thus sidestepping the problem of causal complexity that arises in the context of climate change. Climate change may only be one causally relevant factor among a plethora of others that contribute to a breach of rights; one does not need to identify the cause of a rights violation as some particular act or omission. Consequently, correcting a rights violation is not simply a matter of altering the particular act associated with it. The aim is to bring about a particular goal as effectively as possible, rather than merely ensuring that one is not violating any claims through one's actions.

Of course, the problem of imputation of responsibility still exists on this conceptualization of rights, but it is a separate problem from the identification of rights violations. Unlike the claim-based approach, according to which identifying a violation requires an imputation of responsibility, the goal-based approach allows for a prior identification of violations to serve as a basis for the determination of responsibility. Imputation of responsibility in the case of climate change should plausibly be driven by the historical and equity-based considerations captured in the phrase "common but differentiated responsibility", first affirmed by the United Nations Framework Convention on Climate Change (UNFCCC) and recently reaffirmed in the Paris Agreement of 2016. This negotiated framework for apportioning responsibility requires that states shoulder differential responsibility for climate action keeping in mind the inequality in their relative contribution to the stock of anthropogenic greenhouse gases and their different stages of economic development.

However, that formal principle of responsibility still leaves open the question, "What exactly are states responsible for correcting?" It is here that the human rights framework can provide us a normative vocabulary. The responsibility of the international community (differentially divided across states) is not primarily to hit some global temperature target or ensure some specified preponderance of aggregate benefits over costs. It is to ensure

that climate-related human rights violations, understood using the "rights as goals" framework, are minimized. Undoubtedly achieving that goal will require emissions reductions on the part of developed nations and slowed emissions growth on the part of developing nations, but it will require more than that, it will require funding, capacity-building and technology transfer from richer to poorer nations in order to ensure that the climate-related vulnerabilities are mitigated as effectively as possible. As we have seen before, the most effective strategy for tackling climate-related rights breaches is not always to focus on emissions reductions. Since the causes of these breaches are multiple and complex, the solutions will have to be multi-dimensional, emphasizing development and equity as much as emissions reduction.

This brings us to a final important normative consideration, the conflict between rights. If human rights are understood as claims, as duties to perform or not perform certain actions, then the human rights impact of climate change should create an obligation for us to reduce emissions. But in a large developing nation like India, cutting emissions might slow development, preventing many people in the country from enjoying certain fundamental rights. This problem is often conceptualized as a conflict between the obligation to reduce carbon emissions and the right to development. A little thought will reveal, however, that this is only a conflict from the perspective of the "rights as side constraints" perspective. Conflict arises when an action necessary for correcting a claim violation also creates another claim violation. In the case under consideration, cutting emissions, the action that is plausibly causally linked to the climate change and its associated rights breaches, leads to reduced ability to satisfy various positive rights.

This framework has created an illusory normative landscape evident in the history of international climate negotiations. Development and climate action are seen as conflicting goals, driven by different human rights. The primary purpose of climate negotiations, it is claimed, is climate action, so concerns about development raised by developing countries are given short shrift. The goal of the negotiations is, after all, to correct one particular set of rights violations, the ones produced by climate change (and therefore by carbon emissions). The right to enjoy economic, social and cultural development is a separate issue, not the subject of climate negotiations, and so they are marginalized. This fixation on a uni-dimensional view of climate action, focused on emissions, is starkly evident when we consider Article 2.1(a) of the recent Paris Agreement, opposed by China and India but pushed through

by the developed countries, least developed countries and island states. The Article sets an unrealistic aspirational target of a 1.5 degree Celsius limit to global temperature increase. Setting a target that can only be attained either by a technological miracle or a drastic curtailment of emissions by developing countries (especially given the developed nations' apparent unwillingness to make significant commitments), without concern for the severe development consequences, is a symptom of the uni-dimensional perspective of current international climate discourse.[6] The unrealistic target stems from the least developed countries' and island states' concerns about climate-related human rights crises. Since negotiations treat curbing emissions as essentially the only action that can avert the crisis (a consequence, perhaps, of the "rights as claims" approach's connection of human rights violations with specific action or inaction), an extreme and unattainable target is the only solution available. If, however, developed countries had taken a more holistic multi-dimensional approach to the climate-related human rights issues facing least developed countries, an approach that considered potential socio-economic levers for averting the crisis and not just the emissions reduction lever, they would not have had to hinge climate action on a damaging and unattainable promise.

It is precisely this multi-dimensional approach that the "rights as goals" framework encourages. By turning the normative analysis to outcomes rather than actions, by focusing on the kinds of lives we want people to live rather than only on cutting emissions, it opens up a new conceptualization of the climate problem and its associated obligations. The international community's task is not just to stop performing the action that can be causally linked to human rights violations (in this case, emissions leading to climate change). Our task is to take whatever action is necessary to avert the threat to people's quality of life posed by climate-related human rights violations. Conceptualized in this way, it makes little sense to address the problem solely through massive emissions reductions, since that action will itself have very deleterious consequences for the quality of life of people in developing countries.

Adopting this perspective on human rights also dissolves the apparent conflict between climate action and development. These are not actions aimed at protecting two entirely different rights, rights which conflict with one another. Both climate action and development are complementary tools for accomplishing the goal of ensuring decent lives for all. There is

6 For more on the Paris Agreement, see (Jayaraman, 2015).

no justification for focusing on one tool while excluding the other. Climate justice consists in finding the right balance of development activity, emissions controls and technological innovation to place us on a trajectory towards bringing all humans above the minimal threshold of a decent life of dignity and autonomy.

Conclusion

The conception of rights as claims is unfortunately prevalent in the international human rights literature, and as I have argued, this skews the normative discourse on climate change in an undesirable manner. Seeing rights as claims associates every rights violation with a particular action or inaction by a duty-bearer. This approach won't work for the complex problem of climate change. If we adopt the perspective of rights as goals, however, we have a much different normative landscape to work with. No longer is the central issue the identification of duty-bearers, or the tracing back of causal chains to find parties responsible for particular rights violations. Human rights are now understood in terms of the provision of basic capabilities to people. In the absence of an explicitly claim-based approach to rights violations, we can see the protection and fulfilment of basic rights as a collective global responsibility, with differentiated responsibility dependent not on some judgment of who is the duty-bearer for particular rights, but on broader notions of distributive justice. These might include consideration of unequal starting points, differing historical contributions to climate change, differing urgency of needs and so on.

Climate change does impact the ability of people, especially vulnerable people, to live flourishing lives, and this undoubtedly leads to a collective global responsibility to engage in mitigation and adaptation strategies. However, by focusing on the end-point; the lives of people; rather than the actions of duty-bearers, the particular form of the resolution need not be tied to altering some specific action identified as the rights violation. The rights violation is now conceptualised as the inadequate quality of life of the right-bearer, and so the resolution will involve the most effective means of improving that quality of life, whether it is through climate action or poverty alleviation or health services. Now that the right is no longer tied to a particular action or set of actions, the potential solutions are much broader, and the responsibility of international actors isn't restricted to direct climate action – mitigation or adaptation. The rights as goals approach situates

climate action as just one among a myriad of actions that could help ensure individuals a decent life. On this perspective, the ethics of climate change, the issue of climate justice, cannot be separated from the broader question of international economic and social justice.

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Inept Fiscal Transitions and Budgetary Disruptions in Nutritional Services for Women and Children

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Abstract

The status of health and nutrition of women and children in India remains poor with the latest National Family Health Survey (NFHS-4) data showing improving, but still high, prevalence of stunting amongst children as well as anaemia amongst children and pregnant and lactating women. The Integrated Child Development Services (ICDS) scheme and the newly introduced maternity benefits scheme under the Pradhan Mantri Matritva Vandana Yojana (PMMVY) are the main programmes of the Government of India towards addressing this situation. Entitlements to food and cash support under both these schemes also fall under the National Food Security Act, 2013. This paper presents a review of the coverage and budgets of these two schemes, especially in the context of the recent cuts in central budgets for social sector schemes as a fall out of the recommendations of the Fourteenth Finance Commission. Implications of budget cuts and status of implementation of the schemes are presented. Specific challenges facing the schemes such as the moves to privatise the ICDS are also discussed.

Introduction

It is well recognised that India needs to attend to the nutritional and health status of its women and children, considering that, according to the recent National Family Health Survey 4 (2015-16) nearly 40% of our children remain underweight and stunted, over 50% of women are anaemic

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and 23% underweight (IIPS 2017). The Integrated Child Development Services (ICDS) scheme, popularly known as the *anganwadi* scheme, caters to children under six, pregnant and lactating women, adolescent girls through a comprehensive and integrated programme. Thus, it offers an excellent platform for interventions to mitigate the situation of overall food insecurity, by direct nutritional supplementation, nutrition counselling, health care and referral (including during pregnancy) and growth monitoring; all of which are important activities to tackle the direct and proximal causes of malnutrition. The same platform has also been charged with several other related schemes such as provision of support during maternity through the Pradhan Mantri Matritva Vandana Yojana scheme (PMMVY), as mandated by the National Food Security Act (NFSA), 2013. The ICDS provides nutrition and healthcare to approximately 102 million children and pregnant women and lactating mothers across the country (Government of India 2016). A total of about 2.7 million anganwadi workers and helpers do the work of the ICDS through approximately 13.5 lakh centres, receiving honoraria from the Central budget of Rs 3000 and Rs 1500 per month, with some substantiation in a few States and Union Territories such as Delhi, Puducherry, Telangana and Tamil Nadu (Lok Sabha 2017a).

The scheme had come under the purview of the *Right to Food case* (PUCL vs Union of India and Others Civil Writ Petition 196 of 2001 in the Supreme Court of India). The resultant interim judgements (Prasad, 2013) provided massive impetus to the anganwadis, resulting in major advancements in the ensuing decade and a half. This can be seen clearly in the facts gathered in two surveys done at community level in 2004 and 2014 by the Centre for Equity Studies (Centre for Equity Studies 2016), as reflected in the table below.

Table 1: A Comparison of India's Anganwadis in 2004 and 2014[1]

	2004	2014
Proportion (%) of sample AWCs with their own building	33	87
Perceptions of sample mothers		
Proportion (%) who stated that their child attends the AWC 'regularly'	50	80
Proportion (%) who said that the following services were provided at the AWC:		
Supplementary nutrition	76	79
Immunization	43	81
Home visits	29	46
Referral service	28	24
Growth monitoring	63	70
Pre-school education	45	53
Proportion (%) who:		
Were dissatisfied with the quality of food provided at the AWC 24	24	12
Felt that the quantity of food was adequate	59	79
Reported that PSE activities are taking place at the AWC	45	53
Felt that PSE activities benefit their child	54	82
Felt that ICDS is important for their child's welfare	48	84
Perceptions of survey teams		
Proportion (%) of sample AWCs whose overall functioning was rated as 'poor' or 'very poor'	34	23
Proportion (%) of sample villages where the motivation of mothers to send their children to the AWC appears to be 'high' or 'very high'	33	50

AWC = anganwadi centre PSE = pre-school education

1 Source: This table from Dreze and Khera (2017) is based on the findings of the Progress of Children Under Six (POCUS) report (Centre for Equity Studies 2016). This report is based on the FOCUS survey in 2004 and a re-survey in 2014. The survey involved unannounced visits to about 200 randomly selected anganwadis of six states (Chhattisgarh, Himachal Pradesh, Maharashtra, Rajasthan, Tamil Nadu and Uttar Pradesh) and interviews with a random sample of about 500 mothers of at least one child below six years.

Data from two large national surveys; the NFHS 4 and the Rapid Survey on Children (RSOC) confirmed the findings above. As one report by IFPRI (Menon et.al 2017) put it,

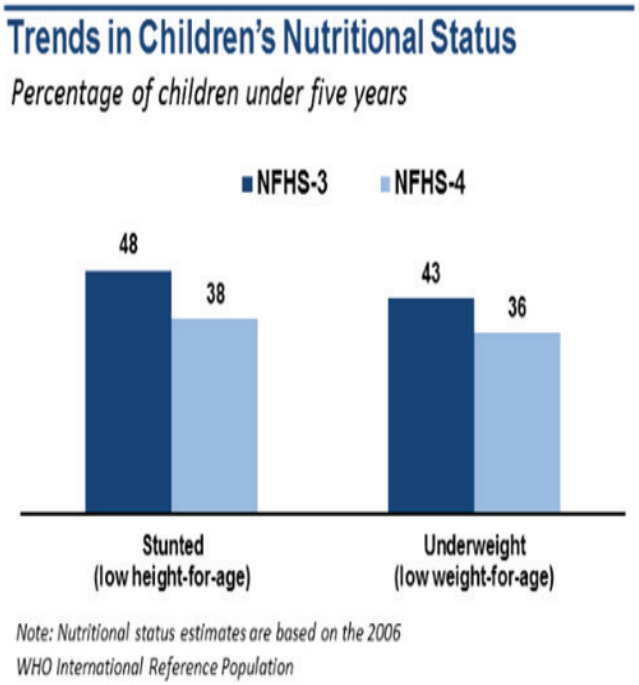
'Overall, improvements were seen in the coverage of nutrition-specific interventions, which in turn, improve the immediate determinants of nutrition. Exposure to ANC, protection against neonatal tetanus, consumption of IFA supplements, institutional deliveries, and birth registration have all increased in the last decade. Immunization coverage and vitamin A supplementation improved remarkably. Similarly, the proportion of children receiving ORS during diarrhoea increased.….

…..The improvements in the coverage of interventions occurred during a period of substantial change in the policy and programmatic environments in India, particularly the two national programs, the ICDS and NHM.' (*ibid.:* 24).

Thus, the proportion of women who had an antenatal (ANC) check-up in the first trimester increased from 44 percent in 2006 to 59 percent in 2016. Consumption of iron– folic acid (IFA) supplements during pregnancy doubled from 15 percent in 2006 to 30 percent in 2016. The proportion of women receiving food supplements during lactation increased from 16.5 percent in 2006 to 42.4 percent in 2014. Vitamin A supplementation of children increased dramatically from 18 percent to 60 percent and the proportion of children receiving food supplements increased from 25 percent to 49 percent. (*ibid.*: 20-21).

As expected, these results were also showing positive trends in nutritional status of children, as seen from the comparison of NFHS 3 and NFHS 4 data.(IIPS 2017).

Figure 1: Trends in Children's Nutritional Status



Thus, by all accounts, the status of the scheme in the year 2014 should have reassured policy makers that existing efforts and investments were bearing fruit.

Considering its importance, the scheme has also been given due status in the NFSA 2013 (GoI 2013) with legal entitlements to its supplementary nutrition programmes defined in Section 4 and 5 of the Act as below:

a) In the case of children in the age group of six months to six years, age appropriate meal, free of charge, through the local *anganwadi* so as to meet the nutritional standards specified in Schedule II.

   Provided that for children below the age of six months, exclusive breastfeeding shall be promoted.

b) Maternity benefit of not less than rupees six thousand, in such instalments as may be prescribed by the Central Government.

   It also states that every *anganwadi* shall have facilities for cooking meals, drinking water and sanitation.

In this context of nutritional gains through the ICDS, and legal entitlements stated in the NFSA, it came as a shock to the ICDS system and the proponents of the scheme, that, instead of making higher investments to implement the NFSA in its true spirit, massive cuts were announced in the budgets of 2015-16 by the Central Government.

Ostensibly, this 'disinvestment' occurred simultaneously with greater devolution of finances to State Governments as per the recommendations of the 14th Finance Commission. However, on closer scrutiny, according to a report by the Centre for Budget and Governance Accountability (CBGA) 'while the states' share in central taxes and non- plan grants, as share of GDP has increased, the magnitude of overall Union resources transferred to states as a percentage of GDP by the 2014-15 budgeted expenditure, reveals a decline in 2015-16' (CBGA 2015: 6). How this move has affected the factual situation of funds actually available for the ICDS specifically, needs to be examined further.

Central Budgets for ICDS

While there has been a huge increase in the budgets provided for the ICDS scheme compared with ten years ago, the last three years show a slightly different trend. This is in part because of the recommendations of 14th Finance Commission, which changed the ratio of devolution of finances to state governments. The 14th Finance Commission submitted its report in December 2014 with recommendations for the period 2015-16 to 2019-20. One of the most important recommendations was that states would receive increased untied funds so that their share of central taxes would increase from 32% to 42%. The *untied* funds are not designated for a particular purpose, so the state can decide how to spend the money.

The Niti Aayog Report on rationalisation of centrally sponsored schemes (Niti Aayog 2015) placed the ICDS scheme under the list of 'core sector schemes' for which the recommendations are as follows:

(1) 'Core Sector Schemes: Centre 60%: State 40% (however, schemes presently having Centre's share below 60% would remain at the same level) [Note: Under ICDS, for SNP component the present sharing ratio is 50:50, so that would remain. For the ICDS *General* it used to be 90:10, this would change. Salary component see below)' (*ibid.*: 36).

(2) 'The funding in existing Schemes where the salary component is borne by the State Government would continue to be borne by the State, i.e. no change is recommended. ii) Where the salary/remuneration is paid under the Scheme, the Centre's allocation share would remain capped at the current level. Hence any upward revision of remuneration or additional hiring may be made only with the States own resources. iii) The Central Ministries may review the extant guidelines in the Schemes to enable States to have the flexibility in norms and guidelines to take an appropriate decision on hiring personnel in any Scheme' (*ibid*.: 37).

Looking at the impact on the budget, if the budgets for the Ministry Of Women and Child Development are considered, there was a sharp overall decline between 2014-15 and 2015-16 as shown below.

Table 2: Budget for Ministry of Women and Child Development by Union Government (in Rs. Crore)

	2010-11 (AE)	2011-12 (AE)	2012-13 (AE)	2013-14 (AE)	2014-15 (RE)	2015-16 (RE)	Addl. Allocation In Union Supplementary demand for grants
Ministry of Women and Child Development	10688	15671	17036	18037	18588	10382	4062

Source: CBGA 2015

However, perhaps as a corrective measure, this allocation has been increased in 2017-18 (BE) to Rs. 22,095 Crores which is not comparable with earlier budgets strictly speaking, since it includes the budgets for new initiatives such as the scheme for maternity entitlements –Pradhan Mantri Matritva Vandana Yojana (PMMVY)[2] , a major outcome of the NFSA, National Nutrition Mission etc.

2 This is discussed in a later section

Within this, in actual terms, since the 14th Finance Commission, there has been a decline in the central allocations for ICDS (see table below).

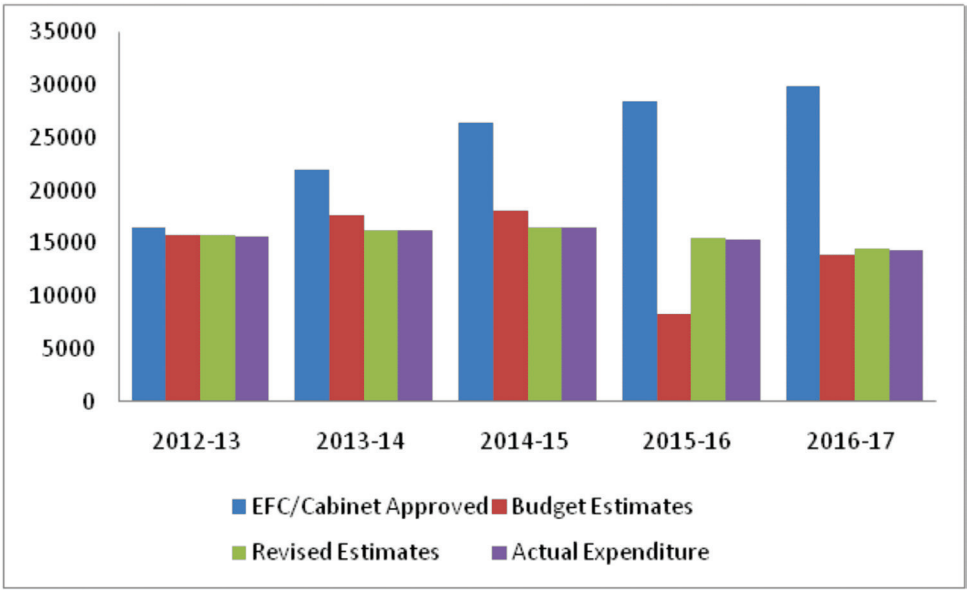
Table 3: Budgets for ICDS, Government of India (Rs. In Crores)

S. No	Year	EFC /Cabinet approved	Budget Allocation (BE)	Revised Estimates (RE)	Expenditure (GoI Share)
1	2012-13	16542.00	15,850.00	15,850.00	15701.50
2	2013-14	22027.00	17,700.00	16,312.00	16,267.49
3	2014-15	26533.00	18,195.00	16,561.60	16,581.82*
4	2015-16	28453.00	8335.77	15,483.77	15,438.93
5	2016-17	30025.00	14,000.00	14,560.60	14,430.32

* This includes saving from other schemes during the year

Source: Lok Sabha 2017b

Figure 2: ICDS Budgets: Government of India Allocations



Source: Lok Sabha 2017b

As can be seen the central budget for ICDS has been declining from 2014-15 onward. This is despite the fact that the amount approved by the Cabinet has been increasing. The allocation for Twelfth Five Year Plan (2012-13 to 2016-17) for ICDS was Rs. 1,23,580 crore. However the amount spent by the Government of India during this period amounts to only Rs. 78,420.06 crores, that was, only 63% of the amount allocated.

Alongside massive outcries from civil society and experts, and perhaps in response to the demands from the States, ICDS then witnessed an increase of 68 per cent in 2016-17 against previous year, as a corrective measure, with total Budget Estimates (BE) allocation of Rs. 14000 Crore (HAQ, 2016). In 2017-18, again there has been a mild increase to Rs. 16,745 Crore (BE), again, and it remains to be seen what the Revised Estimates (RE) and actual expenditures (AE) will be .[3]

However, an analysis of state budgets also needs to be done for this period to get the full picture as to whether or not State governments supplemented the Central allocations adequately. Unfortunately, the data for state budgets are difficult to come by and confusing. The absence of clear consolidated data for the same indicates, to some extent, the lack of preparation for a move that has the potential to adversely affect millions of children and lakhs of women, including the women workers that run these programmes, along with a failure to monitor this shift properly. We attempt to put together some of the information that is available so as to assess the actual impact of these budgetary disruptions and changes.

State Budgets for ICDS

A consultation of Niti Aayog with State Governments in October 2015 was telling in its response to these budgetary transitions. Chief Ministers of Arunachal Pradesh, Jammu & Kashmir, Jharkhand, Kerala, Manipur, Nagaland, Rajasthan, Telangana, Uttar Pradesh and Lt. Governor of A & N Islands were Members of a Sub- Group formed for the purpose. The Chief Minister of Madhya Pradesh was Convener and CEO while NITI Aayog was Coordinator of the Group.

As per the Report of The Sub-Group of Chief Ministers on Rationalisation of Centrally Sponsored Schemes, October 2015, various

3 unless specified, we refer to budgets for 'core ICDS', not including budgets for nutrition mission or maternity entitlement schemes which are dealt with independently.

states expressed their dissatisfaction with the move by Central Government to reduce allocations to social sector schemes including the ICDS (Niti Aayog 2015). It was noted that,

> 'the prevailing arrangements for designing and implementation of CSS [centrally sponsored schemes] fell short of expectations. The States contend that the proliferation of CSS and the gradual reduction in untied Block Grants under Plan, has led to shrinking fiscal space for States. Moreover, there is an overwhelming emphasis on a process-centric approach and lack of flexibility in designing and implementing the CSS that has diffused the focus on their outcomes' (*ibid.*: iii).

States not represented in the Sub Group were also consulted and had similar opinions. For instance, to quote a few, according to Andhra Pradesh, 'The reduction in the Central share for key schemes such as Sarva Siksha Abhiyan, National Health Mission, ICDS, NRDWP, Rastriya KrishiVikasYojana etc., will have adverse effect the State development indicators. Hence, a sudden change in the schemes is not desirable. Sufficient transition period should be given for the States to equip themselves with the changed pattern' (*ibid.*: 109).

Assam went further to say, 'Due to mid-course change in the system, our budget proposals have been completely derailed' and Bihar that '14th Finance Commission has done more harm than good' and Himachal Pradesh said it 'is unlikely to have revenue surpluses post FC devolution and hence has no fiscal space to fund such Centrally Sponsored Schemes'. Karnataka actually noted a decrease in total allocations by Rs.1987 crore as compared to the previous year and Uttarakhand found itself a 'net loser on this account to the tune of Rs 2236 core' (*ibid.*: Annexure XI).

It is hard to understand why such consultations and computations should not have been done prior to the announcement to make this fiscal transition for schemes that have such a major impact on millions of women and children in a state of vulnerability.

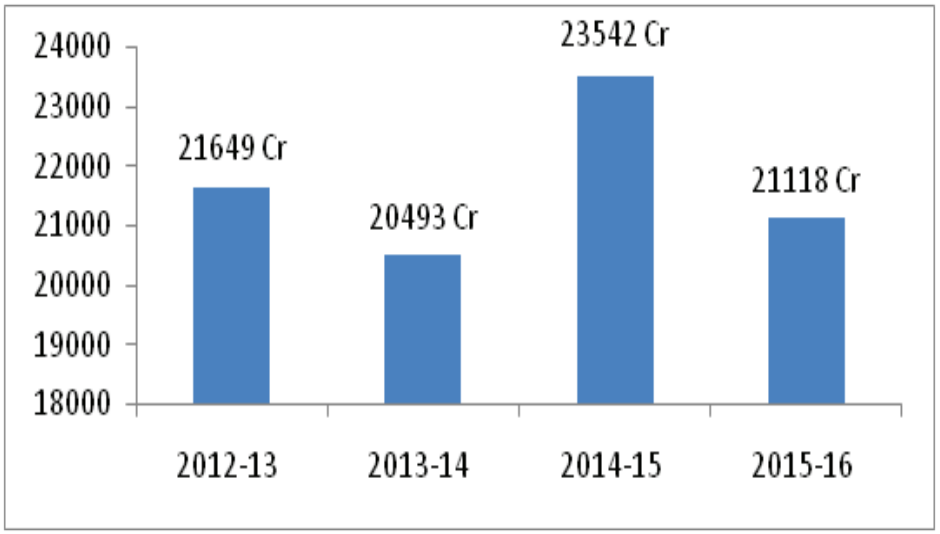
Anecdotally, the cuts in the 2015 funds resulted in supplementary nutrition being delayed for months in many parts of the country; workers were also not paid their monthly stipends for many months in many states. For instance, a report in Scroll.in, about nine months after the budget cuts, reported delays in ration supply as well as payment of salaries to anganwadi

workers in a number of states including Punjab, Uttar Pradesh, Haryana, Andhra Pradesh and Maharashtra (Yadav 2015).

Different states have addressed the ICDS budgets in different ways. However it is noteworthy that there was already a huge gap between required and actual investments in the scheme at state level prior to these budgetary changes; as per the response to an un-starred question, number 1327 dated 18.07.2014 (Lok Sabha, annexure), of a statement indicating state-wise, the position of expenditures under ICDS. This shows the percentage shortfalls for SNP in 2013-2014 for select states were, 74% in West Bengal, 58% in Himachal Pradesh, 50% in Gujarat, 49% in Bihar, 48% in Karnataka, 42% in Jharkhand, 32% in Uttar Pradesh, 30% in Rajasthan and 15% in Odisha (Accountability Initiative 2016).

While there is little state-level information on the ICDS specifically, the response to a Parliamentary question gives the expenditure on ICDS reported by the states, including their own (state) share, as presented in Figure 3. Based on this data, it is clear that the overall expenditure on ICDS in the country increased slightly in 2014-15 but went down again in 2015-16, with the total spending in 2015-16 being less than what was spent in 2012-13. It should be further noted that all these figures are in nominal terms, and when adjusted for prices, in real terms the central and overall expenditures on ICDS it shows that it has declined in the last five years.

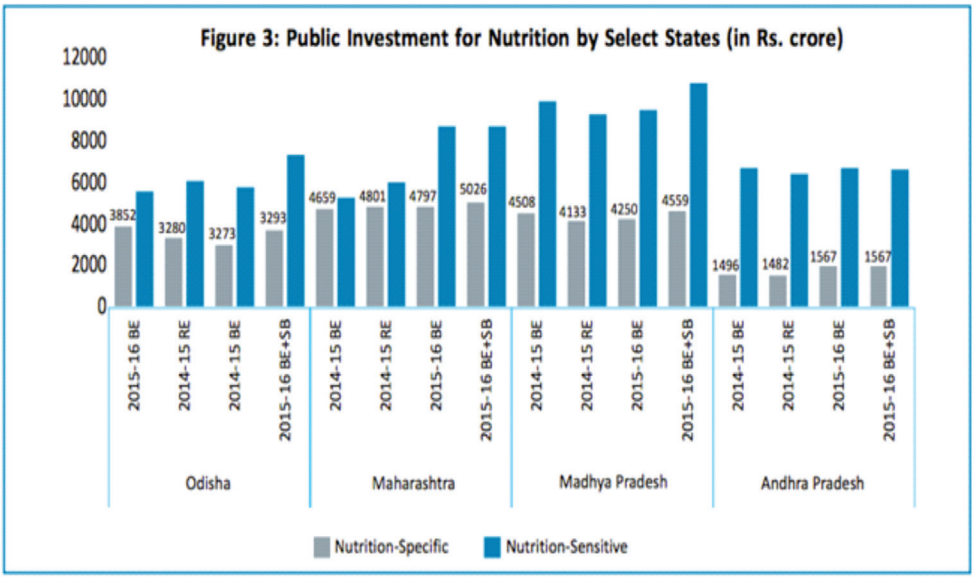
Figure 3: Expenditure Reported by States including State share for implementation of ICDS Scheme



Source: Lok Sabha 2017b

A study of budgetary allocations for nutrition in the states of Odisha, Maharashtra, Madhya Pradesh and Andhra Pradesh, was conducted by the CBGA in 2016, a year after the transition. The nutrition-specific interventions mainly pertained to ICDS along with other state specific schemes such as the Indira Gandhi Matritva Sahyog Yojana (IGMSY) in Odisha and the One Full Meal scheme in Andhra Pradesh. The overall picture is shown below in Figure 4.

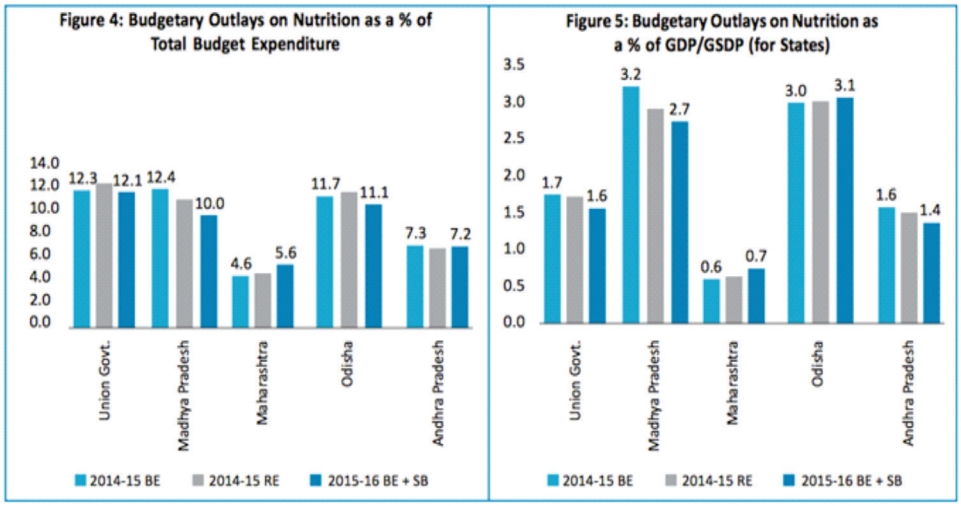
Figure 4: Public Investment for Nutrition by Select States (in Rs. crore)



Source: Shrivastava 2016: 69

However, the study noted that in Madhya Pradesh the total outlay for ICDS in 2015-16 decreased to Rs 2,767 crore (even after adding the supplementary budgets) from Rs 2,851 crore in 2014-15 BE. Odisha too saw substantial cutbacks to the ICDS. Further, three of the four states (excepting Maharashtra) saw decreased allocations for nutrition in terms of percentage of total expenditures and percentage of State GDPs (GSDP), and while Maharashtra saw some increase, its overall allocations were very low, at less than 1% of its GSDP. This only serves to illustrate the fact that State priorities for the ICDS and nutrition have not been high (Shrivastava 2016).

Figure 5: Budgetary Outlays on Nutrition



Source for Figures 4 & 5: State Budget documents for the selected states.
Note:Data for Andhra Pradesh budget does not include any supplementary grants.

Source: Shrivastava 2016: 70

In the absence of data from the States, or any analysis by the Central Government of the current status of the overall budgets for the ICD, it may be relevant to look at case studies of some States to see the impact of these transitions. Examining the Maharashtra case further, a case study is presented below .[4]

The Maharashtra Case Study

Maharashtra has been a leading state with respect to its Gross State Domestic Product (GSDP) and ranks at third position among states in the country where per capita income is concerned. However, Maharashtra lags relatively behind in the Human Development Index and comes at 7th position. This lag is also seen in indicators like immunisation coverage, availability of safe drinking water, gender equality, school enrolment etc. It is believed that the main reason for the disparity between the two positions is inadequate investment in the social sector and inadequate budgetary provisions for social sector services such as health care, education, ICDC

4 This section has been adapted from documents created by the Jaganyachya Hakkache Andolan (Movement for Right to Live), Maharashtra.Budget analyses for JHA have been done mainly by Ravi Duggal, AmitNarkar, Abhay Shukla and Abhijit More.

and PDS. For instance, the budget for 2016-17 had expressed the hope that state revenue would increase substantially by 11.3%. However, the volume of the proposed overall expenditure budget was increased by only 8.23% with only a small percentage of that allocated to nutrition. The share of social sector expenditure in revised budgetary estimates for year 2015-16 constituted about 5.31% of Gross State Domestic Product. This was reduced to 5.01 % in year 2016-17.

In 2014, spending on ICDS was already Rs32,500 million less than it should have been for the reported number of beneficiaries, even when using the inadequate ICDS norms for food. Nonetheless, the social sector saw a 16.5% under-spending. Maharashtra's 2016-17 allocation for DWCD after the 14th Finance Commission came into play, was **62% less than that of 2015-16.** The Rs 13,400 million allocated to WCD in 2016-17 accounted for only 0.5% of the state's budget. The allocation for the health sector (Public health and Medical education) also faced a cut of 13%.

Throughout 2016, activists engaged in protest activity in many districts of Maharashtra. The participation of workers that were directly affected, was the most public, and involved the largest numbers. Other partners contributed their skills, knowledge and other resources, and shared their belief in the rights of poor people to basic social services. 17 out of 48 MPs of Maharashtra and 100 (out of 520) MPs were approached and lobbied.

In its Monsoon Session the Maharashtra Legislature approved an overall supplementary budget of Rs.1,30,210 million, 5.1% more than the original budget of March 2016. While the Rs 35,680 million for the Ministry of WCD, in the revised estimates for 2015-16, accounted for 1.5% of that year's budget and still did not come up to the figures allocated prior to the 14th Finance Commission. This cut could not be explained by a fall in Central level allocations to the state as these had been restored to the 2014-15 levels by then.

Of this supplementation, ICDS received a share of Rs. 11,490 million of which 45% was for food for the under-fives and 45% for anganwadi worker and helper salaries. However, after the increase, the allocation for ICDS, at Rs 25,380 million, was still Rs 10,780 million less than the 2015-16 revised estimate of Rs. 36,190 million.

While one needs a fair amount of expertise on the fiscal systems of the government, a few facts are abundantly clear; there is a general absence

of a well thought out, planned and committed approach to strengthen nutritional services for children even in the context of Maharashtra where there is seems to be no dearth of funds.

Moves to Privatize the ICDS

It was perhaps not a coincidence that the budgetary cuts of 2015-16 were accompanied by various moves to involve private companies, corporate-run NGOs and religious bodies in the running of the anganwadis. The Central Ministry of Women and Child Development went as far as signing an agreement with a company to build anganwadi centres, despite this same company being accused of defaulting on income tax. The company said that the centres would be used partly for skills development, making them less available for ICDS.

A memorandum of understanding was signed between the Ministry of Women and Child Development (WCD) and Cairn India Ltd, a subsidiary of the multinational Vedanta, under which the group earmarked Rs 400 crore to build 4,000, so called next generation anganwadis, in Andhra Pradesh, Assam, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, Telangana and Uttar Pradesh among others (GoI 2015). Similarly, other state governments have handed over anganwadi centres to JP Cements, Nandi Foundation, and ISKON through Public Private Partnerships (PP), adoption etc. (Peoples' Democracy, 2016)

Many states have followed suit; Hindustan Zinc (also of the Vedanta Group) signed a MoU with Government of Rajasthan in 2015 to strengthen 3055 Anganwadis of the ICDS Department in 5 districts i.e. Udaipur, Rajsamand, Chittorgarh, Bhilwara and Ajmer of Rajasthan. The WCD Department of Maharashtra signed a MoU with Britannia Nutrition Foundation to address the problem of child malnutrition in Melghat region of Amravati district through ICDS project blocks of Dharni and Chikhaldara (GoM, 2017).

Responses by Civil Society and Elected Representatives

Widespread concerns were raised about the cuts, by civil society organisations, trade unions such as the All India Federation of Anganwadi Workers and Helpers (AIFAWH) and the press and media. On 15 February 2016, approximately 50,000 anganwadi workers and helpers from around the country gathered in Delhi for the march to 'Save ICDS'. In an unprecedented

move, the Union Ministry of Women and Child Development also wrote two letters to the Prime Minister objecting to the drastic reduction in budget allocated for ICDS for 2015-16. These pressures, as well as the fact that States did not manage to substantiate funds, ultimately resulted in the amount for ICDS being increased in two supplementary budgets to reach an actual figure of Rs 15433 Crores. However, this was still less than the 2014-15 budget for the ICDS (GoI 2017).

The Parliamentary Standing Committee on Human Resource Development also expressed serious concerns about the cuts in the total ICDS allocation, and the poor working condition of the frontline workers. It noted, in its report of 2016, that the constraints in making the sanctioned AWCs operational, need to be identified and taken care of. In States like Bihar and Uttar Pradesh, the number of operational AWCs has not increased. It also noted that, as per the information available from the Ministry, 'from 12.49 lakh AWCs, about 89.91% AWCs are running from pucca buildings and the remaining 10.09% from kutcha buildings; 34.22% running from Government owned buildings; 21.18% running from school premises; 5.78% running from Panchayat buildings; 28.86% running from rented house; 9.14% running from others; 0.82% running from open space. 69.60% AWCs have drinking water facilities within the premises and 49.38% AWCs have toilet facilities.' The Committee also wondered, 'whether in the prescribed cost norms, the beneficiary would be getting the prescribed calories/ protein' and recommended an increase[5] . It was also 'dismayed to note that barring a very few States, majority of the States have got a long way to go in filling the vacant posts of the ICDS functionaries' and recommended enhancing the honorarium paid to AWWs/AWHs in view of their important role in an important scheme (Parliament of India, 2016).

As seen above, the ICDS programme has suffered from underfunding since its inception and this has been exacerbated by changes brought in as a result of the recommendations of the 14th Finance Commission. The shortfalls in ICDS budgets were not only recognised by civil society and trade unions, but also by the Parliamentary Standing Committees and the Ministry of Women and Child Development itself. Further, in ICDS there have been moves to privatise both the running of the anganwadi centres and the supply of supplementary nutrition. Both these pose the risk of putting profits above

5 An increase in financial allocation for supplementary nutrition has just been announced by the Ministry, increasing the amounts per child from Rs 6 to Rs 8 per day.

children's rights and utilising the meagre budgets to cater to commercial interests rather than for providing health and nutrition services for children. A related intervention in nutrition, also deriving legitimacy from the National Food Security Act, which has equally suffered from lack of budgets, is that of maternity entitlements.

Maternity Entitlements for Nutrition and the Budget

Maternity is a critical period in the life cycle, when the rights of the mother and the child overlap. Just after giving birth the mother needs rest and recuperation, and the new-born needs exclusive breastfeeding. According to the WHO 'breastfeeding is an unequalled way of providing ideal food for the healthy growth and development of infants; it is also an integral part of the reproductive process with important implications for the health of mothers. Review of evidence has shown that, on a population basis, exclusive breastfeeding for 6 months is the optimal way of feeding infants.' (WHO website)

The NFSA explicitly acknowledges breastfeeding as providing food security for children under the age of six months, and that it must be promoted. It goes further to define how this must be done, by specifying the entitlement of not less than Rs. 6000 for all women in the period of maternity.

However, women also have rights and responsibilities as workers. Therefore conditions have to be created through social security measures, for women to be able to breastfeed their babies. Indian laws have taken cognizance of this in some small measure, albeit leaving out the vast majority of women engaged in the informal sector. For instance, The National Maternity Benefit Act covers less than 10% of women in the formal sector. According to a recent press release from the Ministry of Women and Child Development, after a recent amendment which increased the entitlement of paid leave from 12 weeks to 26 weeks, the amended act it is likely to impact only 1.8 million women, whereas the number of pregnancies per year is at least 26 million.

Table 4: Summary of legal provisions for Maternity Benefits in India

Name of Act	Ministry responsible	Eligibility	Entitlements
Employees State Insurance Act, 1948 (amended 2017	Ministry of Labour (MoL)	Women in formal sector earning less than Rs.21000	Wage compensation and health services
National Maternity Benefit Act 19561 (amended 2017)	MoL	Women in formal sector. Plantation Act, Factories Act and Mines Act are linked to this Act	26 weeks of paid le ave for live births and 2 nursing breaks till the child is 18 months old, crèches.21 days leave for still birth
Building and Other Construction Workers' Act, 1996	MoL	All workers	Consolidated amount varying from state to state. No wage link
Unorganised Sector Social Security Act , 2008	MoL	All unorganised sector women workers covered under the exhaustive list	Notified Scheme Janani Suraksha Yojana
National Food Security Act , 2013 implemented through Pradhan Mantri Matritrva Vandana Yojana Scheme and ICDS	MWCD	Universal. However the scheme is conditional, being restricted to one pregnancy	At least Rs 6000 to every pregnant woman

Table 5: Coverage of National Maternity Benefit Act

Labour Law	**No. of Establishments submitting returns**	**No. and % of women workers claiming benefits**	**Average amount**	**Complaints received**	**Complaints addressed**
Factories Act	10665 out of 39473	1440 (0.49%)	59853	0	0
Plantation Act	1483 out of 13757	26083 of which 25088 from Assam (14%)	8584	2	4200 (only from TN)
ESI		31512 out of 2721789 (1%)			

Source: GoI 2013

The International Labour Organisation (ILO) Maternity Protection Convention, 2000 (No. 183), Recommendation (No.191), and the Workers with Family Responsibilities Convention, 1981 (No. 156) are concerned with the rights of pregnant working women. The National Maternity Benefit Act and ESI Act adhere to the entitlements mentioned in these conventions; however, India is yet to ratify any of these.

Unfortunately, the Central Labour Ministry does little to monitor maternity entitlements to women in the informal sector, as evident from their (lack of) response to a recent Right To Information request, asking for data on the same[6] . To some extent, the provisions of the NFSA offset the lack of coverage of women in the unorganised sector through labour laws, but, of course, it does not provide a reference to wage compensation for the social function of maternity and breastfeeding.

In response to the NFSA, the Government announced the universalisation of the Indira Gandhi Matritva Suraksha Yojana (IGMSY) in 2014. However, this was not rolled out. It was subsequently renamed Pradhan Mantri Matritva Vandana Yojana (PMMVY) and launched in May 2017. The

6 Vandana Prasad v. PIO, M/o Labour & Employment, CIC/MLABE/A/2017/118245

applicability of the scheme was reduced from two children to the first child only, in contravention to the universality assured by the NFSA (Right to Food Campaign, 2017).

Tamil Nadu and Odisha already had state specific maternity benefit schemes prior to the IGMSY financed through their own resources. The Muthulakshmi Reddy Scheme in Tamil Nadu provided for Rs. 18000 per child and in Odisha, the Mamta Scheme provided Rs.5000 per childbirth for upto two births. With the advent of the universalised IGMSY, a 40% state share was also brought in.

Though the scheme has a high importance in supporting the nutrition of children under six, and is engendered by the NFSA, as with the ICDS, budgetary allocations have remained consistently low. Further, revised estimates have been lower than budgeted estimates year after year, signalling underutilisation of even this meagre amount. The following table provides details of the budgets since 2013-14.

Table 6: Budgeted and Revised Estimates for IGMSY

Year	Budgeted Estimates (Rupees in Crore)	Revised Estimates (Rupees in Crore)
2013-14	500.00	300.00
2014-15	400.00	360.00
2015-16	438.00	233.50
2016-17	634.00*	

Source: Lok Sabha 2017c.

These figures must measure against a calculation that universal maternity entitlements of Rs 6,000 per pregnancy would require an annual allocation of at least Rs 13,000 crore (assuming a birth rate of 19 per thousand and an effective coverage of 90%).

An allocation of Rs 2,700 crores was then made in the Union Budget 2017-18. Even though the budget went up four fold from earlier years it is still only one sixth of what is actually required.

It is estimated that about 2.7 crore births take place in India, each year requiring about Rs 16,000 crores (central share Rs 9,700 crores). Assuming centre-state cost sharing ratio of 60:40, the current allocation would cover

about 75 lakh women. However, even with the conditions of the current scheme, 103 lakh women would be eligible, requiring a central budget of over Rs 3,600 crores. Notably, only as per reports received from the States and UTs, under IGMSY, 23,94,188 beneficiaries were provided maternity benefits since the inception of scheme in the year 2010 (Lok Sabha 2017c)

Conclusions

This paper has attempted to analyse the recent budgetary provisions of two programmes with utmost significance to nutrition in early childhood; the ICDS, a long established programme; and the PMMVY, a new programme, both of which have statutory status under the NFSA.

Where the PMMVY is concerned, a prolonged lag-phase is seen in the implementation of the scheme, which continues to suffer from lack of adequate resources and very low coverage.

Evidence suggests that the ICDS functioning has been improving steadily with slow increases in investments, which have, however, always remained far short of optimal. However, the budgetary disruptions and cuts, resulting from the 14th Finance Commission, have brought about a phase of crisis and uncertainty, especially during a phase where positive impacts on nutrition were becoming evident and the country was showing an economic upswing. The government made a fairly quick attempt to correct this chaos and at to least revert to the budgetary allocations in place prior to the shift. However, allocations remain far short of what would be expected from a strong commitment to the food security of children and the implementation of the NFSA.

The transition process was somewhat cavalier in nature and showed a lack of due diligence, planning with the State governments and care in ensuring that the most vulnerable sections of our society are protected during such major transitions. These disruptions point to the lack of a policy framework that would provide much-needed stability to such programmes across changes of fiscal policy as well as provide a priority for the nutritional rights of children. The long-term impact of these changes will only be evident in times to come.

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Human Dignity and Human Rights: In search of Theory*

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Abstract

'Human dignity', occupies a pivotal role in human rights jurisprudence. It been prominent in international documents since the twentieth century. This article traces the historical development of the idea of human dignity and explains the three conceptions of human dignity developed by the American courts. It also explores the concept of human dignity in the Indian context by analyzing the judicial decisions in the post Maneka era. There is vagueness and lack of coherence with regard to the content in the notion of human dignity as applied by the Indian Courts. Currently, the Indian courts take two approaches (i) deprivation framework where the right to dignity means 'to-protect-life-limbs-and-faculties' and (ii) 'right-to-life-is-more-than-mere-animal-existence'. The author critically examines the need for the development of a theory of human dignity in India with reference to the three conceptions of human dignity developed by the American courts.

Introduction

The expression and concept of human dignity has garnered the attention of many, including philosophers, scholars, lawyers and jurists. The extent to which the concept of dignity is invoked and it's connotation in legal thought and jurisprudence is an age-old debate.[1] Indeed, human dignity has a rich

* I would like to borrow the words, 'In search of Theory' from Rajni Kothari and Smitu Kothari who represent the First and Second generation of Human Rights advocates of India. I profusely thank my colleagues, Snigdha Singh, Eluckiaa and my students, Ayush and Rakshit for providing research support.

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1 See G Reaume, D. (2002). Indignities: Making a Place for Dignity in Modern Legal Thought. *Queen's Law Journal,* 28, pp.61-62.(observing that 'dignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers'); see also D Castiglione, J. (2008). Human Dignity Under the Fourth Amendment. *Wisconsin Law Review,* pp.655, 710.(indicating that the concept of human dignity has been 'under analyzed').

and long intellectual history, but with conflicting approaches.[2] Debates about human dignity range from constitutional law to criminal law, free speech to bio-ethics and 'suffer from absence of coherence' [3]. What emerges from these debates is a dense and confused picture regarding the concept of human dignity within the ambit of legal rights[4] .

Against this background, the current article will analyse the concept and notion of human dignity in the Indian context and attempts to provide some normative and theoretical consistency to the contours of Right to human dignity. The conceptual history and theoretical underpinnings of human dignity 'is not only fulfilling in itself, but it also helps us as an instrument of legal development.[5]' .

The article comprises of four parts. The first part explains the appeal and recognition of human dignity as foundation of human rights. The second part deals with three different conceptions of dignity interpreted by the Unites States Courts while adjudicating individual rights is discussed in second part. The third and final part attempts to understand and analyse the jurisprudence of human dignity in Post Maneka era. The last part further argues the imperative to develop a coherent framework and theory of human dignity.

Dignity is an ethereal concept[6] that can mean many things[7]. It is difficult to determine precisely the ambit of human dignity in the context of a factual setting[8]. The basis of dignity lies in identity and personhood including the autonomy of self and a self-worth that is reflected in individual self-

2 See Barak, A. (2013). Human Dignity: The Constitutional Value and the Constitutional Right. *Proceedings of the British Academy,* (192), p.361.

3 Rex D. Glensy (2011).The Right to Dignity, 43 *Columbia Human Rights Law Review* 65, 142.

4 Ibid.

5 J Bloustein, E. (1964). Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *New York University Law Review*, 39, pp.962, 1004. See, e.g., Benda, E. (2000). The Protection of Human Dignity (Article 1 of the Basic Law). SMU Law Review, 53, pp.443, 453-454.

6 D Castiglione n 1 pp.662, 679. 679 (indicating that the concept of human dignity is 'to some extent, inherently ethereal' and applying it to Fourth Amendment law); see also A Hyman, D. (2003). Does Technology Spell Trouble with a Capital 'T'?: Human Dignity and Public Policy. *Harvard Journal of Law & Public Policy*, 27, p.3.

7 Wright, R. (2006). Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection. *San Diego Law Review*, 43, pp.527-528.

8 Eberle, E. (1997). Human Dignity, Privacy, and Personality in German and American Constitutional Law. *Utah Law Review*, pp.963, 975.

determination. It is, therefore, universal and uninfringeable by the state or private parties.[9]

Dignity is a core value in modern democracy. In fact, human dignity is an essential aspect of governance,[10] and is a central feature in several constitutional states. Indeed, democracy serves as an important value of state formation and gives expression to the values of human dignity and equality.[11]

Modern democratic states give prominence to the protection of human rights. The core values of human rights lie in the recognition and acknowledgment of the dignity of a person. From this perspective, dignity is the 'expression of a basic value accepted by all people'[12] , and constitutes the first cornerstone in the edifice of human rights.[13] The notion of human dignity is considered as a pivotal right deeply rooted in the notion of justice, fairness, and rights.[14] Some nations and international organizations have elevated human dignity to 'the foundational mother right encompassing and underpinning all daughter rights in its fold.[15]' Others have paired dignity with other fundamental rights, such as liberty and equality, in their jurisprudential treatment.[16]

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9 See, e.g., Figueroa Ferrer v. Commonwealth, 7 P.R. Offic. Trans. 278, 301 (1978).

10 Backer, L. (2009). Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering. *Indiana Journal of Global Legal Studies*, 16, pp.85, 101.

11 Backer, L. (2008). God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century. *Mississippi College Law Review*, 27(11), p.57.); see also Anon, (2008). *Pope Benedict XVI Address to the UN General Assembly.* [online] Available at: http://www.vatican.va/holy-father/benedic txvi/speeches/2008/april/documents/hf ben-xvi-spe_20080418_un-visit en.html [Accessed 7 Oct. 2017]. (referring to 'respect for the dignity of the person' as one of the founding principles of the United Nations).

12 Schachter, O. (1983). Human Dignity as a Normative Concept. *American Journal of International Law*, 77, pp.848, 848-850.

13 G Carozza, P. (2003).Subsidiarity as a Structural Principle of International Human Rights Law. *American Journal of International Law,* 97(38), p.46.

14 E Carmi, G. (2007). Dignity-The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification. *University of Pennsylvania Journal of Constitutional Law*, 9, pp.957, 966.

15 See, Supra Note 3 and Eberle, E. (1997). Human Dignity, Privacy, and Personality in German and American Constitutional Law. *Utah Law Review*, pp.968-972; see generally Kretzmer, D. and Klein, E. (2002). *The Concept of Human Dignity in Human Rights Discourse.* 1st ed. Springer.

16 See Englard, I. (2000). Human dignity : from antiquity to modern Israel's constitutional framework. *Cardozo Law Review*, 21, pp.1903, 1925.

Human Dignity Is The Foundation Of Human Rights

The term dignity was not used explicitly in the language of law or in jurisprudence before the twentieth century. *Immanuel Kant* discussed human dignity within the doctrine of ethics. Kant[17] does not speak about dignity of man but instead he speaks about dignity of rational beings. Thus, he extends the framework of dignity beyond humans to all other possible rational beings. Chhatrapati Singh observes that dignity is a supreme virtue and value of the idea of law.[18]

The term, dignity, was first mentioned in the Constitution of the Weimar Republic in 1919 and was followed by the Portuguese Constitution in 1933 and then in the Irish Constitution in 1937. The implied value of human dignity was found in the American Bill of Rights and the Canadian Charter of Human Rights. The Constitution of Spain provides human dignity as an inviolable and inherent right for free development of personality. German constitutional law recognizes the right to human dignity as an absolute right. However, it was the inclusion of human dignity in international legal documents that lead to the rise of its acceptance in legal philosophy and human rights jurisprudence.

The Universal Declaration of Human Rights (UDHR), 1948 was the first document to refer to dignity as the foundation of human rights.[19] The reference to human dignity makes the UDHR distinct from other Declarations. After the inclusion of the term in Article I of UDHR, the concept of dignity assumed a central place in human rights jurisprudence[20] .

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17 Kant, I. (2008). Kant: *Groundwork of the Metaphysics of Morals.* A & D Publishing.

18 Singh, C. (1985). *Law from Anarchy to Utopia.* OUP India.

19 Dicke, K. (2002). The Founding Function of Human Dignity in Universal Declaration of Human Rights. In: D. Kretzmer and E. Klein, ed., *The Concept of Human Dignity in Human Rights Discourse*, 1st ed. Springer.

20 Preamble of the UN Universal Declaration of Human Rights 1948: 'The 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'; Article 1 of the German constitution 1949- Human dignity is inviolable; The Preamble of The Constitution of India 26th November, 1949: We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: justice ... liberty... equality ... to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation; International Covenant on Civil and Political Rights, 1966- Recognizing that these rights derive from the inherent dignity of the human person; South African Constitution, 1996. Founding Provisions, Chapter 1- The Republic of South Africa is one, sovereign, democratic state founded on the following values: a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; Switzerland Constitution, 1999, Chapter 1, Article 7- Human dignity is to be respected and protected; European Constitution, Article 1-2 and Article 11-61 - The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Human dignity is inviolable. It must be respected and protected.

The expression and concept of human dignity seemed to have succeeded in achieving consensus among diverse negotiators during the drafting of Universal Declaration of Human Rights. When the South African President, *Jan Christian Smuts* (1870-1950), suggested in the opening lines for the Universal Declaration of Human Rights in 1945, he made reference to 'fundamental human rights' and 'the sanctity and ultimate value of human personality'. Yet, the drafters changed sanctity to dignity, to achieve the broad consensus[21] . This demonstrates the early universal appeal and recognition of human dignity as the core foundation of human rights.

After the acknowledgment of human dignity in UDHR in 1948, the International Covenant on Civil and Political Rights, 1966explicitly recognized that human rights derive from the inherent dignity of the human person. The 'inherent dignity' of human beings and their 'inalienable rights' seem to be a self-evident truth, which requires no further justification.

The explicit recognition and reference to Child's sense of dignity and worth finds a very prominent place in the Indian Juvenile Justice Act, 2015, as a fundamental principle of juvenile justice. It also underscores the child's right to dignity not to be humiliated, labelled and stigmatized in the entire process of dealing with the child.[22] *Ved Kumari*[23] argues that this principle of dignity in the Juvenile Justice Act 'should be understood specially to direct the state officials not to discriminate any person with whom they interact and all must be treated equally and with dignity'.

Dignity, no doubt serves as the foundation of human rights. This broad interpretation of human dignity at par with human rights becomes more acceptable. Many human rights scholars observed that, 'if human dignity ... is not one of the fundamental values ... of the theory of human rights it is likely to disappear, never to be seen again'[24]. It seems that the concept of dignity precedes and justifies human rights.[25] One may then reasonably ask

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21 Ibid.

22 See Section 3 of Juvenile Justice Act, 2015 and Article 40 (1) of UN Convention on Rights Of the Child, 1990.

23 Kumari, V. (2017) *The Juvenile Justice (Care and Protection) Act, 2015: Critical Analysis*. Delhi: Universal's Law Publishing.

24 W Nickel, J. (1987). *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*. Berkeley/ Los Angeles/ London: University of California Press.

25 See Griffin J (2008) On human rights. Oxford University Press, pp 31.

why a concept that has been described as useless[26] , arbitrary,[27] elusive,[28] groundless,[29] a fog-inducing drug and without reference point[30] can be given such extraordinary significance? The Supreme Court of Canada[31] , in fact, decided in 2008,not to apply the concept of human dignity in anti-discrimination cases, as it was it was 'confusing and difficult to apply'. Of course, not all commentators have such a pessimistic view of the concept. Others believe that it is extremely powerful[32] , revolutionary[33] and represents the human ability to choose good over evil. The extraordinary position of the right to human dignity in human rights language is memorably pointed out by *Aharon Barakas,* 'the humanity of the human being'.

The European Court of Human Rights, in its interpretation of Article3of the European Commission of Human Rights (ECHR) on prohibition of torture, relied extensively on the concept of human dignity. The first reference to Human Dignity appeared in the *East African Case* where racial discrimination was interpreted as infringement of human dignity.[34]

The first reference by the European Court of Human Rights on Human Dignity was *Tyrer v UK*, in which corporal punishment, administered as a part of the judicial sentence, was held contrary to a person's dignity and physical integrity.[35] Since then, it has drawn on in the context of the right to a fair hearing,[36] the right not to be punished in the absence of a legal

26 Ruth, M. (2003). Dignity is a useless concept. BMJ, 327, p.1419.

27 Van Steendam G, Dinnyes A, Mallet J, Roosendaal HE (2006) The Budapest meeting 2005 intensified networking on ethics of science: the case of reproductive cloning, germline gene therapy and human dignity. SciEng Ethics 12(4):731—793.

28 Ullrich D (2003) Concurring visions: human dignity in the Canadian Charter of Right and Freedoms and the Basic Law of the Federal Republic of Germany, in: Global Jurist Frontiers, 3(1).

29 Rachels J (1990) Created from animals, Oxford University Press, Oxford.

30 Statman D (2000) Dignity, humiliation and self-respect. Philos Psychol 13(4):523-540.

31 R. v. Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

32 Beyleveld D, Brownsword R (2001) Human dignity in bioethics and biolaw. Oxford University Press, Oxford.

33 Wood A (2007) Human dignity, right and the realm of ends. Keynote Address to the Conference on Dignity and Law, Cape Town University Law School, July, 2007, <http://www.stanford.edu/~allenw/webpapets/ keynote2007.doc>.

34 East African Asians v.United Kingdom, (1981) 3EHRR 76.

35 Tyrer v United Kingdom,2EHRR 1.

36 Bock v Germany,(1990) 12EHRR 247.

prohibition,[37] the prohibition of torture,[38] and the right to private life. The Court now regards human dignity as underpinning all the rights protected by Convention.[39]

Dignity is more or less assumed the position of constitutional right, particularly in case of prohibition of torture but still needs more coherent articulation in theory and framework to become as a constitutional value. The primary objective of law is to minimize suffering and maximize dignity. This is arguably the case with the concept of dignity.[40]

Three concepts of Human Dignity

Dignity at conceptual level poses several fundamental questions. If the right to live with dignity is a right, where does it originate? Is it a legal philosophy or a moral philosophy? Is it an intrinsic value inherent in human beings? Or is it an extrinsic value dependent on certain conditions? If dignity is a form of respect, what type of respect do we demand from the state and others? If dignity is only a condition of wellbeing, what is the role of the state in ensuring dignity of life and livelihood to its citizens? The concept of human dignity transcends cultural differences and finds place in all major religions of the world.

In this part, I would like to discuss three different conceptions of dignity interpreted by the Unites States Courts while adjudicating individual rights. It will be interesting to look at how the courts have used three different conceptions of dignity, such as, intrinsic or inherent dignity, positive or substantive dignity and recognition and respect.

Intrinsic or Inherent Dignity: The first concept of dignity denotes that it is intrinsic or inherent. This is the most accepted notion of dignity, which focuses on the inherent worth of each individual. This intrinsic or inherent dignity owes its origin to Natural Law and Natural Rights theory. Such dignity exists merely by virtue of a person's humanity and does not depend on any external features such as social status, caste, class, gender, education, rural, urban etc. This intrinsic dignity is a presumption of equality of each personwho is born with the same quantum of dignity.

37 SWvUK;CRv UK,(1995) 21EHRR 363.

38 Goodwin v United Kingdom, (2002) 35EHRR 447.

39 Pretty v United Kingdom, (1997)24EHRR423.

40 Doris Schroeder, Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins, Ethical Theory and Moral Practice, Vol. 15, No. 3 (June 2012), pp. 323-335, Springer.

The concept of inherent human dignity is pluralistic and has no external measure or standard to count the dignity or a respect of a person. It focuses on human potential-not the exercise of such potential. In constitutional law, particularly in the United States, the idea of intrinsic dignity is reflected in decisions about freedom from interference by the state in areas such as freedom of speech, privacy, and sexual relationships. This dignity encompasses the liberal notion of negative freedom, of creating a space for individual choice.[41]

The Indian Supreme Court recognized dignity as an intrinsic and inherent right available to citizens in the criminal justice system. The Post-Emergency Indian Supreme Court provided several safeguards to guarantee the core rights of life, liberty, dignity and equality through the process of 'constitutionlisation' of Criminal procedure. The right against self incrimination[42] and right against torture[43] intended to preserve the dignity, privacy, integrity and personal autonomy of every citizen. In *D.K. Basu case*[44] , the Court observed that custodial torture is a naked violation of human dignity that destroys the self-esteem of the victim and does not even spare his personality. It also observed that torture is a calculated assault on human dignity. In the Extra-Judicial Executions & Victims Families case[45], the Supreme Court of India, further extended human dignity, not only to apply to living persons, but also to the dead. The Court observed that, 'It is not as if the dignity of only living persons needs to be respected but even the dignity of the dead must be given due respect'.

Positive or Substantive Dignity: The second concept of dignity relies on the social condition of wellbeing. It can express and serve as the grounds for enforcing various substantive values. The Positive or substantive conception of dignity is also associated with social-welfare rights or protection by the state from poverty and violence. In this understanding, 'dignity' demands that the government provide the basic conditions of wellbeing. It embodies what constitutes the good and decent life for people.

The concept of substantive dignity was relied on extensively by the Indian Supreme Court in several of its judgment, starting with *Francis Coralie*

41 Ibid.

42 *Nandini Satapthy v P.L. Dani* (1978) 2 SCC 424 and also see *Selvi v State of Karnataka,* (2010) 7 SCC 263.

43 *D.K.Basu v State of West Bengal*, AIR 1997 SC 610.

44 Ibid.

45 In Extra judicial execution and victims families case (2016) 14 SCC 578.

Mullin[46], as inclusive of the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as shelter over ones head, adequate nutrition, clothing and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings.[47] The *Olga Tellis case*[48] made a pioneering contribution to social and economic rights jurisprudence in India, by importing the concept of substantive dignity and making the right to shelter a fundamental right, by reading it with the right to livelihood and elevating it to the level of positive duty of the state.

Dignity is Recognition and Respect: The third form of dignity concerns respect and recognition. This dignity is rooted in the recognition of personal identity and respect afforded by society and the broader community, and allowing the person to lead his or her own life. What matters is not just having a free space of non-interference for one's inherent individual dignity or of living life with a particular dignity, but rather the attitude possessed by others and the state. Such dignity requires interpersonal respect, fraternity, brother and sisterhood, tolerance, the respect of one's fellow citizens; as in the cases of laws against defamation and hate speech.

The idea is that individuals need protection from insults and hateful speech in order to preserve their self-image as well as their standing in the community. Furthermore, this dignity requires the state to adopt policies that express the equal worth of all individuals and their life choices, such as requiring gay marriage, not just legally equivalent civil unions, because of the expressive and symbolic importance of marriage.[49]

Dignity as recognition reflects a new political demand, not for freedom or liberty or a minimum standard of living, but rather for respect, sometimes referred to as third-generation 'solidarity rights'. Such rights are protected by modem human rights documents and in some national constitutions.

These three concepts of dignity reflect different ways of thinking about dignity as a legal right. The scope and extent of dignity depends on the

46 *Francis Coralie Mullin v Union Territory of Delhi* AIR 1981 SC 746.

47 Singh, J. (2006). *Fifty years of the Supreme Court of India: Its Grasp and Reach.* Indian Law Institute, Oxford University Press.

48 AIR 1996 SC 180.

49 This is a different rationale than the positive conception of dignity linked with providing minimum standards of social welfare. In those cases, courts have considered that there exists some external standard of dignity that cannot be met in the absence of certain goods, such as adequate housing.

context. Each type of dignity is associated with a legal interest that requires creative interpretation by the courts in plurality contexts. This holds true even for the Right to Life and Personal Liberty guaranteed as in the Indian Constitution under Article 21, which is an inclusive 'right to live with dignity. The repeated references to 'dignity' and 'life beyond animal existence' is, in principle, acknowledgment of the trinity of rights; life, liberty and dignity. Even if it is tokenism, it is worthy in the context of that time and period.

Leslie Meltzer Henry[50] argues that the judiciary has to play a pro-active role to give weight to the substantive interests of dignity in specific contexts. 'For instance, *equality as dignity* to justify its antidiscrimination jurisprudence; *liberty as dignity* to protect individuals' personal choices with regard to abortion and same-sex marriages; *personal integrity as dignity* to safeguard people's reputations and bodies from disgraceful intrusions; and *collective virtue as dignity* to advance notions of a decent society in contexts as diverse as the death penalty and partial-birth abortion.' The idea of dignity is a meta-ethical one and maps the difficult terrain of what it may mean to say being human and remaining human; or put in another way as the relationship between self, others, and society. *Upendra Baxi*[51] , describes dignity in terms of personhood (moral agency) and autonomy (freedom of choice). Dignity here is to be treated as 'empowerment' which makes a triple demand in the name of respect for human dignity, namely: respect for one's capacity as an agent to make one's own free choices; respect for the choices so made; and respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice. Understanding these different concepts will help all of us who are interested and concerned in the lofty appeal of dignity. I am sure that some of these discussions will enhance our knowledge and scholarship to develop Dignity Jurisprudence.

Dignity Jurisprudence in the Post-Maneka Era

The *Maneka Gandhi case*[52] marked a watershed in the history of human rights and dignity in India. The Supreme Court of India in this case has taken an expansive rights based approach, based on the premise that any law that is 'fanciful, oppressive or arbitrary' is no law. The court, by way of creative

50 Meltzer Henry, L. (2011). The Jurisprudence of Dignity. *University of Pennsylvania Law Review*, p.160.

51 Justice H.R. Khanna Memorial Lecture Delivered on 25th February, 2010 on *Protection of Dignity of Individual under the Constitution of India.*

52 *Maneka Gandhi v Union of India*, 1978 AIR 597.

interpretation, conferred a fundamental right on every person not to be deprived of life or liberty except in accordance with the procedure prescribed by law and that the procedure should be 'reasonable, fair and just'. [53]

Article 21 of the Indian Constitution provides that citizens have a right to life, that is, to live with dignity, freedom and safety. This right emerges from Article 21 of the Constitution of India[54] . 'The notion of personal identity is an important principle underlying the interpretation of various guaranteed rights and the very essence of the Constitution being respect for human dignity and human freedom'[55] .

'The Right to Life and Personal Liberty has its traces in the dignity of human being. It has been recognized as part of Article 21 of the Constitution'[56]. The Supreme Court of India, in many cases, has reiterated that the right to life under Article 21 includes a right to live with dignity, while determining the scope of the same.

Justice V.R. Krishna Iyer, in 1980 in the *Prem Shankar Shukla case*, observed that the guarantee of human dignity forms part of our constitutional culture and can be found in Articles 14, 19 and 21 of the Indian Constitution. [57] The significance of this decision is that the concept of human dignity was upheld in India with respect to the infliction of indignity on detainees, such as by handcuffing and fixing bar fetters on the accused, as inhuman and degrading treatment even before the Convention against Torture articulated in 1985. The violation of human dignity may result in acts causing humiliation and indignity. The Supreme Court of India in *Dr. Mehmood Nayyar Azam v State of Chattisgarh*[58] held that 'any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity'.

Some recent reiterations of intrinsic human dignity can be found in *Shabnam, Animal Welfare Board, NALSA* and other cases.

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53 Singh, J. (2006). *Fifty years of the Supreme Court of India: Its Grasp and Reach*. Indian Law Institute, Oxford University Press.

54 *Avishek Goenka vs. Union of India (UOI) and Anr.* (2012)5SCC321.

55 Van Kuck v Germany as quoted in *National Legal Services Authority v Union of India* (UOI) and Ors.,(2014)5SCC438.

56 *Shabnamv Union of India and Ors.*,(2015)6SCC702.

57 *Prem Shankar Shuklav Delhi Administration* AIR 1980 SC 535.

58 AIR 2012 SC 2573.

The judicial approach that can be deducted from some of the cases is discussed hereinafter. 'Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word 'life' has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, life means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity'[59] .

The Supreme Court of India underscored human dignity as the most basic aspect of self-determination to choose sex and gender identity in NALSA case. The court observed, 'The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having a democratic set up. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity'[60] .

The Supreme Court of India, in the *Shabnam case,* read the principle of human dignity as integral to the right to life as it is inherent and intrinsic to human beings. It further expanded that several rights of accused persons flow and derive from the dignity of human beings. That was unique and the most innovative interpretation in recent times. In *Shabnam*, the court observed that, 'the right to human dignity has many elements. *First and foremost*, human dignity is the dignity of each human being 'as a human being'. *Another element*, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial

59 *Animal Welfare Board of India v A. Nagaraja and Ors.*(2014)7SCC547.

60 *National Legal Services Authority v Union of India and Ors,* (2014) 5 SCC 438.

as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence[61] .

The Supreme Court, in the *Naz Foundation case*, observed that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. At the root of dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity and value as a person, irrespective of the utility he or she can provide to others.

In the recent Privacy judgment, the Supreme Court stressed the importance of giving value to the dignity of a person. The Supreme Court noted two facets of dignity,[62] that is, of intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. These observations by the Supreme Court of India reflect the dynamic nature of 'dignity'.

The court noted that, 'to live is to live with dignity'. The draftsmen of the Constitution defined their vision of a society in which constitutional values would be attained by emphasizing, freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual persons by Part III of the Indian Constitution. That dignity is the core right that unites all fundamental rights, because fundamental rights seek to achieve for each individual, the dignity of existence.[63]

The court thus held that privacy, with its attendant values, assures dignity to the individual and it is only when life can be enjoyed with dignity that liberty can be of true substance. Privacy ensures the fulfilment of dignity and is a core value, which the protection of life and liberty is intended to achieve. The court also used the word 'autonomy' in dealing with the concept of human

61 *Shabnamv Union of India (UOI) and Ors.*,(2015)6SCC702.

62 *Justice K S Puttaswamy (Retd.), and Anr v Union of India and Ors*, Writ Petition (Civil) No 494 Of 2012.

63 Ibid.

dignity and privacy, that recognises the 'autonomy' of the individual and the right of every person to make essential choices that affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms, which are the cornerstone of the Constitution. The autonomy of the individual is the ability to make decisions on vital matters of concern to life.

This approach reiterates that dignity is a constitutional value and recognized as an inseparable constitutional right under Article 19 and 21. This needs further elaboration and firm commitment to enumerate that content of these rights.

Human Dignity is a Constitutional Value and a Constitutional Right

The Supreme Court of India, for the first time, in the 1981 Francis Coralie Mulin case, expanded the right to life using the human dignity principle. It invoked human dignity to develop a new framework to articulate the positive conception that the 'Right-to-Life is more than-mere-animal-existence'.[64] This has been reiterated for many decades in all subsequent cases.

Constitutional law scholar, Anup Surendranath,[65] argues that the use of 'dignity' and the 'right to life is more than mere animal existence' framework lacks coherence with regard to the content of rights. He further observes that it is 'a 'bald assertion' on a case-by-case basis, rather than any attempt to justify the recognition of a right by placing it in any normative standard.'[66] Elaborating further *Anup* points out, that no clear framework has been developed in India on the issues of custodial torture, death, rights of prisoners and sexual violence in custody except reliance on 'dignity'. He laments about the 'discretion on the part of the court as to the rights which the court will recognize and the ones which it will not'. This discretion of the Court is manifestly apparent in the selective upholding of 'dignity' in case of social and economic rights and the court missed the opportunity in terms of Civil and Political Rights particularly in developing the Anti-Torture

64 Surendranath, A. (2016). Life and Personal Liberty. In: S. Choudhry, M. Khosla and P. Bhanu Mehta, ed., *The Oxford Handbook of The Indian Constitution*, 1st ed. Oxford, United Kingdom: Oxford University Press.

65 Ibid.

66 Ibid.

jurisprudence. *Anup's* anguish is that the 'Right-to-Life is more than-mere-animal-existence framework is never translated into meaningful recognition of their rights. The court provided an inclusive list under this framework 'without developing Principles and normative frame work of dignity'.

Let me extend further *Anup's argument* and critically examine the need for development of theory of human dignity in India using three conceptions of human dignity developed by the United States Courts. We could broadly identify two forms of conception of dignity in the dignity framework of *Francis Coralie Mullin case*. They are; a *Deprivation framework of dignity*, which is based on individual autonomy to include dignity-to-protect-life-limbs-and-faculties; the other conception, the 'Right-to-Life-is-more-than-mere-animal-existence' relied on developing a social and economic rights framework to cater to peoples' needs. Although, it was a paradigm shift in dignity jurisprudence in 1981, it has not been able to develop normative principles and a coherent approach in the last two decades.

Dignity to protect life, limbs and Faculties: The Supreme court invoked dignity in personal liberty cases to adjudicate the constitutionality of practices like solitary confinement and bar fetters, handcuffing of prisoners, custodial death and torture. The use of dignity in *Sunil Batra and DK Basu* is typical of the manner in which it is invoked in personal liberty cases. The court declared the issue at hand to be an instance of violation of dignity without ever really developing principles of violations of dignity.

Dignity to include peoples' rights such as social and economic rights: The dignity based conception in the *Asiad, Olga Tellis, Bandhua Mukti Morcha and Mohini Jain cases*, can be regarded as positive expansion of the concept of dignity. Even in the cases of right to housing and shelter, the court failed to translate any meaningful recognition of these rights.

The Delhi High Court in the *Ram Lakhan case*, 137 (2007) DLT, speaking about difficult aspect of legitimacy of begging argued eloquently: 'Does a starving man have a fundamental right to inform a more fortunate soul that he is starving and request for food ? And, if he does, would it leads to deprivation of liberty by means of arrest which runs counter to Article 19 and 21?'. Indeed, begging involves the beggar displaying a miserable plight soliciting alms by words spoken or actions. Is it not a worth a case to invoke the Right to Dignity framework?

At the international level, the concept of human dignity is interpreted in a broader perspective, which has contributed to rhetorical flourish and has lead to judicial confusion.[67] In South Africa, human dignity essentially means respecting individual autonomy.[68] In Canada, human dignity is understood as 'mandating protection of people's needs'.[69] McCrudden advocates that dignity is a concept that has been universally recognised and recognising the 'worth of all persons' and is seen as a 'place holder' for furthering human rights.[70] At least with regard to human dignity, Indian courts have established the practice of interpreting Article 21 to include right to dignity. However, lack of coherent understanding of this concept with regard to the content of Article 21 needs to be addressed.

Conclusion

Dignity jurisprudence is slowly moving forward in constitutional law discourse and this shift in the paradigm could be seen in India and abroad. The courts are the guardians of human rights and the *'little Indians'* the *'daridranarayanas'* look upon the court as their protector.

As rightly observed by the Supreme Court of India in the *Ramdeo Chauhan case*, 'human rights are not like edicts inscribed on a rock. They are made and unmade on the crucible of experience and through an irreversible process of human struggle for freedom'. Similarly, human dignity is the foundation of human rights and the courts in India have to make and unmake it as the humanity of human beings.

The Judiciary and the courts in India have an obligation to forge new tools and weapons to provide content to the vague concept of human dignity. Let a thousand flowers of constitutional values bloom to make human dignity a constitutional value and right.

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67 O' Mahony, C. (2012). There is No Such Thing as a Right to Dignity. *International Journal of Constitutional Law*, pp.551-552.

68 O' Connell, R. (2008). The Role of Dignity in Equality Law: Lessons from Canada and South Africa. *International Journal of Constitutional Law*, 6, pp.267, 285.

69 Ibid.

70 McCrudden, C. (2008). Human Dignity and Judicial Interpretation of Human Rights. *European Journal of International Law*, 19, p.655.

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A Child's Right to a Family: Deinstitutionalization – In the Best Interest of the Child

*Asha Bajpai**

Abstract

Family is the core unit of society and a major source of the development of children. Every child has the right to a family. There are millions of children living in institutions worldwide. The best of institutions cannot substitute the care in a family of the child. In India there is a disturbing trend of young children, although having both parents, frequently being placed in institutional care for supposed education and a better life. There is proven recognition, worldwide, that institutional care is associated with negative consequences for children's development. Yet thousands of children are in institutions rather than with their families, because they cannot access alternative care systems. Using national and international law, court observations, and field experiences, this paper argues a case for deinstitutionalization of such children, by empowering the families, thereby protecting their right to a family and preventing abuse and exploitation.

Introduction

A child's best chance for a fulfilled and happy life begins in a family environment. In an ideal world, children would grow up in a loving family; if not with their mother or father, perhaps with a grandmother or an uncle. Family life is not always a guarantee of a good life, but the alternatives to family are often grim. In the real world, global issues such as death, poverty, HIV/AIDS, migration, and even war and displacement are real problems that prevent children from being raised by their own families. For many of the millions of children who lose their families because of parental death, poverty, or other causes, the alternative to family is institutionalization. There are millions of children living in institutions worldwide. One estimate puts the total at up to eight million[1] ; though, given gaps in global statistics and

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1 The number of residential institutions and the number of children living in them is unknown. Estimates range from 'more than 2 million' (UNICEF, Progress for Children: A Report Card on Child Protection

indications that there are many unregistered children's homes; the true figure may well be much higher. It is also likely to rise with the increasing impact of conflict, climate change and the HIV and AIDS that affect the poorest and most vulnerable families.

India has 430 million children (0-18), the largest population of children in the world.[2] There is a need to ensure that these children grow up healthy, both in terms of physical health and mental health, and have sufficient opportunities to contribute to the growth of the country. Amongst the information provided by the Government of India in its third and fourth combined report on implementation of the Convention on Rights of the Child relating to children's care[3] , the following estimates relating to children in institutions are significant:

- It is estimated that a large number children are destitute and orphans or without parental support in the country. Many of them have been placed in institutional care under the juvenile justice system. These include children in conflict with law, children of prisoners, and children in need of care and protection. Information on the number of children, who are not orphaned but placed in institutional care, is not available.
- The Programme for Juvenile Justice provides for the establishment and maintenance of institutions for the rehabilitation of juveniles in conflict with law and children in need of care and protection.[4] At present, there are 794 homes established under the JJ Act, 2000, catering to 46,957 children. This Programme has been merged with the Integrated Child Protection Scheme (ICPS).[5]

Number 8, 2009) to 8 million (Cited in: Pinheiro, P., World Report on Violence against Children, UNICEF, New York, 2006). These figures are often reported as underestimates, due to lack of data from many countries and the large proportion of unregistered institutions

2 Census of India 2011, Government of India

3 India's third and fourth combined report on the implementation of the Convention on the Rights of the Child. CRC/C/IND/3-4. 22 July 2013 submitted to the Committee on the Rights of the Child. See full report at: http://www2.ohchr.org/english/bodies/crc/crcs66.htm

4 Objective of the Juvenile Justice Act, 2015: The Act creates a robust legal framework for the protection of the rights of all children whether alleged or found to be in conflict with law or children in need of care and protection, by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child- friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established therein which will adopt child friendly processes.

5 The Integrated Child Protection Scheme (ICPS) is a centrally sponsored scheme of the Ministry of Women and Child Development Government of India, aimed at building a protective environment

- Based on the various estimates, there are between 6 and 30 million children with disabilities (CWDs) in India, who have special needs.[6]

Orphans and children living outside of family care are an extremely vulnerable population, often exposed to poverty, stigma, physical and sexual violence and a lack of educational resources. The best of institutions cannot substitute the care of the family of the child. My research studies, surveys and visits to institutions in Maharashtra[7] over a period of time, have shown that only a minority of children in institutions are orphans, with many of them having being displaced and separated from a living parent or relative whose whereabouts may be unknown, some of them abandoned due to disability or illness. In practice, there is now an increasing use of residential care for children who are being sent by their parents for education, food and clothing. [8] It has been observed that in the institutions, reasons that some parents place their children in institutions include the following:

1. Children having both parents being placed for education. These parents think that institutions are hostels for schooling and education and disciplining a child.

2. Poverty

3. Children of migrant parents

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for children in difficult circumstances, as well as other vulnerable children, through Government-Civil Society Partnership. For details see: http://icds-wcd.nic.in/icpsmon/

6 See supra note 4

7 My unpublished studies for UNICEF and Mumbai High Court on implementation of Juvenile Justice Act in Maharashtra , reports on the of children's homes in Maharashtra for the Mumbai High Court, and a status report on Mentally Deficient Children's Homes in Maharashtra . In the recent study on the status of MDC homes in Maharashtra(PIL 182/2010, Mumbai High Court) , one of the finding is: 43% of Homes in the state cater to children who live with their parents but whose families use the MDC Home as a hostel facility.

- 39% children in the MDC Homes have one or both parents alive.
- Social workers hired by the Home scout the neighbourhood for children who are mentally disabled. They encourage parents to send their children to the Home, instead of enabling them to care for their children within the community.
- The Juvenile Justice (Care and Protection) Act 2000 (amended 2006) recommends institutionalisation of a child only in the event that other non-institutional rehabilitation options are rendered unavailable for any reason. Therefore children who have one or both parents are to be supported and enabled within the community. Instead in Maharashtra, children who have one or both parents alive are left in MDC Homes. As a result the Homes are treated as hostels, where parents can leave their children for extended periods of time. This contradicts the very spirit of institutional care as articulated in the Act.

8 Official data required for the numbers of such children who are using institutions as hostels

It is a disturbing trend that young children with both parents are frequently placed in institutional care for the purpose of education. They are generally admitted on an application by their parents in the month of June, before the new academic year commences. Like other children living with families, they go home during vacations and holidays, festivals and after exams are over and return again to be admitted for the next academic year. When the children's institutions are visited during vacations, these children are there on the roll but absent from the institutions as they are back home celebrating *Ganpati and Divali.* The meagre resources of the State and institutions are thus being used incorrectly. The reason generally given by parents is that they are too poor to educate their children and hence choose to place the children in institutions. These parents are now generally considered unfit parents under Section 2 (14) (v)[9] of the JJ Act and their children placed in institutions by the Child Welfare Committees (CWCs).[10]

This is the situation throughout the country. Indian orphanages and childcare institutions all over the country are thus crowded with a mix of orphans, abandoned children and a complicated category of children from families who have placed them in institutions to obtain education and a better life, but have not technically forfeited all parental rights. Many of these children come under the category of children in need of care and protection as defined under Section 2(14) of The JJ Act 2015[11] . The State has the legal

9 Juvenile Justice Act 2015, Section 2(14(v) states that : who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child

10 Juvenile Justice (Care and Protection of Children) Act 2015, Section 27(1). Child Welfare Committee. The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

11 Juvenile Justice (Care & Protection of Children) Act 2015, Section 2(14) "'child in need of care and protection'" means a child— (i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or (ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or (iii) who resides with a person (whether a guardian of the child or not) and such person— (a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or (b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or (c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or (iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or (v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or

and moral responsibility to protect Children in Need of Care and Protection (CNCP). The concern is that the only option the State currently has, is to place children in institutions under the Juvenile Justice (Care & Protections of Children) Act 2015. This appears to be an easy way out but not in the best interest of the children.

Institutions today have low staff to child ratios and interaction, poor salaries, low levels of staff experience and autonomy and no motivation nor monitoring, lack sensitivity towards children, strict routines, and poor provision of books and play equipment. As for the children, they lack personal possessions and individuality, and the everyday experiences of living in families. Institutions are often unsafe for children. They can leave them vulnerable to neglect, violence and abuse, which often goes undetected and unreported. The UN Study on Violence against Children (2006)[12] identified care institutions as one of the five settings where violence against children occurs. It mentions that children in institutions 'are at risk of violence from staff and officials responsible for their well-being'. Inappropriate institutionalization can compound the effects of abuse and neglect, and contribute to the suffering of children and the harm done to them.[13]

There is thus worldwide proven recognition that institutional care is associated with negative consequences for children's development. Many institutions do not have structured curriculums or formal schooling. Young children in institutional care are more likely to suffer from poor health, physical underdevelopment and deterioration in brain growth, developmental delay and emotional attachment disorders. Consequently, these children have reduced intellectual, social and behavioural abilities compared with those growing up in a family home. A long history of institutionalization also produces problems for young adults when they leave institutional care and

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the Board, to care for and protect the safety and well-being of the child; or (vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or (vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or (viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or (ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or (x) who is being or is likely to be abused for unconscionable gains; or (xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or (xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage;

12 http://srsg.violenceagainstchildren.org/un_study accessed on Sept 2, 2017

13 ibid

try to reintegrate into society, leading to much higher rates of homelessness, aggression, difficulties finding employment, criminal activity, and depression resulting in high rates of suicide. The aftercare system in the country is in the doldrums. So a child in need of care and protection may turn into a child in conflict with law.

Institutions cut children off from their families and take away that critical role in promoting children's long term care and wellbeing. **Most such children in institutions would not be there if their parents had adequate support.** Several studies have shown that institutional care is more expensive than providing support to vulnerable families. Many institutions are happy to have more children on the roll as their grants are proportionate directly on the number of children. Some institutions actively recruit children because they are paid based on the number of children in their facilities.

The best place for these children is their homes, with their families and not in Institutions. The Right of Children to Free and Compulsory Education Act (known as the Right to Education Act or RTE), 2009, makes education a fundamental right of every child between the ages of 6 and 14 and specifies minimum norms in elementary schools. It also requires all private schools to reserve 25% of seats for children that cannot afford fees (to be reimbursed by the state as part of the public-private partnership plan). Schooling being free up to 14 years of age, many of these children could be in school and remain with their families. Certainly, broader structural interventions are needed, which will address the underlying causes of these children's problems and counteract their marginalization, bringing them within the reach of needed services and schemes of the State and Central government and enabling them to access their constitutional rights and entitlements. Their special circumstances need to be addressed by Government through special laws, schemes and programs. There are Government Schemes for foster care, sponsorship, poverty alleviation programs and schemes for children of migrant parents, employment guarantee and schemes for skill development etc. The Government must further review these schemes to suit such children and their families and make them easily accessible and create awareness.

Current National and International laws and principles relating to Institutionalization of Children

The current laws and principles relating to institutionalization of children are laid down in:

a. The Constitution of India

b. Objectives of Juvenile Justice Act 2015(JJ Act) and the general principles laid down Chapter II of the JJ Act 2015 for implementing the Act in its true spirit.

c. The Convention on the Rights of the Child and other international law ratified by India.

d. Some Observations of the Courts in India.

a. The Constitution of India.

The Directive Principles of State Policy guarantee that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment[14]. Elementary education is considered a basic fundamental developmental right of every child and which human resources the Department of Education, skill development, social justice and human resources and development must fulfil. It is clear that if those families that are deemed incapable or unfit are supported and strengthened by the Government to be capable, the health, development and education of the child can be achieved in the family, with freedom and dignity.

b. The Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act).

The objective of the JJ Act 2015 in its preamble[15] and in its statement of objects and reasons acknowledges the significance of international instruments and includes the provision of basic needs and social integration of children as its main objective.[16] Chapter II of the JJ Act 2015 lays down the General principles for implementing the Act in its

14 Constitution of India, Article 39(f)

15 The preamble is the preliminary part of the Act usually setting out what it is all about or why it has been prepared, specially used of an Act of Parliament where Parliament expresses the general purposes of the piece of legislation. It can be referred to for the purposes of statutory interpretation

16 An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto

true spirit.[17] The general principles laid down in the JJ Act uphold the right of all children to grow up in a family with institutionalization being a measure of last resort. The variety of non-institutional options in the Act include: sponsorship and foster care including group foster care for placing children in a family environment which is other than child's biological family, which is to be selected, qualified, approved and supervised for providing care to children. Thus under the Act itself, keeping the child in the family is the first option and sending children to institutions or keeping children in institutions must be the last resort only after exploring options of family and other non-institutional alternatives.

The following principles under the Act further lay down the rights of the child and reiterate that family is the best option for the child unless there is exploitation and abuse in the family. It also lays down that parents cannot force their children to the institutions and their rights need to be taken into consideration.

- Principle of family responsibility[18]: means that (a) the primary responsibility of bringing up children, providing care, support and protection shall be with the biological parents. However, in exceptional situations, this responsibility may be bestowed on willing adoptive or foster parents. (b) All decision making for the child should involve the family of origin unless it is not in the best interest of the child to do so. (c) The family - biological, adoptive or foster (in that order). **This principle clearly implies that family must be given the first preference for placing the child.**
- Principle of participation[19] : Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child. **This implies that in a decision relating to institutionalization, the views of the child must be taken, if he is capable of forming it.**
- Principle of best interest[20] : All decisions regarding the child shall be

17 Juvenile Justice (Care & Protection of Children) Act 2015, Chapter II Section 3. General principles to be followed in administration of the Act.

18 JJ Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle v

19 Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle iii

20 JJ Act 2015, Chapter II Sec 3, General Principles of Care and Protection of Children, Principle iv

based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.[21]

ICPS also envisages 'institutionalization' as a measure of last resort to take care of vulnerable children and re-integrate them in society. Yet, thousands of children are in institutions and not with their families or they cannot access alternative care systems. Under Section 39 of the JJ Act 2015[22] preference for rehabilitation and reintegration is given to family based alternatives. Section 40 of JJ Act 2015[23] implies that restoration and protection is only for children in need of care and protection. The first priority is the biological parents. The CWC has to determine the suitability of the parents, adoptive parents or foster parent, guardian or fit person or guardian or fit person to take care of the child, and give them suitable directions.

CRC and International Law

Globally, the move is towards deinstitutionalization of children and providing alternative quality care. The UN Guidelines for the Alternative Care of Children clearly speak in favour of such evolution: 'where large residential care facilities (institutions) remain, alternatives should be developed in the

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21 Definition of best interest in Sec 1 (9) of JJ Act 2015 — best interest of child means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development;

22 Sec 39(1): Process of rehabilitation and social reintegration. The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care: Provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care, together, unless it is in their best interest not to be kept together

23 JJ Act 2015 Section 40 Restoration of child in need of care and protection. . (1) The restoration and protection of a child shall be the prime objective of any Children's Home, Specialized Adoption Agency or open shelter.

(2) The Children's Home, Specialized Adoption Agency or an open shelter, as the case may be, shall take such steps as are considered necessary for the restoration and protection of a child deprived of his family environment temporarily or permanently where such child is under their care and protection.

(3) The Committee shall have the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.

Explanation.—For the purposes of this section, —restoration and protection of a child means restoration to—

(a) parents;
(b) adoptive parents;
(c) foster parents;
(d) guardian; or
(e) fit person

context of an overall de-institutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination.' Further, the concept of 'last resort measure' is detailed in the Guidelines for the Alternative Care of Children,[24] which mention that State parties must focus on all possible alternative care options PRIOR to the decision of institutionalizing the child.

Article 9 and other articles of the UN Convention on the Rights of the Child state that children have a right to family relations and to be with their parents unless this is proven not to be in their best interests.[25] According to Article 3 of CRC 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The Convention directs the State Parties to ensure that 'both parents have common responsibilities for the upbringing and development of the child.' The CRC provides that a child should be separated from his or her parents if there is 'abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence.' Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society. The best interest principle is a tool to aid any statutory construction or decision relating to children including institutionalization.

The Committee on the Rights of the Child has provided additional guidance regarding the best interest standard in its General Comment 14.[26] The Committee stated that it is 'useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests.' The Committee suggested that the following considerations can be relevant: the child's views; the child's identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation

24 Resolution adopted by the UN General Assembly on the report of the Third Committee (A/64/434)]64/142.Guidelines for the Alternative Care of Children. Available at: http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

25 The UNCRC was ratified by India in 1992. Nations that ratify this convention are bound to it by international law. Compliance is monitored by the UN Committee on the Rights of the Child, which is composed of members from countries around the world

26 Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, Para. 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013).

of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability (disability, minority status, homelessness, victim of abuse, etc.); and the child's right to health and right to education.

General Comment No. 14 further states that: 'attention must be placed on identifying possible solutions which are in the child's best interests' (Para 33). 'If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best' (Para 39).

The above standards 'come from internationally respected organs and bodies of the UN and the Council of Europe, agreed on by a community of meaningful and significant state representatives and that these regulations are an expression of the behaviour which the respective Member States expect from each other' [White paper of the European Council for Juvenile Justice, created by the International Juvenile Justice Observatory (IJJO) in 2009.[27]

Judicial Observations:

Through judicial activism "the Indian judiciary has played a proactive role in implementing India's international obligations under International treaties, in the field of human rights relating to vulnerable groups like women and children. The courts, while applying the rules of international customary law, have crafted them in Indian domestic law.[28] In Jose Maveli v State of Kerala and Ors[29] the facts were that five minor children were produced before the

27 I. Pruin, The evaluation of the implementation of international standards in European juvenile justice systems in SAVE MONEY, PROTECT SOCIETY AND REALISE YOUTH POTENTIAL: IMPROVING YOUTH JUSTICE SYSTEMS DURING A TIME OF ECONOMIC CRISIS 27 (Marianne Moore Ed, July 2013) http://www.oijj.org/sites/default/files/white_paper_publication.pdf (last Visited may 25, 2016)).

28 The combined reading of Articles 51(c), 73, 253 read with entries 10 to 21 of Seventh Schedule and 372 and judicial interpretation reveal that, unless and until Parliament enacts a law implementing international treaty (treaties involving conferring or curtailing private rights, cession of territory), such treaty provisions cannot be enforced per se in India. Further if such treaty provisions are consistent with Indian law or there is void in the domestic legal system then they can be read into, to do justice, and if there is conflict between the two then domestic law prevail over international law

29 MANU/KE/0830/2007 (Crl. R.P. No. 4423 of 2006) (high Court of Kerala)

Chief Judicial Magistrate by an institution that saves street children who are found begging or engaged in child labour. On production, the children were entrusted to the institution until further orders, pending an enquiry. After about six months, a person claiming to be the father of three of the children filed a petition before the Chief Judicial Magistrate's Court for getting the three children released to his custody. On being satisfied that the Petitioner is the father of the three children, the Magistrate directed the institution to release the children to their father.

The order was challenged in the revision petition by the Director of the institution contending that the institution is entitled to retain the children in their custody in their best interest. The Court directed that minors were to be released to their parents, and the others to their home State in accordance with the provisions of the JJ Act.

Observations have been made by the Court regarding parents being 'unfit or incapacitated' in the Juvenile Justice (Care and Protection of Children) Act 2000. 'A parent who is not of an acceptable standard or not suitable to be a parent can be said to be 'unfit'. A child of such a parent is a 'child in need of care and protection' as per section 2(d) (iv). But, poverty of the parent by itself may not make a parent 'unfit' to be a parent.' It further stated that 'in a country like India, poverty is not quite uncommon. It will, therefore, be unjust and even cruel, if poor financial condition of a parent or guardian alone is made the basis for disqualifying a biological parent to be 'unfit', so as to treat his/her child as a 'child in need of care and protection''. A child may not be treated as a 'child in need of care and protection', and nipped off from the care of his or her own biological parents, only because his parent is financially poor, homeless or penniless. Even if the parents are poor and their purses are empty and they are unable to feed the children or provide for them a hut to live in, a conducive family atmosphere is ensured by most parents.

In such circumstances, it is only reasonable to think that the legislature would not have intended that a parent who does not have a house to live in and who is without any ostensible means of subsistence must be deprived of the custody of a child, for that reason alone. It does not appear to be the intention of the legislature that a child shall be denied of his right to live under the care and custody of his biological parents or their guardian, who may be willing to look after them, only because they are financially poor.

The Child Welfare Committees, which is the appropriate authority under the JJ Act, must not just pass orders sending a child to an institution. They must examine the relevant facts and decide, on the facts and circumstances of each case, as to whether the parent or family is 'unfit' or not. But, the financial unfitness of the parent alone should not be a consideration. **Financial unfitness of the parent alone may not be sufficient to deprive the child of parental care, if the parent is otherwise fit.** Secondly, every child between the age of 6 and 14 years is entitled to receive free education. When a State is providing free education to every child up to 14 years (under RTE Act)[30] and the school is available in the neighbourhood, sending the child to an institution is in violation of the child's right to a family as well as to the right to education.

Institutionalization – the last resort

Children and their circumstances are not homogeneous. Each Child faces distinctly different risks and specific vulnerabilities. Hence each child must be dealt on a case-by-case basis. The decisions of the CWC must be informed by the general principles laid down in the Constitution of India, JJ Act and CRC, and international law. These principles convey the essence of the JJ Act, which ensures that:

- The child remains within the family and institutionalization is the last resort;
- Access to Government schemes and services to be facilitated and followed up
- Every decision by the CWC is made on a case to case basis, looking at the unique circumstances of the child;
- Decisions are informed by a thorough assessment of the child and his/her situation;
- Confidentiality is ensured in all processes pertaining to the child and her/his family;

30 The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. Article 21-A and the RTE Act came into effect on 1 April 2010

- Informed consent of the child is sought in all processes including for interviewing
- The child, medical testing etc and the child's views are taken into account in the process of decision making; which are in the best interest of the future of the child.
- Protection of the child is ensured at all stages of rehabilitation and social integration.
- The child's progress and family situation is reviewed on a periodic basis
- Decision on whether a parent is unfit or fit is a temporary decision and needs to be periodically reviewed.

In addition to the other clauses already in Section 2(14) of the JJ Act, such as being forced into child labour, physical abuse, sexual abuse, etc., to be an unfit or incapacitated parent, the CWC could consider only temporary institutionalization:

a. If the child is addicted to drugs, alcohol, or any intoxicating substance, and the family does not have the resources or capacity to provide for rehabilitation and de-addiction. The child must be sent for de addiction and attempt to be rehabilitated.

b. Where the parents are mentally or physically disabled to a degree that they cannot take care of the child, or parents suffering from severe mental illness.

c. Where the child has repeatedly (more than 3 times) committed petty offences. (The JJ Board usually lets children out on a 'plead guilty' bond for petty offences such as theft. However, many of these children are repeat offenders, which indicate that their parents are unable to supervise the children. They are generally let out on bonds, and commit repeat offences. (They need intense counselling and therapies and later sent out so that as CNCP they are prevented from becoming CICL. This could be done through and NGO, within community supervision, or in an institution.

d. Where one parent has abandoned the family/passed away, and the remaining parent has to work long hours without adequate family support/supervision of the children.

e. If the child is regularly being exposed to domestic violence at home between the parents.

f. Parents themselves found to be drug users.

g. Parents who are terminally ill and are unable to take care of the child.

h. Parents accused of child abuse or rape.

i. Parents serving prison term (could be for short term or life imprisonment.

No family can be declared permanently unfit. In the above circumstances, where the family situation is dangerous or harmful for the child or where the family, because of their situation, is not in a position to take care of the child, the CWC can declare the family temporarily unfit for the care and protection of the child. The CWC will reach this decision only after a detailed inquiry process by the Probation Officer or by home visits by the committee.

To prevent inappropriate admissions and consequent institutionalization, before declaring parents as unfit the following steps must be undertaken by CWC:

- Counselling of parents
- Needs Assessment of the child
- Family , Parents and Community Assessment
- Considering the views of the child
- Identifying and Monitoring alternate placement or support or non institutional services linking with Government schemes, monitoring access and periodic review

Conclusion:

Undoubtedly, families are best placed to care for and nurture children and keep them safe. But families trapped in chronic poverty, surviving on irregular income or suffering other stresses, domestic violence, drug and alcohol abuse, face major obstacles in caring for their children. Families in these situations need support and this support can take a variety of forms including home visits by social workers or community workers; social protection including cash benefits; preschool and nursery care; eliminating

school fees and charges for health care (including hidden costs for school such as transport, school uniforms etc); parent counselling, information and education; community-based rehabilitation services for children with disabilities; child protection services to work with families and communities to address issues of abuse, neglect, violence, and substance abuse; vocational training or economic strengthening.

With so much reliance on non-institutional services, standards must be laid down. There is a need for the development of high-quality alternative care options such as kinship care (extended family), fostering and adoption. It has been suggested that a set of minimum standards and guidelines for such care be developed. Foster care families should be carefully assessed supported and monitored to prevent the child continuing to experience poor parenting, maltreatment and additional moves. Alternative care must also provide permanency planning which must explore the option of reuniting the child with his or her family after removal, or adoption if reunification efforts fail.

It is essential that there are more budget resources or reallocation of the budget to support parents and family-based care, and for recruiting family-based carers. But the State's assistance in supporting families may be challenging due to resource constraints, under spending of the State budget and delay in the delivery of services. Funds are rarely released under the heads of formal education, vocational training, counselling and drug detoxification, which form the backbone of the rehabilitation process[31] .

No public health care facility should be entitled to exclude a child in need of care and protection from treatment. Tax concessions should be offered to private clinics that provide emergency services to destitute children. Specific financing should be allocated to schools that accommodate such learners. No public school should be entitled to turn away a child on the grounds of not having a uniform.

A universal grant scheme should be in place to provide protection against absolute poverty, accessible to every child, along with additional special grants to address special needs and circumstances like disability, illness, single-parenting. Reflecting national patterns, and the strong correlation between poverty and malnourishment, regular health check-

31 Meghna Dasgupta, Rehabilitation through Education for Juveniles in Conflict with Law, Working Paper No 238 (2010).

up, immunization and supplementary nutrition for pregnant and lactating women. In that malnutrition affected areas like Melghat, additional grants should be directed. Or in case of de-addiction of the family or child, special assistance may be granted. The programmes may take the form of special assistance being rendered to non-governmental and other organizations to enable them to provide such services. Above all there must be networking of all Child Welfare committees.

Deinstitutionalization is the process of reforming childcare systems and gradually closing down orphanages and children's institutions, finding new placements for children currently resident and setting up replacement services to support vulnerable families in non-institutional ways.[32] Deinstitutionalization has occurred in the US, in Western European and some South American countries and the former Soviet Bloc.[33] India must stop making new children's institutions or homes and move towards deinstitutionalization as every major social change, the process of de-institutionalization needs periodic review and independent evaluation to answer questions, such as to what extent the goals have been achieved and are they still valid, and have the planned activities been implemented and how the process shall be further continued. The process could take time, but it needs to be sustained in order to end the institutionalization of children and regain their right to a family life.

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32 See:https://en.wikipedia.org/wiki/Deinstitutionalisation_(orphanages_and_children%27s_institutions)#cite_ref-4Retreived on Sept 30, 2017.

33 Children in institutions: the beginning of the end? : The cases of Italy, Spain, Argentina, Chile and Uruguay. (PDF). Florence, Italy: UNICEF International Child Development Centre. 2003. ISBN 88-85401-86-4. Retrieved Oct 2, 2017

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International Relations Between Countries Impacting Human Rights

*Manoj Kumar Sinha**

Abstract

This paper attempts to find out how international relations between countries affect the promotion and protection of human rights by a Sovereign state. To understand the influence of another state on the implementation of human rights it must be analysed on the basis of the state parties to human rights instruments. As a matter of fact, human rights instruments available at international and regional levels are the outcome of participation and negotiation by sovereign states during the drafting of the treaties. Impermissibility of intervention in the domestic jurisdiction of states by other states or by intergovernmental organisations is a well-established principle of international law. Respect for the territorial integrity and political independence of states is the basic premise of this principle. An attempt has been made under this paper to identify the areas where interdependence among the states plays an important role in the implementation of human rights.

Introduction

The inviolability of territorial sovereignty of states is a cardinal principle of international law.[1] The state is supreme within its territory and no external force ought to interfere with that supremacy without the consent of the state.[2] Impermissibility of intervention in the domestic jurisdiction of states by other states or by intergovernmental organisations is a well-established principle of international law. Respect for territorial integrity and political independence of states is the basic premise of this principle. The reaction of

* Director, Indian Law Institute, New Delhi.

1 Malcom N. Shaw, International Law (Cambridge, 1986), p.238, state governments are free to act without restrictions within their borders. International law is based on the concept of the state system. The state in turn relies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person.

2 Manoj K. Sinha 'Is Humanitarian Intervention Permissible Under International Law ?' *Indian Journal of International Law,* vol.40, n.1 (2000), pp,62-71.

the international community to an internal humanitarian crisis may be posed in the dilemma state sovereignty versus human suffering. While some states are extremely reluctant to see their sovereignty encroached upon, notably in relation to the treatment of their own nationals, others are more permeable to the influence of international politics and law that may demand states to abide by universally applicable standards of human rights.[3] Legally, '[t]he Charter's provisions have created implicit tensions between international law concepts of sovereignty, non-intervention, and human rights'.[4] This is complicated by the fact that, whereas some principles such as that of sovereignty and the prohibition of the use of force (article 2(4) UN Charter) are well recognised, others such as that of non-intervention into the domestic jurisdiction of a state (article 2(7) UN Charter), have never been codified in a clear set of rules.[5] One of the principal differences between the Covenant of the old League of Nations and the Charter of the new United Nations was the fact that the Charter gave the matter of human rights and fundamental freedoms particular prominence. The reason is not hard to find. The events leading up to the Second World War and the terrible atrocities perpetrated by Nazi Germany, both in those years before the war and during it, provided the springboard for a detailed consideration of human rights issues.

Universal Declaration Of Human Rights

Defenders of human rights strongly believe that the UDHR signalled a normative shift away from the absolute sovereignty presumed by states and toward the idea that all individuals should have rights by virtue of their common humanity.[6] The persistence of two sets of rival normative claims, one based on the rights of sovereign states and the other on the rights of individuals as members of a natural universal community, is something that scholars of international relations trace back many centuries. Eleanor Roosevelt, one of UDHRs main advocates, said that it had 'set up a common standard of achievement for all people and all nations.'[7] The Charter of the United

3 Noelle Quenivet, 'The Responsibility to Protect: An Empty Concept for Darfur?' Manoj K, Sinha (ed.) *Global Governance, Human Rights and Development* (Satyam Law International, New Delhi, 2009), pp. 153-183.

4 Steve G. Simon, 'The Contemporary Legality of Unilateral Humanitarian Intervention' *California Western International Law Journal* vol.24, n.1 (1993), pp. 117-153..

5 Ibid.

6 Nigel Rodley, 'The Universal Declaration of Human Rights: Learning From Experience*' Essex Human Rights Law Review*, vol. 5, n.1 (2008), pp. 1-6.

7 *Eleanor Roosevelt and the Universal Declaration of Human Rights*, available at <www.erooseveltudhr.org>,

Nations lays down certain guiding principles with regard to the promotion of human rights and fundamental freedoms.[8] The first step was towards the implementation of the UN Charter provisions, under the authority of Article 68.[9] The Economic and Social Council on 21 June 1946 adopted a resolution [10] outlining the function and composition of the Commission on Human Rights. Through its three sessions, the Commission formulated and approved a Draft Declaration, as the first part of the proposed International Bill of Rights.[11] The Draft Declaration was subsequently adopted by the General Assembly as the Universal Declaration of Human Rights on 10 December 1948, by a vote of 48 to 0 with 8 abstentions.[12] The Universal Declaration of Human Rights (hereinafter referred as UDHR) includes not only civil and political rights[13] , but also economic, social and cultural rights. [14]The concluding articles emphasise the interdependence of the rights and duties of the individual in relation to the community. The UDHR recognises these rights and freedoms for all 'without any discrimination of any kind, such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Furthermore, no distinction shall be made with respect to the application of the above rights and freedoms, as between independent states and trust or non-self governing territories.[15]

Thus, the UDHR is designed as the first part of the proposed Bill of Rights. It is an elaboration of the principles of human rights and fundamental freedoms. The contemporary struggle between the universal and particular is brought into sharp relief by the doctrine of human rights. After the euphoria

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visited on 26 September 2017.

8 Myres S. McDougal & Gerhard Bebr, 'Human Rights in the United Nations' *The American Journal of International Law,* vol.58 (1964), pp. 603-641.

9 Article 68 says, 'The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.'

10 Resolution 1/5 of 16 February 1946 (Doc.E/20 of 15 February 1946); Record of the Economic and Social Council, First Year: First Session, pp.163-64.

11 Resolution 115 of 16 February 1946 (Doc.E/20 of 15 February 1946). Official Records of Economic and Social Council, First Year: First Session, pp.163-64.

12 The Universal Declaration of Human Rights was adopted in UN General Assembly in Resolution 217A, 3 UNGAOR, Pt.I, pp.71-72. The abstaining states were: Byelorussia SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Union of South Africa, and Yugoslavia.

13 Articles 2 to 21 of the Universal Declaration.

14 Articles 22 to 27 of the Universal Declaration.

15 Article 2 of Universal Declaration.

of the UN General Assembly's proclamation of the UDHR, human rights advocates had to wait a further three decades before such principles began significantly to constrain the behaviour of states.[16] In the intervening period, the call for states to live up to the principle of respecting universal rights was muted by two factors: first, the priority accorded to national security by the leading protagonists and their allies during the Cold War; and second, the fact that states did not allow multilateral monitoring of their human rights practices.[17] In its very first session the Commission on Human Rights observed that it had 'no power to take any action in regard to any complaints concerning human rights'.[18] In other words, from the outset, human rights were overshadowed by systemic factors to do with great power rivalry and the preference by members of international society to view human rights as standards and not as enforceable commitments.[19] With the exception of the limited group of states who were signatories to the European Convention of Human Rights, the general picture from 1945 to 1973 was one in which there was a yawning gap between standards and delivery.

A. International Covenant on Civil and Political Rights

The Commission on Human Rights devoted six sessions, the fifth to tenth from 1949-1954, to the preparation of the two Covenants. Once the Commission began to reconsider the drafting of a Covenant on Human Rights in 1949, it was confronted with proposals put forward by the Soviet Union and Australia which sought to extend the scope of the Covenant to include economic and social rights as well as civil rights. The French delegate expressed a desire to see economic and social rights included, but in a separate and later Covenant. However, the Commission did not take a decision on the USSR-Australian proposal at the fifth session and instead adopted a resolution and requested the Secretary-General to prepare a report on the activities of other bodies of the United Nations as well as of the specialised agencies, affecting matters within the scope of Articles 22-27 of the UDHR for consideration by the Commission at its sixth session. The Commission at its sixth session decided that the draft Covenant covering certain essential civil rights should be the first of a series of Covenants and that it would consider

16 Phillip Alston, (ed.) *The United Nations and Human Rights* (London: Clarendon Press, 1995).

17 John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers, New York, 1983).

18 Ibid.

19 Hersch Lauterpacht, *An International Bill of the Rights of the Rights of Man* (Praeger, New York, 1950).

additional Covenants dealing with economic, social, cultural, political and other categories of human rights at its subsequent sessions.[20]

The developing countries of Asia, Africa and Latin America and even USSR and East European countries were in favour of inclusion of both economic and social rights, as well as civil and political rights in one Covenant. However, those in favour of having two Covenants as well as those in favour of a single Covenant generally agreed that `the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent' and that 'when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man'.[21]

Those in favour of including economic and social rights in a separate Covenant based their contention on the fact that civil and political rights were immediately enforceable, or of an absolute character, while economic, social and cultural rights were to be progressively implemented. On the question of these two different categories of rights, observations were made to the effect that measures necessary for the enforcement of civil and political rights are of an entirely different type from those necessary for the enforcement of economic, social and cultural rights, which were attainable only gradually because of the differing economic structures, standards of life and cultural traditions of different states.[22] The Commission finally adopted two Draft International Covenants on Human Rights and Measures of Implementation; one on Economic, Social and Cultural Rights, the other on Civil and Political Rights.[23] A milestone was reached on 16 December 1966, when the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) by a unanimous vote.[24] The value of

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20 UN Secretary-General, Draft International Covenants on Human Rights, Doc.A/2929 (1 July 1955), p.25.

21 UN Commission on Human Rights, Doc.E/CN.4/SR.64.

22 As Lauterpacht states: 'That does not mean that the recognition of these rights in an international instrument must be reduced to a mere declaration which is not legally binding upon states or that it must be ignored altogether. The difficulty surrounding this problem can be solved by giving to social and economic claims a place in an enforceable bill of rights without making such enforcement primarily judicial in character', H. Lauterpacht, *International Law and Human Rights* (London, 1945), p.286.

23 General Assembly Resolution, 543 (VI).

24 G.A. Resolution 2200A, 21 UN GAOR, Supp.16, p.49. Three instruments annexed to the resolution were adopted: The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and an Optional Protocol to the CP Covenant, both the

these instruments is apparent: first, they defined more explicitly the scope and standards of those human rights which are considered fundamental in the Declaration of Human Rights, second, to the extent they are ratified, they would give substantial legal efficacy to the general obligations now imposed by the UN Charter. Lastly, they would provide a means for implementing the rights contained therein.[25]

Article 2 of ICCPR provides that each state

> ...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, 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.

In 1976 the ICCPR and International Covenant on Economic Social Cultural Rights (ICESCR) and Optional Protocol I (OP I) entered into force. The UN Commission on Human Rights became more active, in part helped by its expanded membership and the inclusion of states committed to making a difference. While the work of the Commission is largely that of information gathering and sharing, its role raises the status of human rights in the UN system. The appointment of a UN High Commissioner for Human Rights in 1993 took the profile to an even higher level. A significant change has been witnessed in the mid to late 1990s regarding the recognition and implementation of international human rights instruments. International human rights norms had diffused widely. One key driver here was the rapid increase in the number of liberal democratic states. With the fall of communism in USSR and East European countries and their gradual transition to democracy, which also spread in Latin America and Asia, it is now the case that a far larger proportion of the world's population live in

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Covenants adopted unanimously. The Optional Protocol was adopted by a vote of 66 to 2 (Niger and Togo) with 38 abstentions. The Covenant entered into force on 23 March 1976 in accordance with Article 45 of CP Covenant for all provisions except those of Article 41; 28 March 1979 for the provisions of Article 41 (Human Rights Committee); There are 129 countries parties to the CP Covenant; for optional Protocol 80 countries parties to it and 25 has ratified it: [Multilateral Treaties deposited with the Secretary-General (United Nations, New York, 1995), pp.117-53].

25 See Moses Moskowtiz, 'The Covenants on Human Rights: Basic Issues of Substance', Proceedings of the American Society of International Law, vol.53 (1959), pp.230-34.;Oona A Hathaway, 'Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?'Arizona state Law Journal, available at http://www.law.yale.edu/documents/pdf/cglc/Hathaway_HumanRightsAbroad.pdf accessed on 7 July 2013.

what could broadly be described as liberal democratic states.[26] Such regime types are naturally hospitable to protecting individual rights; on those occasions when citizens' rights are curtailed by excessive executive authority, liberal states contain important countervailing legal mechanisms to protect individuals.

Several regional human rights Conventions, part at least of the inspiration for which may be traced back to the Declaration, have been adopted. Most well known, of course, is the European Convention on Human Rights 1950, which mentions the influence of the Declaration in the first paragraph of the Preamble. The American Convention on Human Rights 1969 mentions the Declaration in the third (and fourth) paragraphs of its Preamble. The African Charter on Human and Peoples' Rights 1981, refers to the Declaration in its Preamble and in its operative article 60 mandates the African Commission on Human and Peoples' Rights 'to draw inspiration from ... the Universal Declaration of Human Rights'. The impact of the UDHR was huge in the adoption of international and regional human rights instruments; the sluggishness of many states on the implementation of human rights was gradually diminished. In an era of globalisationa state's standing before the international community is assessed on its being party to the various human rights treaties.

B. The Human Rights Council

The CHR acted for almost six decades as a forum in which countries large and small, non-governmental groups and human rights defenders from around the world voiced their concerns. Over the years, the work of the CHR has changed substantially, though the CHR had a proud history. Under its first chairperson, Eleanor Roosevelt, it gave the world the UDHR and went on to develop the body of international human rights law and other core human rights treaties. Unfortunately, its functioning was increasingly undermined by block voting and procedural maneuvers that prevented some of the world's worst human rights violators from being held to account for their abuses.[27] Some states have sought membership on the CHR, not to strengthen human rights, but to protect themselves against criticism or

26 David L. Cingranelli and David L. Richards, 'Respect for Human Rights after the End of Cold War' vol.36, n.5(1999), pp. 511-534.

27 The two countries from the African Continent notorious for human rights violations, namely, Sudan and Zimbabwe, both managed to become the members of the CHR. For a complete list of members see, *http://www.ohchr.org/english/bodies/chr/docs/62chr/2006members.doc,* visited on 10 May 2006.

to criticize others. The purpose of CHR was to protect the UN's human rights role against manipulation by those who had become adept at gaming the system to their advantage. On 26 March 2006, the CHR concluded its sixty-second and last session after 60 years of work for the promotion and protection of human rights.[28]

Kofi Annan, Secretary–General of the United Nations, urged member states of the United Nations to establish the Human Rights Council (HRC). In his report, *In Larger Freedom: Towards Development, Security and Human Rights for All*,[29] he highlighted the urgency of establishment of the HRC in the following words; *'if the United Nations is to meet the expectations of men and women everywhere – and indeed, if the Organisation is to take the cause of human rights as seriously as those of security and development – then Member states should agree to replace the Commission on Human Rights with a smaller Human Rights Council.'*[30] The states did not agree (in September 2005) to the initial proposal of Kofi Annan, which was actually for a body that would ensure higher standards of membership and accountability. The failure of that first initiative was due in part to demands for sweeping changes to the text that U.S. Ambassador to the United Nations, John Bolton put forward at the last minute.[31] Following lengthy negotiations and several draft resolutions, the General Assembly overwhelmingly voted in favour of creating a new Human Rights Council (HRC).[32] The HRC remains large at 47 members, distributed by region, with states elected by an absolute majority of the General Assembly. The resolution calls upon states to take into account a candidate's human rights

28 The CHR adopted without a vote resolution E/CN.4/2006/L.2 entitled 'closure of the work of the Commission' recalling General Assembly resolution 60/251 of 15 March 2006, which created the Human Rights Council, and Economic and Social Council resolution 2006/2 of 22 March 2006; taking note of General Assembly resolution 60/251 of 15 March 2006; referring, accordingly, all reports to the Human Rights Council for further consideration at its first session in June 2006; expressing its appreciation to all those who contributed to the promotion and protection of human rights during its 60 years of existence; and deciding to conclude its work in accordance with the above mentioned resolutions. Press release, Commission on Human Rights Concludes its Sixty Second and last Session, 27 March 2006, available at http://www.unhchr.ch/huricane/huricane.nsf/, visited on 10 May 2006.

29 Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, A/59/2005, 21 March 2005. Available on http://www.un.org

30 Ibid., para.183.

31 Joseph Klein, The (UN)-Human Rights Council, http://www.FrontPageMagazine.com, 13 March 2006

32 General Assembly Establishes New Human Rights Council by vote of 170 in favour to 4 against, with 3 abstentions. Israel, Marshall Islands, Palau, United states voted against the resolution, and Belarus, Iran, Venezuela abstained from the voting.General Assembly, GA/10449, 15 March 2006. Available at, http://www.un.org, visited on 26 September 2017.

record. Although the new resolution did not go as far as some member states and human rights organizations hoped, the majority supported its adoption. The US was one of only four member states that voted against the adoption of the text.[33]

Role and Functions of the Human Rights Council

A new beginning for the promotion and protection of human rights has started after the election of the first 47 members of the newly created HRC. The members are elected on the basis of equitable geographical distribution.[34] The 47 members would be individually elected by an absolute majority of 96 votes of the General Assembly's members.[35] Those elected would be expected to respect the council's rules and their performance would be reviewed under the universal periodic review mechanism during their term of membership.[36] An elected member can be suspended, if it fails to uphold high human rights standards. For suspension, a two-thirds majority vote by Assembly members present at the meeting is necessary. The council has been meeting more often and for more weeks in the year than previously, and schedules no fewer than three sessions per year. With the support of one third of the membership of the Council, the HRC could call additional meetings in order to address human rights crises..[37] The special role accorded by the commission to non-governmental organisations and experts has been retained, preserving some of the checks and balances that help hold states properly accountable for their human rights conduct. The HRC's work is guided by the principles of universality, impartiality, objectivity, non-selectivity and international dialogue and cooperation.[38] After the election, General Assembly President Jan Eliasson of Sweden observed that, by creating the HRC as a subsidiary organ of the Assembly, Member states had further strengthened the Organization's human rights machinery and elevated the institutional standing of its human rights work. The fact that all candidates for election have presented pledges and commitments in accordance with the resolution was very encouraging.[39]

33 Ibid., Israel, Marshall Islands, Palau, United states voted against the resolution.

34 General Assembly Resolution 60/251 of 15 March 2006, Article 8, the membership in the new Council is based on equitable geographic distribution, and seats shall be distributed as follows among regional groups: African Group, 13; Asian Group, 13; Eastern European Group, 6; Latin American and Caribbean Group, 8; and Western European and Others Group, 7.

35 Ibid., Article 7.

36 Ibid., Article 9.

37 Ibid., Article 10.

38 General Assembly, n.20, Article 4.

39 Ibid.

The HRC, in its eleven years of existence, has addressed urgent, serious and long-running human rights situations wherever they occurred in an effective manner. A universal periodic review of all UN member states makes all countries subject to guaranteed scrutiny. In addition, those committing gross violations can be suspended from the body by the General Assembly through a two third majority vote. The challenge for the HRC is to avoid the fate of the old CHR, which abusive governments flocked to join to avoid condemnation. The new HRC is the best available option for making the UN an effective human rights defender. That's a reality that everyone should support.[40]

Responsibility To Protect

States can no longer justify gross violations of human rights by invoking the bogey of sovereignty. In many cases the doctrine of humanitarian intervention[41] was widely used to describe the situation where states, individually or jointly, had intervened in a country to hinder the furtherance of violations of international human rights or humanitarian law. International lawyers now speak of the Responsibility to Protect (R2P).

The responsibility to protect implies a duty of the state to act as a moral agent of the international community. The doctrine of R2P was adopted in 2001 by a group of scholars commissioned by the Canadian government who announced several principles that need to be respected in order for an intervention to be lawful.[42] It must nevertheless be stressed that the report produced by this commission is not legally binding.[43] Chandler adds that '[r]ather than delegitimizing state sovereignty the Commission asserts that the 'primary responsibility' rests with the state concerned. In many cases this responsibility will be carried out with the active partnership of the international community, and only if the state is unwilling or unable to address the problem or work in cooperation with the international community would

40 Maximilan Sphor, 'United Nations Human Rights Council: Between Institution Building Phase and Review of states', *Max Planck UN Yearbook*, vol.14(2010), pp.169-218

41 A classical definition of humanitarian intervention is 'the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights'. Teson, *supra* n 6 at 11-12.

42 International Commission on Intervention and state Sovereignty, The Responsibility to Protect, IDRC/CDRI, Ottawa, December 2001.

43 Quenivet, *supra* note 3.

the international community assume direct responsibility.'[44] This comment also applies to the following reports on the subject matter.

It is quite revealing that as a matter of fact, the conditional element, of the state being unable or unwilling to cope with the situation, embodies the principle of state sovereignty. Hence, the international community is not yet ready to rid itself of the principle of sovereignty in favour of a more generous approach towards protecting human lives and human dignity.[45] The responsibility to protect includes the accompanying responsibility to prevent that may be considered as the responsibility to look into the roots of the conflict and to suggest peaceful solutions. This responsibility to prevent only applies should the state be unable to ensure respect for human rights.[46] The report specifies that the Security Council is the proper authority to authorise an intervention for humanitarian purposes.[47]

In conclusion, the high-level panel of experts declared 'we endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent,'[48] a position also adopted at the 2005 United Nations World Summit.[49] Despite all these well-intended reports and statements, states are unwilling to adopt, formally and legally, the concepts of the responsibility to protect or, in its old version, humanitarian intervention. Not only have several large and powerful states such as Russia, China and India opposed the concept but a range of African and Asian states loathe this idea as reminiscent of colonial times. In addition, even states that have at times used this terminology are reluctant to engage in the development of legally binding norms as it may tie their hands in the future.[50]

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44 David Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace", International Peacekeeping, vol. 1, n.1 (2004), pp. 59-81.

45 Quenivet, supra note 3.

46 High-level Panel Report, supra note 42,para. 201.

47 Ibid.

48 High-level Panel Report, supra note 42,para. 203.

49 World Summit Outcome, UN Doc. A/60/L.1, 20 September 2005. see Alicia L. Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism', *Yale Law Journal,* vol.115 (2006), pp. 1157-1165

50 Quenivet, supra note 3.

Terrorism And Human Rights

Terrorism has been the major concern of the international community and, to overcome this challenge, counter terrorism measures require active cooperation among states. Modern day terrorism is a cause for serious concern because it targets innocent civilians to create fear or terror in the minds of the people. In the wake of the tragic attacks on the twin towers in New York on 11 September 2001, the Security Council of the United Nations passed Resolution 1373.[51] A Counter-Terrorism Committee (CTC) was established to monitor each state's compliance with their obligations to abide by the Resolution. Since the adoption of the SC resolution 1373, considerable progress has been made by the international community in weakening terrorism related activities.[52] However, the scale of the threat in parts of the Middle East and Africa has escalated and diversified, and now affects more Member states.[53]

The terrorist threat is evolving rapidly. It has also become more diverse, challenging and complex, partly because of the considerable financial resources flowing to certain terrorist organizations from the proceeds of transnational organized crime. It has been noticed in a number of situations particularly in the Middle East, that terrorist groups were quick to seize opportunities provided by the weakening of Government in conflict situations. The Syrian crisis has become a serious threat to international peace and security. It has also sparked the world's biggest current humanitarian emergency crisis and caused the deaths of at least 250,000 persons.[54] A large proportion of the population of Syria was forced to flee their homes and take shelter in neighbouring countries. Many reached Europe to save themselves from the ongoing conflicts in their homeland.[55] Till recently, large parts of the Syrian Arab Republic were under the control of terrorist groups, such as the Islamic

51 Noelle Quenivet, 'The World After September: Has it Really Changed?' European Journal of International Law , vol. 16, n.3, pp. 561-567.

52 Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' *European Journal of International Law*, vol.14, n.2 (2003) pp. 241-264

53 Alex P. Schmidt. 'Challenging the Narrative of the 'Islamic state' (International Centre for Counter-Terrorism, The Hague, 2015), pp, 1-21, available at <https://www.icct.nl/> visited on 26 September 2017

54 Nicole Ostrand, 'The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom and the United states', *Journal on Migration and Human Security*, vol. 3, n.3(2015), pp. 255-279.

55 Ibid

state in Iraq and the Levant (ISIL), (also known as Daeshand ISIS), and the Al-Nusrah Front. Boko Haram controls significant parts of North-East Nigeria, and AlShabaab controls large areas of Somalia.[56]

The lack of domestic criminal laws to prosecute foreign terrorist fighters remains a major shortfall, globally. Few states have introduced comprehensive criminal offences to prosecute foreign terrorist fighter-related preparatory or accessory acts.[57] Some states rely on existing legislation to tackle the foreign terrorist fighter phenomenon, and such legislation may not be sufficient to prevent their travel.[58] In most states, prosecutions are undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence against foreign terrorist fighters. States have also experienced challenges associated with generating admissible evidence or converting intelligence into admissible evidence from information obtained through ICT, particularly social media. Investigating and prosecuting suspected foreign terrorist fighters pre-emptively is a further challenge for all sub-regions, particularly in the light of due process and human rights concerns. In several sub-regions, lack of information-sharing and inter-agency cooperation and coordination remains a major impediment to the successful interdiction of foreign terrorist fighters. All states would benefit from strengthening national and international law enforcement information-sharing and inter-agency cooperation and coordination.[59] Thus, there is a need for coordinated action among Government agencies and information technology and law enforcement sectors to tackle the foreign terrorist fighter phenomenon. Very few states are fully connected to the relevant databases of the International Criminal Police Organization (INTERPOL).[60]

The major challenge states are facing is disruption of funding sources to terrorist groups. This can be tackled effectively if states of all regions enhance their domestic anti-money-laundering/counter-financing of

56 Schmidt, *supra* note 53.

57 P.S.Rao, 'International Terrorism, Self- Determination and National Liberation' *Conference Proceedings* (International Conference on International Law in the New Millennium: Problems and Challenges Ahead, organised by the Indian Society of International Law, New Delhi, 4-7 October 2001), pp. 813-860.

58 Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Categories of International Law' *European Journal of International Law*, vol. 12, n.5 (2001), pp. 993-1001.

59 Ibid.

60 Ibid

terrorism regimes. Most states have identified the need to address conditions conducive to the spread of terrorism as part of a comprehensive approach to tackle the terrorist threat. India has given high priority to the conclusion of effective international legal arrangements to prevent and combat terrorism. India has also taken the initiative to introduce a Comprehensive Convention on International Terrorism in the United Nations for adoption. According to P.S.Rao, accepting the provisions of the Indian draft without any dilution would best serve the purpose of the fight of the international community against international terrorism.[61]

Human Rights And Business

In the 21st Century, one of the most noteworthy changes in the human rights debate relates to increased recognition of the link between business and human rights.[62] Transnational Corporations (TNCs) became the main international actors during the second half of the twentieth century. The revenue of some transnational corporations exceeds the gross national product of smaller European states and in some cases larger than many African states together. This gives TNCs excessive influence over international market regulations and national legislative and political processes.[63]

In recent decades, especially the 1990s, global markets expanded significantly as a result of multilateral trade agreements, bilateral investment treaties, and domestic liberalization and privatization policies adopted by states.[64] The rights of TNCs became more securely anchored in national laws and increasingly defended through compulsory arbitration before international tribunals. Globalization, no doubt, has significantly contributed to impressive poverty reduction in major emerging market countries and overall welfare in the industrialized world. But it also imposes costs on people and communities including corporate-related human rights abuses.[65] What

61 Rao, *supra* note 57.

62 R. Sullivan, (ed.) *Business and Human Rights: Dilemmas and Solutions* (Sheffield: Greenleaf, 2003); Amnesty International, *Business and Human Rights: A Geography of Corporate Risk* (The Prince of Wales International Business Leaders Forum, 2002); R. Mares, ***Business and Human rights: A Compilation of Documents*** (Leiden; Martinus Nijhoff , 2003); Oliver De Schutter, (ed.) Transnational Corporations and Human Rights(Oxford ; Portland, Hart, 2006).

63 R.Fagerfjäll, P. Frankental, F. House, *Human Rights - A Corporate Responsibility?* (Stockholm: Amnesty International: 2001)

64 Ibid.

65 J. Ruggie, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'human rights Council' Report of the Special Representative of the Secretary-General on the issue of human

is important today is to harmonize economic growth with the protection and promotion of human rights.[66] It is a challenge, which, if met, could harness the great power of economic growth to the great principle of human dignity. Many companies find strength in their human rights records; others suffer the consequences of ignoring this vital part of corporate life. Today, human rights are a key performance indicator for corporations all over the world.[67]

Businesses are increasingly focused on the impact they have on individuals, communities and the environment. It is clear that one of the central measures of a company's social responsibility is its respect for human rights.[68] And while most companies recognize the moral imperative to operate consistent with human rights principles, recognition is growing that respect for human rights also can be a tool for improving business performance.[69] Ensuring that business operations are consistent with these legal principles helps companies avoid legal challenges to their global activities. In recent years in the United states and in other countries, courts have considered lawsuits alleging that multinational companies, sometimes through their business partners, have contributed to human rights violations in their global operations.[70]

Many of the principles enunciated in the UDHR involve the creation of a stable, rule-based society that is essential to the smooth functioning of business. Applying human rights principles thoroughly, consistently and impartially in a company's global operations can contribute to the development of legal systems in which contracts are enforced fairly, bribery and corruption are less prevalent and all business entities have equal access to legal process and equal protection under law. A multinational's presence can be viewed locally as positive or negative. Avoiding human rights violations will help maintain positive community relations and contribute to a more stable and productive business environment.

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rights and transnational corporations and other business enterprises, A/HRC/4/35, 19 February 2007, available at *http://www. ohchr.org.*

66 Harvard Law School, *Business and Human Rights: An Interdisciplinary Discussion* (Harvard Law School, 1999).

67 Sullivan, *supra* note 62.

68 D. Nayyar, 'Alleviating Poverty: Role of Good Governance and Constitutional Reform', *Economic and Political Weekly,* 2000 35: pp. 3739-42.

69 G. Alfredsson, *Human Rights and Good Governance. Building Bridges* (The Hague: Martinus Nijhoff Publishers, 2002).

70 International Human Rights Law Group, U.S. Legislation Relating Human Rights to U.S. Foreign Policy (NewYork,W.S. Hein, 1991)

Conclusion

In the comparatively short space of time since the adoption of the UN Charter in 1945, the development of international human rights law has been quite remarkable. We have now a considerable body of substantive treaty-based law, ranging from general human stipulations to very specific ones, both under the UN Treaty Body system and located elsewhere. In many cases, effective measures of implementation comprising both the system of 'state reports' and the 'individual communication procedure' have been imposed at the international level. Several effective regional human rights treaties have been developed. The new Human Rights Council has developed a novel procedure for handling complaints about gross and consistent patterns of human rights abuses and has instituted a system of 'Universal Periodic Review'. Some of the most important developments recently include more attention to the rights of minorities and indigenous peoples, together with the emergence of individual international criminal responsibility for crimes against humanity and other international crimes catalogued in the Rome Statute of the International Criminal Court. The lamentable state of human rights in the world today does not mean that the UN has failed entirely in one of its primary aims, but it does signify that there is no room for complacency. In sum, the international community can be reasonably satisfied with what it has achieved in the last 72 years, but much remains to be done to eradicate human rights violations in the world today and in the future.

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The Universal Periodic Review Process; A Critical Appraisal

*Ranbir Singh and Aparna Chandra***

Abstract

The Universal Periodic Review is the result of wide ranging reforms to the UN human rights mechanisms carried out in the first decade of the 21st century. The UPR process seeks to review the human rights record of each UN member every 4 years. India has undergone three cycles of review since the inception of the mechanism. This article describes and evaluates the UPR process and India's engagement with it.

The UPR Process

Until 2006, the United Nations Commission on Human Rights (UNCHR) was the principal human rights body of the UN. However, it increasingly came under criticism, including, amongst other things, for "declining credibility and professionalism…."[1] As a result, in 2006 the UN undertook wide-ranging reform of its human rights machinery. The Commission on Human Rights was replaced with the Human Rights Council (HRC). In establishing the Council, the UN General Assembly mandated

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1 UN General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All : Report of the Secretary-General*, 21 March 2005, A/59/2005, p.48; UN General Assembly, *Note [transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A More Secure World : Our Shared Responsibility"]*, 2 December 2004, A/59/565, pp. 88-90. For a general discussion on the issues that triggered the reform process see Maximilian Spohr, "United Nations Human Rights Council: Between Institution Building Phase and Review of Status," *Max Planck Yearbook of United Nations Law,* Volume 14, 169-218 (2010); Sarah Joseph & Joanna Kyriakakis, "The United Nations and Human Rights," in Sarah Joseph and Adam McBeth (eds.), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010).

this new body to "undertake a Universal Periodic Review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments…"[2] . A year later, the Human Rights Council adopted an institution building package, which included modalities for the working of the Universal Period Review (UPR) mechanism.[3] Through a series of subsequent resolutions and decisions these modalities have been further refined and clarified.[4]

The UPR mechanism seeks to review the human rights record of each member of the United Nations once every four and a half years. Each member of the United Nations is reviewed for compliance with the Charter of the United Nations; the Universal Declaration of Human Rights; Human rights instruments to which that State is party; voluntary pledges and commitments made by the state, including those undertaken when presenting their candidatures for election to the Human Rights Council; and applicable international humanitarian laws. Together these instruments form the standards of the review.[5]

The review is based on three documents presented to the Human Rights Council. First the state under review prepares a national report on its human rights record. Second, the Office of the High Commissioner for Human Rights (OHCHR) prepares a compilation of information contained in the reports of treaty bodies, special procedures and in other official United Nations documents. Third, other stakeholders, including civil society organizations and national human rights institutions, may also submit reports to the OHCHR, which summarizes this information in the form of a report.

As per the resolution establishing the HRC, the UPR was conceived as a "cooperative mechanism, based on an interactive dialogue, with the

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2 UN General Assembly, *Resolution 60/251, Human Rights Council,* 15 March 2006. A/RES/60/251. (emphasis added).

3 Human Rights Council, *Resolution 5/1, Institution-building of the United Nations Human Rights Council,* 18 June, 2007,A/HRC/RES/5/1.

4 Human Rights Council, *Decision 6/102, Follow-up to Human Rights Council Resolution 5/1,* 27 September, 2007, ; Human Rights Council, *Resolution 16/21, Review of the work and functioning of the Human Rights Council,* 25 March, 2011, A/HRC/RES/16/21; Human Rights Council, Decision 17/119, *Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review*, 19 June 2011, A/HRC/DEC/17/119.

5 Human Rights Council, *Resolution 5/1, Institution-building of the United Nations Human Rights Council,* 18 June, 2007,A/HRC/RES/5/1.

full involvement of the country concerned, and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies…"[6] According to the HRC Resolution 5/1 which laid down the principles upon which the UPR mechanism was to operate, the UPR is to be conducted in a constructive, non confrontational and non politicized manner. Furthermore, the HRC has mandated that the UPR process should not become overly burdensome for states under review or for the Council, and therefore should not be overly long or take up too much of the resources of states and the Council.[7]

These principles have influenced crucial design elements in the UPR mechanism. For example, recommendations made by states on the human rights record of a country are not binding on the country. It can choose which recommendations to accept, and which to merely note.[8] So, in order to keep the process limited in terms of time and effort, the HRC has placed strict word limits on the length of reports to be submitted as part of the UPR Process.[9] It also adheres to a strict schedule for the interactive session where the country under review presents its record and engages in an interactive dialogue on it.[10]

A state under review sits through a three and a half hour review session,[11] where it presents its own report and is asked questions and is given recommendations by other UN member states. The country under review can decide which questions to respond to, and which recommendations to accept.[12] The outcome of the review process is a report that summarizes the

6 UN General Assembly, R*esolution 60/251, Human Rights Council,* 15 March 2006. A/RES/60/251.

7 Human Rights Council, *Resolution 5/1, Institution-building of the United Nations Human Rights Council*, 18 June, 2007,A/HRC/RES/5/1.

8 Human Rights Council, 8/PRST/1, *Modalities and Practices for the Universal Periodic Review Process*, April 9, 2008, para 10.

9 Human Rights Council, *Resolution 5/1, Institution-building of the United Nations Human Rights Council*, 18 June, 2007, A/HRC/RES/5/1 ("the written presentation summarizing the information will not exceed 20 pages, to guarantee equal treatment to all States and not to overburden the mechanism").

10 Human Rights Council, *Decision 17/119, Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review*, 19 June 2011, A/HRC/DEC/17/119 ("The duration of the review shall be extended to three hours and thirty minutes for each country in the Working Group, so as to be within existing resources and with no additional workload, during which the State under review shall be given up to 70 minutes to be used for initial presentation, replies and concluding comments in line with President's statement PRST/8/1 of 9 April 2008").

11 This was initially a three-hour session, but was increased to three and a half hours *vide* Resolution 17/119. See id.

12 Human Rights Council, 8/PRST/1, *Modalities and Practices for the Universal Periodic Review Process*, April 9,

proceedings, the recommendations made, and whether or not the state under review has accepted each recommendation.

Since the UPR is a state driven mechanism, the national report prepared by the state under review is the most crucial document in the UPR process. The focus of the national report is required to be on the normative framework of laws, and equally on the implementation of human rights obligations on the ground; the advances and achievements as well as the challenges and constraints in meeting the human rights obligations of the state.[13] For the second and subsequent cycles, states are required to focus their report on the extent of implementation of accepted recommendations from past review cycles, as well as new developments in human rights in the country concerned.[14]

India's Engagement with the UPR Process

India was one of the first countries to undergo review under the UPR mechanism. As of this writing, India has gone through three cycles of review; in 2008, 2012, and recently in 2017. The national report for the first cycle provided a descriptive account of the normative and institutional framework for the protection and promotion of human rights in India. Of the 18 recommendations received by India in this cycle, it accepted 5 and provided responses to the others.[15] The second national report focused on the status of implementation of the accepted recommendations from the first cycle as well as human rights developments since 2008. An interesting feature of this report was an annexure detailing the inclusion of contributions made by the judiciary towards the promotion of human rights. The second round of review resulted in 169 recommendations being made to India,[16] of which it accepted

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2008.

13 Human Rights Council, *Decision 6/102, Follow-up to Human Rights Council Resolution 5/1*, 27 September, 2007.

14 Human Rights Council, *Resolution 16/21, Review of the work and functioning of the Human Rights Council*, 25 March, 2011, A/HRC/RES/16/21; Office of High Commissioner for Human Rights, *3rd Cycle Universal Periodic Review National Report – Guidance Note,* 2017, available at http://www.ohchr.org/Documents/HRBodies/UPR/3rdCycle_GuidanceNotePreparationReports_EN.docx

15 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: India – Addendum*, 25 August, 2008, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/161/58/PDF/G0816158.pdf?OpenElement

16 Human Rights Council, *Report of the Working Group on the Universal Periodic Review*: India,9 July 2012, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement

67.[17] In the third round of review, as per the guidance note issued by the OHCHR, the report focused on the status of implementation of previously accepted recommendations. India received 250 recommendations as part of the interactive process.[18] As of this writing, the outcome of the review has not been completed, hence the number of accepted recommendations is not yet available.

In each of these three cycles, the Ministry of External Affairs (the nodal ministry) has sought the assistance of academic institutions to prepare its national report.[19] It has also conducted consultations with other stakeholders, primarily civil society organizations, to receive their inputs in the formulation of the reports. Through a series of inter-ministerial meetings, the Ministry has gathered the data required to report on the implementation of accepted recommendations. Drafts of the second and third national reports were also made available online for public review and comments.

Concerns with the Working of the UPR Process

The then UN Secretary General, Ban Ki-Moon had proclaimed that the UPR "has great potential to promote and protect human rights in the darkest corners of the world."[20] However, the UPR process has not lived up to this promise, for a variety of self-inflicted reasons.

First, states are free to accept recommendations, and to ignore (technically 'note') the ones they do not approve. In subsequent cycles their reports are required to focus primarily on the implementation of accepted recommendations.[21] This allows states to evade international accountability by simply ignoring those recommendations that deal with the most egregious and controversial human rights issues facing the country. The state under

17 Human Rights Council, *Report of the Working Group on the Universal Periodic Review*: India – Addendum,17 September 2012, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement

18 Human Rights Council, *Report of the Working Group on the Universal Periodic Review:* India, 17 July, 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/193/56/PDF/G1719356.pdf?OpenElement

19 NALSAR, Hyderabad in 2008, and National Law University, Delhi in 2012 and 2017.

20 United Nations Secretary General, *Secretary-General's Video Message for the Opening of the Fourth Session of the Human Rights Council,* 12 March 2007, available at https://www.un.org/sg/en/content/sg/statement/2007-03-12/secretary-generals-video-message-opening-fourth-session-human-rights

21 Human Rights Council, *Decision 17/119, Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review,* 19 June 2011, A/HRC/DEC/17/119

review is under no obligation to provide justification for rejecting a recommendation.

Further, recommendations vary in quality; from the very precise to the quite vague. A study of the first UPR cycle found that countries were more likely to accept recommendations that placed the least burden on them in terms of requiring specific actions. For example, they were more likely to accept vague, aspirational recommendations to 'continue efforts towards' a particular goal, rather than a precise recommendation to ratify a particular treaty or repeal a specific law.[22]

Second, while the word limits on national reports, which currently stands at 10,700 words,[23] was introduced to manage time and resources, this tight leash, again, allows states to evade the responsibility of fully explaining their position on a particular issue. Given the breadth of human rights concerns that all nations face, the limited word space allows states to get away with very cursory statements on controversial issue. This limits meaningful engagement on any given human rights issue. Therefore, the attempt to develop a mechanism that covers the breadth of human rights concerns comes at the cost of deep engagement with any issue.

Third, the Guidance Note issued by the OHCHR in advance of the 3rd cycle of review, asked states to classify previously accepted recommendations under headings such as 'fully implemented', 'partially implemented', 'in the process of implementation,' and 'not implemented yet.' With respect, realizing human rights is a work in progress, there is always scope for improvement in the conception and implementation of human rights standards. Furthermore, as stated above, many recommendations are so vaguely worded that there is no meaningful way to fully implement them. Therefore, categorizing recommendations relating to human rights as fully or partially implemented makes little sense other than giving states an easy means of superficially complying with a recommendation and then claiming that it has met its human rights obligation with respect to the relevant recommendation.

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22 See Edward McMahon, "Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review Mechanism of the United Nations Human Rights Council," Working Paper, University of Vermont, July 2010 (dividing recommendations into 5 categories on a scale from those that place the least amount of burden on a state, to the more precise recommendations that require specific state action."

23 Office of High Commissioner for Human Rights, *3rd Cycle Universal Periodic Review National Report – Guidance Note*, 2017, available at http://www.ohchr.org/Documents/HRBodies/UPR/3rdCycle_GuidanceNotePreparationReports_EN.docx

Fourth, the UPR foundational documents all state that the outcome of the review has to be implemented by the state concerned. There is no follow up between cycles on the status of implementation of recommendations. States can voluntarily choose to update the Council on the progress made. [24]However, this is not mandatory. While the Council cannot monitor the implementation of UPR recommendations in each state, it can definitely mandate certain follow up mechanisms, the least of which might be to require states to report on the institutions and structures they have created to implement the recommendations. This reporting requirement will at least push states towards creating such structures in the first place.

Finally, the interactive dialogue process is often hijacked by political wrangling and alignments. Countries often lobby allies to praise their efforts or to put forward 'soft' recommendations that are easy to accept.[25] Due to strict time limits, such interventions end up reducing the space for more meaningful engagement with a state's human rights record. Rather than a platform for critical self-assessment and peer review of a country's human rights record, UPR often devolves into an international arena for grandstanding.

The Indian Experience

India is a significant actor on the global stage and has engaged vigorously with international laws and institutions. In the field of human rights as well, India has participated actively in the development and working of the global human rights regime. India has been a member of the Human Rights Council since its inception, except for a one statutorily mandated break. It was one of the first countries to be reviewed under the UPR process.

However, many of the limitations of the UPR process are visible in India's engagement with the mechanism. The Indian government routinely ignores recommendations that do not align with state ideology. It accepts very few recommendations relating to civil and political rights, or on any sensitive or controversial issue. The bulk of the recommendations accepted by India relate to socio-economic rights, which are subject to progressive realization. More worryingly, the bulk of these recommendations are so vaguely worded as to put very little obligation on the state to take any concrete

24 Human Rights Council, *Resolution 16/21, Review of the work and functioning of the Human Rights Council*, 25 March, 2011, A/HRC/RES/16/21.

25 Human Rights Watch, *UN: Nations Show True Colors at Rights Review*, 13 February 2009, available at https://www.hrw.org/news/2009/02/13/un-nations-show-true-colors-rights-review

steps towards their implementation. It is therefore difficult to hold the Indian state accountable for non-implementation of accepted recommendations.

India also requires more meaningful follow up to the UPR process domestically. Once recommendations are accepted in Geneva, they are not translated into policy goals domestically. There is little to no follow up on the modalities and roadmap for implementing the recommendations. These recommendations do not form part of governmental deliberations in deciding state priorities and policies. India is yet to conduct a mid-term review of recommendations or to seek from its various ministries any updates on the status of implementation of the recommendations. Instead, at the time of the subsequent review, attempts are made to re-purpose ongoing schemes and projects, and showcase them as advances towards the implementation of UPR recommendations. The disconnect between recommendations accepted in Geneva and domestic policy and legislative priorities is most starkly evident with respect to torture. India agreed, both in 2008 and in 2012, to ratify the Convention Against Torture. However, despite repeated assurances, India has yet to implement this recommendation.

Finally, UPR is designed to be a consultative and collaborative process aimed at broad based involvement of stakeholders in determining ground level realities relating to a country's human rights obligations. As per the HRC, "[s]tates are encouraged to prepare the [national report] through a broad consultation process at the national level with all relevant stakeholders." [26] However, such consultation is often perfunctory and one-off. Also, consultations are often Delhi centric due to insufficient resource and time allocation for broad based consultation. As a result, many crucial voices are not afforded any meaningful opportunity to engage with the UPR process.

Conclusion

Despite its many drawbacks the UPR process provides an important peer review mechanism for the public and international scrutiny of a country's human rights record. This enables stakeholders to hold the country accountable for the commitments it makes and has the potential of changing state behavior because of the fear of international naming and shaming.

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26 Human Rights Council, *Resolution 5/1, Institution-building of the United Nations Human Rights Council*, 18 June, 2007,A/HRC/RES/5/1.

However, in order to be an effective vehicle for the implementation of human rights obligations, the UPR mechanism needs to align its operational protocols with its stated objectives and principles. Asking states to provide specific, precise and concrete recommendations; requiring the state under review to justify why it is rejecting a particular recommendation; requiring states to put in place institutional mechanisms for implementation of accepted recommendations and mandating periodic follow up to the HRC – might all aid in making the Universal Periodic Review a more robust mechanism for the global protection of human rights.

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International Section

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Building a Coalition for Change: The Role of the Asia Pacific Forum of National Human Rights Institutions

Kieren Fitzpatrick*

Abstract

This article examines the role of national human rights institutions (NHRIs) and their regional organisation, the Asia Pacific Forum of National Human Rights Institutions (APF). Despite the diverse social, cultural and political environments in which NHRIs operate, the very high level of collegiality that exists between the member institutions of the APF means that APF members are committed to sharing expertise, exchanging information and working collaboratively to address common human rights challenges. The article examines how this coalition of NHRIs has achieved substantive change for the protection and promotion of human rights.

'Our vision is for an Asia Pacific where everyone enjoys human rights.'

The Asia Pacific – the world's most populous and diverse region – is in a state of enormous flux, with many fundamental human rights under serious threat.

Conflict and insecurity in places like Afghanistan, Syria and Myanmar have led millions of people to flee across borders in recent years, forced from their homes to seek safety but often left in precarious and exploitative situations.

The rise of populism, sectarianism and extremism in some countries has seen fundamental human rights values come under sustained attack, while also fanning division, blame and mistrust within communities. Refugees,

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immigrant communities and other minority groups have become convenient scapegoats for the fears and grievances of the broader community.

The space for civil society to organise and advocate has become ever smaller. Individuals and groups calling for justice and equality have been detained and threatened under new and old laws. Journalists in many countries across the region have been killed or abducted.

Torture and ill treatment in places of detention continues to be routine and widespread, with the poor and vulnerable most at risk of abuse. At the same time, entrenched and systemic discrimination continues to undermine the dignity and limit the opportunities of women, indigenous peoples, people with disabilities, lesbian, gay, bisexual, transgender and intersex (LGBTI) people and other marginalised groups.

And despite positive developments in other regions, there is patchy progress towards the abolition of the death penalty in countries across the Asia Pacific. In 2015, of the 1998 death penalties (excluding China) imposed by courts in countries around the globe, 855 were carried out in Asia.

Meanwhile, a State-sanctioned 'war on drugs' in the Philippines has seen thousands of people killed at the hands of police and vigilante groups over the past year.

The role of national human rights institutions

While progress has been made in tackling some important global human rights challenges, for example, the number of people living in extreme poverty has been slashed to less than 10 per cent of the world's population, many individuals and communities in the Asia Pacific remain vulnerable to serious violations of their human rights.

National human rights institutions (NHRIs), along with the courts, civil society and State agencies, are a critical part of an effective national human rights protection system. They can investigate complaints and provide redress for individuals who have experienced human rights abuses and holding their governments to account for their responsibilities under domestic and international human rights commitments. Unlike all other regions, the Asia Pacific does not have a comprehensive intergovernmental system to monitor, promote and protect human rights. This makes the role of NHRIs even more important.

NHRIs are established, by law or in the constitution, with powers to promote and protect human rights in their respective countries. They hold a unique position, operating independently from both government and civil society but maintaining constructive relationships with both. NHRIs do not compete with or take the place of other domestic institutions and mechanisms, such as the courts, but rather complement these institutions and mechanisms in their work.

Specifically, independent and effective NHRIs help bridge the 'protection gap' between the rights of individuals and the responsibilities of the State by:

- **Monitoring the human rights situation** in the country and making their findings available to the public
- **Providing advice to government** so that laws and policies reflect international human rights standards
- **Receiving, investigating and resolving complaints** so that victims of human rights violations can seek redress
- **Delivering human rights education programs** that help change attitudes and behaviour
- **Engaging with the international human rights community** to share information, highlight systemic or emerging issues and then advocate for recommendations that can be made to their State.

The Paris Principles (Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights)[1] set out the minimum standards required by NHRIs to be considered credible and to operate effectively. They include the need for a broad-based mandate, guarantees of independence, autonomy from government, pluralism of members and staff, adequate powers of investigation and adequate resources.

The Paris Principles were developed at workshop of NHRIs convened by the UN Commission on Human Rights and held in Paris, France, from 7-9 October 1991. The UN Commission on Human Rights endorsed them in 1992[2] , and the General Assembly in 1993. Since that time, they have become the standard against which NHRIs are assessed for recognition and

1 General Assembly resolution 48/134. The full text of the Paris Principles is available at http://www.asiapacificforum.net/support/what-are-nhris/paris-principles/.

2 Commission on Human Rights resolution 1992/54.

participation in the international human rights system and are 'the test of an institution's legitimacy and credibility' (Office of the High Commissioner for Human Rights 2010: 7). In the years since the Paris Principles were adopted, there has been a five-fold surge in the number of NHRIs operating around the globe; from fewer than 20 in 1991 to 121 today, of which around 78 (65%) are recognised as compliant with the Paris Principles.[3]

A coalition for change

The Asia Pacific Forum of National Human Rights Institutions (APF),[4] established in 1996, has played a pivotal role in supporting the establishment of NHRIs in the region, as well as strengthening existing NHRIs to be strong and effective advocates for the human rights of all people. It is one of four regional coordinating committees of NHRIs. Equivalent bodies have been established to support the NHRIs of Africa, the Americas and Europe.[5] However, the APF is the oldest and most developed of these regional bodies.

The APF was established as an informal association at a regional workshop of NHRIs, held in Darwin, Australia, from 8-10 July 1996, which brought together representatives from four NHRIs operating in the Asia Pacific at that time; Australia, India, Indonesia and New Zealand.[6] The framework of cooperation that is the hallmark of the APF today was evident in the Larrakia Declaration,[7] issued at the end of that first meeting, which stated:

That the promotion and protection of human rights is the responsibility of all elements of society and all those engaged in the defence of human rights should work in concert to secure their advancement,

That national institutions work in close cooperation with non-government organisations and, wherever possible, with governments to ensure that human rights principles are fully implemented in effective and

3 A complete list of all NHRIs and their accreditation status is available on the GANHRI website: https://nhri.ohchr.org/.

4 Detailed information about the role and operation of the APF is available at: http://www.asiapacificforum.net/.

5 The other bodies are the European Network of National Human Rights Institutions, the Network of African National Human Rights Institutions and the Network of National Institutions for the Promotion and Protection of Human Rights of the Americas.

6 The Commission on Human Rights of the Philippines was unable to attend the meeting.

7 Available at http://www.asiapacificforum.net/events/apf-1/.

material ways,

That, at the international level, regional co-operation is essential to ensure the effective promotion and protection of human rights, and

That to ensure effectiveness and credibility the status and responsibilities of national institutions should be consistent with the Principles relating to the status of national institutions adopted by the General Assembly that provide that national institutions should be independent, pluralistic and established wherever possible by the Constitution or by legislation and in other ways to conform to the Principles.

In the Larrakia Declaration, members of the newly formed APF agreed to respond to requests from governments in the region for assistance to establish and develop NHRIs. They also agreed to a programme of mutual support, cooperation and joint activities to bolster the work of their own institutions. At the conclusion of the meeting, the National Human Rights Commission of India, led by its inaugural Chairperson, Justice Shri Ranganath Misra, offered to host the second meeting of the APF, which was held in New Delhi in September 1997, and included representatives from the Commission on Human Rights of the Philippines.

Since its inaugural meeting, the APF has drawn on the experiences and expertise of those within its member institutions to provide advice to governments and civil society groups across the region on the role, functions, establishment and accreditation of NHRIs. This has included countries as diverse as Cambodia, China, Japan, Laos, Lebanon, Nauru, Palau, Papua New Guinea, the Solomon Islands, Taiwan and Vietnam.

A key priority of the APF is to ensure that new NHRIs are established in accordance with the Paris Principles. It has developed guidelines to assist governments and civil society in the process of establishing NHRIs and, where requested, provides expertise in drafting legislation or reviewing draft Bills to establish NHRIs. This has included contributing to the development of the founding legislation of many current APF members, such as the NHRIs of Afghanistan, Iraq, Jordan, Malaysia, Mongolia, Myanmar, Nepal, Republic of Korea, Samoa, Thailand and Timor-Leste.

From an original membership of four NHRIs, the APF has grown to include 24 members.[8] Of this number, 15 are full APF members (fully

8 Current APF members include the NHRIs of Afghanistan, Australia, Bahrain, Bangladesh, India,

compliant with the Paris Principles) and nine are associate members (not yet fully compliant with the Paris Principles). Other NHRIs within the region that are not yet members of the APF include Fiji, Kyrgyzstan, Pakistan, Turkmenistan and Uzbekistan, although these institutions have participated in selected APF meetings and training programmes.

In the past 18 months, the APF has worked in partnership with the South Pacific Community's Regional Rights Resource Team to conduct scoping visits to Tuvalu, Nauru, the Marshall Islands, the Cook Islands and the Federated States of Micronesia. Progress to establish an NHRI in Tuvalu has been especially swift, with the APF assisting in the preparation of a Bill that was presented to the Parliament in early 2017 and subsequently passed in October 2017. The legislation to establish the NHRI includes explicit protection for the rights of women and girls.

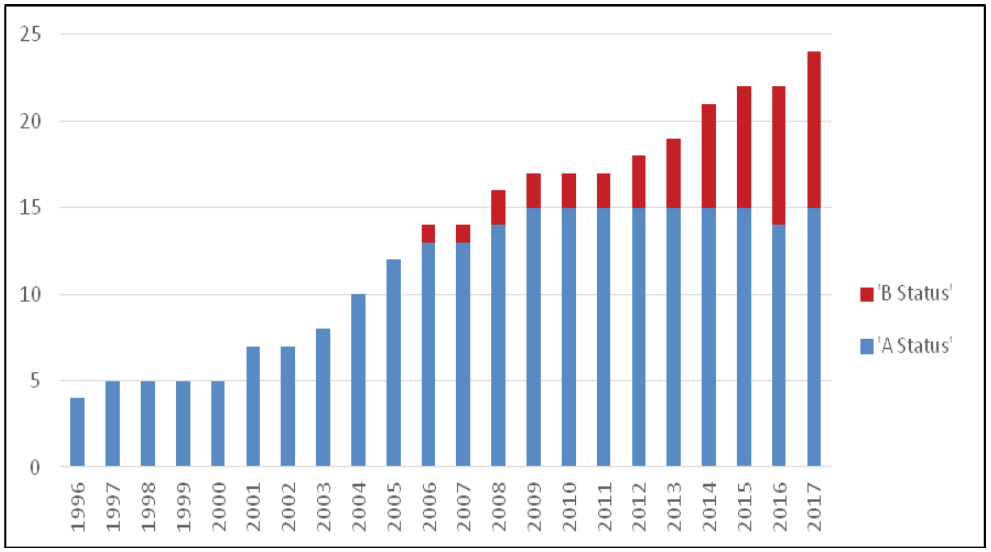
To support its growing work and the requests for assistance from governments and member institutions, the APF was incorporated in 2002 as an independent, non-profit organisation. It established a board of directors, the Forum Council,[9] which decides membership applications, determines the APF's policies and strategic priorities and exercises all the powers under the APF Constitution.[10] The Forum Council reflects the regional diversity of the APF, comprising one voting councillor nominated by each full APF member. The APF also established a small secretariat that reports to the Forum Council and implements its decisions. While this system has worked well since 2002, the APF is currently in the process of developing new governance arrangements in order to better meet the needs of its growing membership. The National Human Rights Commission of India, as a foundation member of the APF, is playing a leadership role in this process.

Indonesia, Iraq, Jordan, Kazakhstan, Malaysia, the Maldives, Myanmar, Mongolia, Nepal, New Zealand, Oman, Palestine, the Philippines, Qatar, Republic of Korea, Samoa, Sri Lanka, Thailand and Timor-Leste.

9 A list of current members of the Forum Council is available at: http://www.asiapacificforum.net/about/governance/forum-council/.

10 Available at: http://www.asiapacificforum.net/resources/apf-constitution/.

Figure 1: APF membership since 1996



Strengthening the capacity of our members

The driving vision of the APF is to help build communities across the Asia Pacific where all people can enjoy their fundamental human rights and live with dignity, free from violence and discrimination. We draw on the unique powers and standing of our members to drive genuine and lasting change. From conducting inquiries and investigating complaints through to awareness raising and advising government on laws and policies, the work of APF members, individually and collectively, is directed towards building fair, just and inclusive communities.

A number of APF member institutions operate in countries where war, conflict and impunity can place communities and vulnerable groups, such as women and ethnic minorities, especially, at grave risk of human rights violations. As the United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein told the annual meeting of the Global Alliance of National Human Rights Institutions (GANHRI) in March 2017, the work of NHRIs in these situations is 'fundamental to securing sustainable peace, with sound, transparent and accountable institutions, and a healthy social fabric'.[11]

The High Commissioner also encouraged NHRIs working in situations of crisis and conflict to:

11 GANHR1 2017 Annual Meeting, 6-8 March 2017, Geneva; Opening Statement by Zeid Ra'ad Al Hussein UN High Commissioner for Human Rights available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21319&LangID=E.

… continue to monitor, document, issue public statements and release reports on human rights violations. It is essential that your institutions continue to carry out their mandates with independence, integrity and impartiality as tensions arise, including during conflict. Collection of data, receiving complaints and investigation of allegations are essential to restore justice, to ensure effective remedies and to combat impunity.[12]

However, NHRIs can face challenges in delivering on their mandate to promote and protect human rights. Some work with a modest annual budget and resources, some require support to bolster the technical capacity of their staff, and some are only newly established and need to build public trust and confidence in their institution. One of the primary goals of the APF is to provide advice and assistance so that member institutions can be as effective as possible in their work to investigate, respond to and prevent human rights violations.

The APF's programme of support, which draws on the knowledge, experiences and good practice developed by member NHRIs, includes:

- **Legal advice and expertise,** especially when member institutions require support to strengthen their founding legislation or are seeking international accreditation
- **High Level Dialogues** that support new leadership teams in APF members to develop their collective goals and chart an agenda for human rights progress
- **Capacity assessments**[13] that enable participating NHRIs to identify practical and strategic steps they can take to strengthen their institutions.
- **Professional development training programmes and resources**[14] to support NHRIs in their efforts to promote and protect the rights of those vulnerable to human rights violations.

The APF invests strongly in the work of the Commissioners and staff of

12 Ibid.

13 Capacity assessments have been run with NHRIs in the Asia Pacific region since 2008. Developed by the APF and delivered in partnership with OHCHR and UNDP, it is a forward-looking process that identifies both the current capacities of the NHRI and those that need to be developed or strengthened over the following five-year period. To date, capacity assessments have been undertaken with 18 APF member institutions, most recently with the National Human Rights Institution of Bahrain in April 2017. Information about the APF's capacity assessment programme is available at: http://www.asiapacificforum.net/support/capacity-assessments/.

14 Information about the APF's professional development training programme is available at: http://www.asiapacificforum.net/support/training/.

NHRIs, especially through the delivery of training programmes that respond to the priorities identified by APF members. While the APF has always provided training in 'core' areas of NHRI responsibility, such as conducting investigations and handling complaints, the current suite of training services has been expanded to include a focus on the role of NHRIs to respond to needs of vulnerable populations, including women and girls, people held in detention, migrant workers, indigenous people and LGBTI people. Training takes place in English and Arabic (since 2014) and we use expert presenters, often drawn from member institutions, to lead the programmes.

In addition to sharing knowledge and skills, APF training programmes are designed to directly inform the practice of participating NHRIs. Training participants are generally asked to develop a set of practical action points on the training theme for implementation by their respective NHRIs. In some instances, the APF provides seed funding to support NHRIs implement human rights protection or promotion initiatives that respond to identified community need. The annual APF member survey indicates that this form of practical support is highly valued by our members.

The APF also provides advice and assistance to member institutions when their NHRI is reviewed for accreditation or re-accreditation by GANHRI's Sub-Committee on Accreditation. Accreditation outcomes are used to determine GANHRI and APF membership status.[15] 'A status' accreditation can confirm or strengthen the credibility of the NHRI. It also grants the NHRI the right to participate independently in the work of the UN Human Rights Council and thereby influence discussions and outcomes of the Council, the human rights treaty bodies, the Universal Periodic Review and the special procedures. The recommendations of these bodies carry significant weight and, as such, NHRIs can leverage the participation rights that come with 'A status' accreditation to deliver tangible benefits or vulnerable communities in their respective countries.

Building partnerships across the region

One of the great strengths of the APF is the very high level of

15 NHRIs can be accredited as 'A status' (full compliance with the Paris Principles) or 'B status' (not fully in compliance with the Paris Principles or has not yet submitted sufficient documentation to make that determination). To ensure consistency and to minimise duplication, the APF considers the accreditation decisions of GANHRI to determine APF membership status. Full membership of the APF is equivalent 'A status' accreditation and associate membership is equivalent to 'B status' accreditation.

collegiality that exists between member institutions. Despite the diverse social, cultural and political environments in which they operate, APF members are committed to sharing their expertise, exchanging information and working collaboratively to address common human rights challenges. This includes both bilateral programs of engagement between NHRIs to target specific cross-border human rights violations (such as human trafficking or the treatment of migrant workers) and developing and sharing effective methodologies to identify and counter the root causes of human rights violations.

For example, the NHRIs of Australia and India were early pioneers of using national inquiries[16] as a tool to investigate systemic discrimination and human rights violations, educate the broader community and engage with law and policy makers on a programme of reform. In Australia, this has included landmark national inquiries on the rights of people with mental illness (1993) and on the separation of Aboriginal and Torres Strait Islander children from their families (1997), while the National Human Rights Commission of India has conducted national inquiries on the right to food (2004) and to health care (2004) that have had far-reaching influence.

Drawing on their experiences, and with tailored APF support and training, a number of NHRIs in the region have conducted powerful national inquiries that have exposed injustice, delivered redress for individuals and included recommendations to prevent further violations. These national inquiries have addressed issues as diverse as torture in places of detention (Mongolia), rape and 'honour killings' (Afghanistan), land rights of indigenous peoples (Indonesia, Malaysia) and the rights of transgender people (New Zealand).

On 10 December 2016, the Ombudsman of Samoa launched a national inquiry to identify the factors that have contributed to the widespread incidence of family violence in the Pacific island nation, as well as to improve support for the women and children affected. The Ombudsman of Samoa first drew attention to the disturbingly high levels of violence and abuse, including the sexual abuse of children, in his 2015 State of Human Rights Report. The APF has provided financial and technical assistance to support the NHRI conduct this national inquiry, including training for staff of the Office.

16 See APF and Raoul Wallenberg Institute of Human Rights, *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation* (2012); available at: http://www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/.

In addition to sharing examples of good practice, the APF has sought to harness the extensive legal expertise that exists within its member institutions and their national and regional networks. In 1999, the APF established an Advisory Council of Jurists (ACJ) to provide legal advice on entrenched or emerging human rights issues identified by the Forum Council. The establishment of the ACJ was also a reflection of the value that APF members placed on having access to independent, authoritative advice on international human rights issues and for the development of regional jurisprudence relating to the interpretation and application of international human rights standards.

Made up of a group of eminent jurists nominated by APF members, the ACJ has considered a wide range of human rights issues including business and human rights, terrorism and the rule of law, prohibitions on torture and trafficking, the right to education, and the impact of the environment on human rights.[17] Each report prepared by the ACJ includes a thorough examination of the issue, as well as practical recommendations to assist NHRIs in their efforts to promote and protect human rights in their own countries and in partnership across the region.

The reports of the ACJ continue to have currency. The 1999 ACJ report on the death penalty was updated in 2016 to highlight the pivotal role that NHRIs can play to reduce the use of the death penalty in retentionist countries; for example, by making recommendations to amend their State's criminal code, by monitoring trials in all capital cases and by monitoring pre-trial and post-trial detention. It will be a key point of reference, in current efforts initiated by APF members, to work together to lobby governments in the region to move towards a de facto moratorium or the eventual abolition of the death penalty.

The APF has also sought to develop innovative practice-based approaches to address some of the most intractable human rights challenges in the region. In 2013, the APF and the Association for the Prevention of Torture began a three-year project to strengthen the capacity of NHRIs in the Asia Pacific to prevent torture and other ill treatment. Funded by the EU, the project included a series of tailored training programs for APF members and the establishment of a regional network of Torture Prevention Ambassadors.

17 A full list of references considered by the ACJ since its establishment is available at: http://www.asiapacificforum.net/support/advice-and-expertise/acj/.

Nine Torture Prevention Ambassadors, representing NHRIs from seven countries across the region, Australia (two), Maldives, Mongolia (two), New Zealand, Philippines, South Korea and Timor Leste, took part in the programme. Each Torture Prevention Ambassador was tasked with planning and implementing a project to identify and address the root causes of torture and ill treatment in their respective countries. They were assigned an expert mentor to provide support and advice and they also received a small amount of seed funding to implement their projects.

At the conclusion of their projects, each participating NHRI could point to tangible outcomes that would benefit persons deprived of their liberty. These results were recorded in the Torture Prevention Ambassadors Good Practice Report,[18] launched in Geneva in June 2016. The group also delivered an oral statement to the 32nd session of the UN Human Rights Council,[19] highlighting the vital contribution of NHRIs in the fight against torture and ill treatment. Based on the success of the Torture Prevention Ambassadors project, the APF intends to use a similar methodology to address other pressing human rights issues in the Asia Pacific region.

Bringing about change on complex issues is difficult, long-term work. It also involves many committed groups and individuals working together. Recognising this reality, the APF has also sought to create opportunities for representatives of NHRIs to build constructive partnerships with civil society organisations, most recently to respond to the shocking levels of violence, harassment and discrimination experienced by LGBTI people in countries across the Asia.

In 2016, the APF and UNDP Asia Pacific Regional Hub launched an 18-month program of support to equip our members with additional knowledge and tools to bolster their work with LGBTI communities. The partnership has delivered:

- Training for 60 representatives from NHRIs and LGBTI organisations in South Asia, South East Asia and the Pacific

18 APF and the Association for the Prevention of Torture, *The Torture Prevention Ambassadors' Good Practice Report: Good Practices from National Human Rights Institutions* (Sydney, 2016); available at: http://www.asiapacificforum.net/resources/tpa-good-practice-report/.

19 The statement, delivered on 20 June 2016, highlighted the role of NHRIs to support States in their efforts to prevent torture and ill-treatment; available at: http://www.asiapacificforum.net/resources/statement-torture-prevention-ambassadors-human-rights-council/.

• Guidelines to support NHRIs in their efforts to mainstream LGBTI human rights considerations into their strategic plans and work programs[20]

• A world-first publication on human rights in relation to sexual orientation, gender identity and sex characteristics[21]

• An international conference to mark the 10th anniversary of the adoption of the Yogyakarta Principles.[22]

The training courses and the relationships that were established between participants, have helped sparked new education and outreach programmes within APF members; for example, training on human rights and sexual orientation and gender identity for police in Pokhara, central Nepal (April 2017), and, in September 2017, Indonesia's Attorney-General's Office announced that it had rescinded a job notice that had barred lesbian, gay, bisexual, and transgender applicants, following advocacy by the Indonesian National Commission on Human Rights (Komnas HAM).[23]

Influencing human rights on the international stage

As part of their role to drive change at the national level, NHRIs are increasingly turning to the international human rights system to share information, draw attention to pressing issues and advocate for recommendations that can be made their States.

APF members are active and consistent contributors to the work of the Human Rights Council and its mechanisms, including the Universal Periodic Review, the human rights treaty bodies and the special procedures.

The fact that NHRIs have an independent voice in these mechanisms is a direct result of advocacy efforts by the APF and partner organisations

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20 APF, *Part of our Everyday Work: NHRI Guidelines for Mainstreaming SOGISC Work* (2017); available at: http://www.asiapacificforum.net/resources/guidelines-mainstreaming-sexual-orientation-gender-identity-and-sex-characteristics-work/

21 APF and UNDP, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics A Manual for National Human Rights Institutions* (Sydney, 2016); available at http://www.asiapacificforum.net/resources/manual-sogi-and-sex-charactersitics/.

22 'Conference on the Yogyakarta Principles: What have we learnt and where to now?', Bangkok, Thailand, 25-26 April 2017; conference details available at: http://www.asiapacificforum.net/events/conference-yogyakarta-principles/.

23 See Human Rights Watch, 'Indonesia's Attorney General Rejects LGBT Discrimination' (14 September 2017); available at: https://www.hrw.org/news/2017/09/14/indonesias-attorney-general-rejects-lgbt-discrimination.

when the Human Rights Council was established in 2006 to replace the former Commission on Human Rights.

The APF,[24] individual NHRIs, OHCHR and the NGO community developed a coordinated strategy to ensure that the unique role and status of NHRIs, separate from both government and from civil society, was recognised when the rules and procedures of the new Human Rights Council were being drawn up, often in meetings behind closed doors.

NHRIs from Australia, Egypt, France, Germany, India, the Philippines, South Korea and New Zealand, among others, came to Geneva to lobby their governments, while NHRIs that were unable to visit Geneva sent messages to their government representatives. Their combined efforts made a decisive impact. Governments that had not previously spoken about the role of NHRIs during the negotiation process began to mention them in positive terms.

'A status' NHRIs and their coordinating committees were ultimately granted independent participation rights in the new Human Rights Council. It was a major advance from the position of NHRIs in the previous UN Commission on Human Rights, where they had no guaranteed rights to speak and, in addition, could only speak on one agenda item.

While 'A status' NHRIs are able to contribute to the work of the Human Rights Council in Geneva, participation in the mechanisms of the General Assembly in New York has been extremely limited.

The APF and GANHRI have been at the forefront of a global campaign to secure the independent participation of NHRIs in these UN bodies since 2009, initially with the UN Commission on the Status of Women and more recently with the UN Permanent Forum on Indigenous Issues, the UN Open Ended Working Group on Ageing and the Conference of State Parties to the Convention on the Rights of Persons with Disabilities.

This advocacy was rewarded in December 2016 when the UN Open Ended Working Group on Ageing became the first General Assembly mechanism to formally include NHRIs in its work. It is an historic achievement and one that sets an important precedent for the independent participation

24 Pip Dargan, Deputy Director of the APF secretariat, was stationed in Geneva for six weeks to represent the APF and its members, as well as acting as temporary representative of the Chairperson of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

of NHRIs in other bodies of the General Assembly.

'Darker and more dangerous': Advancing human rights in a changing world

Addressing the 36th session of the Human Rights Council, United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein described the threats to human rights principles as becoming 'darker and more dangerous'. He shared his concern that governments, in their attempts to address the genuine risk posed by terrorism, extremist groups and localised conflict, may be unwinding the human rights protections that have been developed since the adoption of the Universal Declaration of Human Rights in 1948:

> Left on their current course, it will be governments who will break humanity. Terrorists may attack us, but the intellectual authors of those crimes will then often sit back and watch as governments peel away at human rights protections; watch, as our societies gradually unravel, with many setting course toward authoritarianism and oppression.[25]

Kenneth Roth, Executive Director of Human Rights Watch, contends that this 'dangerous trend [towards authoritarianism] threatens to reverse the accomplishments of the modern human rights movement' (2017: 1), while Philip Alston, UN Special Rapporteur on extreme poverty and human rights, has stated that the 'the challenges the human rights movement now faces are fundamentally different from much of what has gone before' (2017:2).

In this climate of growing opposition to human rights standards, NHRIs can often be a target for threats and reprisals when carrying out work in accordance with their legal mandate:

If they are to perform their functions independently and fearlessly, [NHRIs] may, indeed, almost certainly will, antagonise government officials, who may be tempted to retaliate by taking measures that undermine the status and functioning of the institution, whether by reducing budgets, imposing restrictions on the exercise of powers, or appointing as members persons with close connections with ruling political party interests (Byrnes et al 2008: 65).

25 'Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries' (11 September 2017); available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E.

This has been the unfortunate reality for a number of NHRIs in the Asia Pacific region in recent years. They have faced reprisals and threats to their independence for undertaking their work with integrity and impartiality and, in the process, holding their governments to account for their international human rights obligations.

In September 2014, the Supreme Court of the Maldives launched a suo moto case against the five members of the Human Rights Commission of the Maldives for treason. The case centred on comments, included in the Commission's report to the Universal Periodic Review process, which citied an assessment of the Supreme Court of the Maldives by UN independent experts.

The Australian Human Rights Commission and, in particular, its President, faced sustained criticism following the release in February 2015 of its report documenting violation of the rights of children in Australia's immigration detention centres. The scale and intensity of this criticism were unprecedented in Australia and came from the highest levels of government, including the then Prime Minister, the Attorney-General and the Minister for Immigration.

Most recently, the Commission on Human Rights of the Philippines has been the subject of threats and attacks by the country's President and other senior officials for its investigation into deaths linked to the government's 'war on drugs'. In May 2017, President Duterte threatened to 'behead' human rights advocates who criticised the country's human rights record, and in September 2017 the House of Representatives overwhelmingly voted to slash the Commission's annual budget from US$15 million to just US$20, stripping it of the ability to function.[26]

The APF is gravely concerned whenever NHRIs in the region face reprisals or threats to their independence. We work in partnership with other human rights bodies, including GANHRI and OHCHR, to provide support and assistance to the concerned NHRI. The APF also reminds governments of the unique role of NHRIs and the critical importance of ensuring their financial and functional independence, as set out in the Paris Principles.

In September 2014, the UN Human Rights Council adopted a

26 The Commission was able to mobilise community opposition to the proposed cuts to its annual budget and they have since been reversed.

resolution [27] on NHRIs, which stressed that NHRIs 'should not face any form of reprisal or intimidation … as a result of activities undertaken in accordance with their respective mandates', including their engagement with the international human rights system. The resolution was co-sponsored by 76 States, including Australia and the Maldives. The APF will continue to work with our members, the international community and other partners to remind governments of the content and spirit of this resolution.

More broadly, the APF will support member institutions to be strong and effective defenders of human rights by strengthening their capacity to monitor, investigate and advocate and by encouraging them to build alliances within their countries and across borders to affirm the basic values that underpin human rights. These partnerships should be as broad as possible, with the civil society, with parliamentarians, with business, with the media, with academics and with faith leaders.

As Roth notes, 'values of human rights depend foremost on the ability to empathize with others' (2017: 14). The work of the APF, through our member institutions, is focused on identifying and then advocating for practical steps that help create communities where each person can live with dignity and make choices for their life.

As the social and political climate threatens to harden against human rights, in the Asia Pacific region and across the globe, it is more important than ever to vigorously defend these values and to ensure that NHRIs are open, accessible and trusted institutions, committed to operating by these values and responding to those who call on them. This spirit of inclusion is reflected in the words of Justice K.G. Balakrishnan, former Chairperson of the National Human Rights Commission of India, who told the APF in an interview:

We can help a large number of poor people in the country … they cannot go to court, they cannot hire an expensive lawyer, they are not accustomed the system of litigation. So they come to us and we can render assistance … Working with the National Human Rights Commission is a very challenging task but it gives immense satisfaction to any person who is interested in the welfare of the people of this country.

27 UN Document No. A/HRC/27/L.25.

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Third Universal Periodic Review of India at the UN Human Rights Council, 2017

- NHRC India Report for UPR-3
- Oral Statement Made by NHRC, India at the Plenary Session
- Recommendations of Members of the UN Human Rights Council to the Government of India
- Recommendations accepted by the Government of India

NHRC, India Submission to the UN Human Rights Council for Third Universal Periodic Review of India

Introduction

An independent and active judiciary, a free media and a strong, watchful civil society are the sentinels guarding the human rights challenges in India which is a constitutional democracy. India is also a federal country with 29 States which have designated power under the Constitution. The way they perform either contributes or diminishes the protection of human rights.

2. For purposes of monitoring the implementation of UPR II recommendations, NHRC, India adopted a process, which is at **Annexure-I.**

Status of Implementation of Recommendations in UPR II

3. Given below is the NHRC assessment on the progress made by the Government on the recommendations it accepted at the -UPR II as per A/HRC/21/10/Add.1 dated 17.09.2012 :

Civil and Political Rights

Recommendation : 21

4. The Bill introduced in Parliament in 2010 to enable CAT ratification has lapsed with the dissolution of 15th Lok Sabha in May 2014. A mendacious view prevails in the Government that existing provisions with slight amendment in the IPC are sufficient to deal with torture. Delay in bringing out the changes in the law as a pre-requisite for ratification of CAT is disquieting as five years have passed without any significant change.

Recommendations : 39 & 40

5. "Human rights" is taught as part of the basic course for Constables, Sub-Inspectors and Deputy Superintendents of Police in different States along with in-service training on "human rights" of 2-3 days duration. Sometimes, "gender" and "child rights" training is interspersed ranging from 2-5 days.

6. Training is uneven across States and needs assessment from the human rights perspective. The training modules need to include the new forms of human rights apart from civil and political rights. It remains low priority among Police Departments and other law enforcement officers.

Recommendation : 4

7. The legal system continues to be dysfunctional with slow disposal of cases and inordinate delay in giving finality to both criminal and civil litigation. While paucity of Judges/Magistrates has often been put forth as a prime reason behind the slow moving system, the polity and judiciary also seem to have no appetite for reforms in court processes and appointment procedures of Judges and business process re-engineering of an archaic system created during the colonial rule.

8. Functioning of legal aid authorities at all levels need to improve to reach the poor/marginalized who suffer long periods of incarceration as undertrials due to inadequate and free but less than quality legal assistance in a ponderously slow legal system.

Economic, Social and Cultural Rights

Women Sexual and Reproductive Health & Rights

Recommendations : 64 & 67

9. Generally tardy in implementation otherwise, recently emphasis has increased on RCH programme under the NRHM. There are still close to 46,500 maternal deaths each year due to causes related to pregnancy, child birth and post-partum period. 8% of maternal deaths are attributed to unsafe abortions.

Recommendations : 16 & 26

10. Progress achieved in recent period is due to programmes like *JSY, JSSK, Dial 102 Emergency Ambulance Services*, nutrition coverage for pregnant and lactating mothers and reduction in anemia through iron and folic acid and vitamin tablets though the pace of decline is not uniform across States. The MMR remains high at 167 for the country as a whole during 2011-2013 as against MDG target of 109 by 2015.

11. IMR has come down to 39 per 1,000 live births in 2014 as against 50 in 2009 but it remains high for States like MP, Assam, Odisha and UP. In 2014, U5MR for the country was 45 against 49 in 2013. This may be viewed against the MDG-4 target of 42 deaths by 2015.

Recommendation : 60

12. "Prohibition of Interference with the Freedom of Matrimonial Alliances Bill" to prevent honour killings was supported by several States. However, Government has not proceeded further, even with this anodyne Bill which steers clear of suggesting amendments to IPC for defining honour killings and proposing appropriate punishment. The Bill also does not propose amendment to the Special Marriage Act to remove the 30-day waiting period for registering a marriage. India does not have a law on compulsory registration of marriages. Hence, child marriage and forced marriage goes on with impunity.

Recommendations : 63 & 65

13. 2011 Census indicates CSR at 914 girls against 927 recorded in 2001 Census. The overall rural CSR has also fallen steeply from 934 in 2001 to 919 in 2011, whereas urban CSR has decreased from 906 in 2001 to 902 in 2011 Census indicating girl child being more at risk than ever before.

14. PCPNDT Act, 1994 is in operation to pre-empt sex selective abortions but it suffers from extremely poor implementation with only a few convictions in court of law. Government has initiated the *Beti Bachao Beti Padao* campaign to arrest this trend which appears to be yielding positive dividends.

Women/Other Issues

Recommendations : 11, 51 & 46

15. Government has initiated several steps to integrate gender perspective in various policies/programmes being implemented by its agencies. The approval procedure of Government schemes requires mandatory information pertaining to mainstreaming of gender perspective. Gender budgeting is an important component in this direction. Much more is required in terms of definite targeting. across different sectors and geographies which stubbornly buck the trend of improvement.

16. Budgetary allocation from Central Government to schemes Ike ICDS has recently been reformatted with higher responsibility on the State Governments. This may have repercussions on MCH and nutrition services with the States showing reluctance to provide for their part.

17. While amendment to the SC & ST (PoA) Act, 1989 was made in 2015, insufficient efforts were made to review the legislations - ITPA, 1956; DPA, 1961; ERA, 1976; and PWDV, 2005, resulting in non-fructification of amendment process. NCRB data shows that despite a strong law in place, 47,064 crimes against SCs and 11,451 crimes against STs were committed in 2014.

Recommendation : 52

18. RTE, 2009 is being implemented in 25 out of 29 States guaranteeing education of children between 6-14 years till Class 8. Affirmative action in education has resulted in delayed marriages with accompanying dividends. However, women labour participation rates do not seem to show strong reversal.

19. The Reservation Bill for Women in Parliament continues to linger though several States have brought in reservation for women in Panchayats and State Legislative Assemblies.

Recommendations : 35, 49, 58 & 66

20. The Criminal Law (Amendment) Act, 2013 was enacted redefining rape and incorporating additional provisions on violence against women. along with stringent punishments. Yet, VAW has not shown strong trends of abatement as NCRB statistics shows 3,37,922 crimes- against women including 36,735 cases of rape in 2014. The POCSO, 2012; and SHWW, 2013 have been enacted. While legal regime stands strengthened, allegations of sexual offences against minors have not shown signs of abatement. The JJA, 2015 has also been amended. However, an allegedly retrograde provision has been added which enables adjudication of cases related to children between 16-18 years to courts.

21. Communal violence witnessed a 17% rise in 2015, with 751 incidents recorded across the country as against 644 in 2014. 'Prevention of Communal Violence (Access to Justice and Reparations) Bill, 2013' is yet to become a law.

Recommendation : 29

22. Appropriate mechanisms in terms of policies, acts and programmes for different categories of vulnerable groups are in place and monitoring responsibility is carried out by the Ministries. Ombudsman function is discharged by respective Commissions meant for Women, Minorities, Scheduled Castes, Scheduled Tribes and Children both at the national and state level.

Recommendations : 5, 17, 28 & 42

23. Government's initiatives towards promoting gender equality include, enhanced maternity leave benefits for working women from 12 weeks to 26 weeks through amendment of the MBA, 1961 and allowing enhanced entry of women in 'Armed Forces. Gender sensitization programmes among Police and law enforcement agencies is being emphasized.

Child Labour

Recommendation : 13

24. While NCLP project is continuing across 270 endemic districts in 20 States, rehabilitation of released children from labour is highly unsatisfactory. Many children after being released, return back to work for want of livelihood avenues to their households.

Protection of Children

Recommendation : 18

25. While the NCPCR and respective State Commissions exist as also the ICPS including Childline services is being implemented, a large number of children continue to lead lives on streets and without families devoid of dignity and adequate scope for development.

Recommendations : 3 & 37

26. Incidence of child marriage continues, inspite of the PCMA, 2006 being in place due to ineffective implementation and traditional customs and practices. There is no survey to arrive at the base line to make a meaningful impact in eliminating child marriage.

27. Opportunities for consultations on child rights issues have increased due to initiatives taken by Government as well as concerned human rights institutions.

Children - Right to Education

Recommendations : 25, 31, 34, 44 & 57

28. RTE guarantees education to children in the age group of 6-14 years. Gaps persist in basic infrastructure in schools. Learning outcomes in both government and private schools also indicate a dismal picture as per the ASER conducted by an NGO.

Trafficking

Recommendations : 6, 7 & 8

29. Criminal Law (Amendment) Act, 2013 was brought into force wherein Section 370 and 370A IPC covers trafficking.

30. However, trafficking, both within the country and across the borders continues. ATUs established by States have been less than effective in preventing such activities. Rehabilitation activities as well as counseling and other services like legal aid are inadequate. Gol has been implementing *Ujwala* scheme for prevention, rescue and rehabilitation of trafficking victims with the help of NGOs.

31. ITPA too needs to be repealed by Government.

Vulnerable Groups

Recommendation : 12

32. Allocation of resources by Central Government for subjects touching economic/social rights assigned constitutionally for States has gone up by almost ten times during the period 1999-2000 to 2012-13 signifying serious efforts to accelerate social development. However, deprivation levels among vulnerable groups still remain high.

Freedom of Religion

Recommendation : 32

33. Freedom of religion to everyone is guaranteed by the Constitution of India. However, there is need for the federal and State Governments to be more vigilant in view of some of the recent happenings in a few States.

Social Welfare Programmes

Recommendations : 1, 10, 20, 22, 24, 41, 47 & 56

34. Efforts have been made towards poverty alleviation and incidence of poverty for the country has declined from 37.2%. in 2004-05 to 21.9% in 2011-12. Though sharp decline in rural poverty has been witnessed, further work needs to be continued. Poverty alleviation programmes like MGNREGS, NSAP, NRLM, and NRuM require further improvement.

35. A comprehensive ICPS is being implemented across the country but problem areas persist among children homes, street children, out of school children, requiring urgent attention.

36. Agrarian crises in many parts of the country and inadequacy of Government safety net have driven poor farmers into debt traps resulting in large number of suicides.

Health, Education & Employment

Recommendations : 9, 23, 33, 45, 54 & 62

37. In India, total healthcare expenditure as a proportion of GDP is 4.7% as against 9.94% for the world. Out of this, Government share is 30% which converts to 1.4% of GDP. On an average, large percentage of family healthcare expenditure is met out-of-pocket as against global experience of pooling arrangement like insurance and State provided healthcare. Health emergencies often push families into poverty.

38. While RTE has come into vogue, with higher budgetary outlays, positive impacts are yet to be assessed.

39. Allocation to MGNREGS has been almost static compared to the previous couple of years. NRLM for reducing poverty by enabling poor households to access self-employment opportunities was allocated an amount of 4,000 crore rupees in 2014-2015 which was same in previous year.

Recommendation : 48

40. SBA, a national cleanliness mission, is in place to address this area. Government has taken initiatives to accelerate sanitation coverage and access to safe and sustainable drinking water in rural areas. However, large number of habitations/households does not have access to safe quality drinking water sources and also suffer from problems of arsenic and fluoride contamination. Open defecation is still rampant especially in rural areas. Large projects in the pipeline, when implemented, will still leave huge areas with quality problems.

Food Security

Recommendations : 36 & 53

41. Significant, progress has been achieved towards implementation of the NFSA, 2013 in the States. 34 ,States/UTs have implemented the Act in various measures. Efforts have also been made towards strengthening of the public distribution system in accordance with the provisions of the Act. However, identification of beneficiaries is a problem area as States use different methodologies leading to confusion. Net result is continued food insecurity in some tribal pockets.

Right to Work & Labour

Recommendation : 3

42. The entire country is covered except for municipal areas by MGNREGS, a wage employment programme. Richer States like TN and AP tend to have better absorptive capacity and these get more funds than poorer States like Bihar. The average number of days for which the households have been provided employment has been 50 days against maximum 100 days. Many studies also point to weaknesses like delays in wage payment and non-payment of unemployment allowance.

Recommendation : 38

43. While Government has been taking initiatives to promote social security through schemes like PMSBY, PMJJBY, APY and RSBY, there is need to do much more as 93% of the workforce is in unorganized sector, without social security and safety net. The UWSSA, 2008, is in place, needs to be implemented more effectively by the States.

44. The implementation of the BLSA, 1976 is weak. More effective implementation is also needed for legislations like IMWA, 1979 and MWA, 1948.

Recommendation : 59

45. Women, especially from vulnerable sections, continue to be discriminated both in terms of work and wages as are persons with disabilities despite legal and constitutional provisions.

Disabled and Elderly

Recommendations : 55 & 15

46. Implementation of the PWD Act, 1995 has not really been effective as substantial action needs to be taken by States. As a result, accessibility and equal opportunities for PWDs is still a far cry. Recently, GoI has launched a campaign for their accessibility. Nearly half of children with disabilities do not have access to specialized education. Illiteracy is particularly high for children with visual, multiple and mental disabilities. Share of children with disabilities in out of school children is high. Special schools are few and cater to limited number of children. Similarly, elderly face problems of financial security/personal safety, abuse and even abandonment.

47. Implementation of MWPSCA, 2007 falls far short of desired effect.

Cooperation with UN System/Special Procedures

Recommendation : 43

48. Government has taken positive steps. However, it needs to ratify the CED. It also should submit India country reports long due to UN Human Rights Committee and ESCR Committee.

Recommendation : 19

49. The country had visits by UN Special Rapporteurs on Extra-judicial Killings, VAW and Right to Adequate Housing during recent years.

Miscellaneous

Recommendation : 2

50. Human rights issues are part of social-sciences syllabi of CBSE. Incorporation of HRE into education system in entirety, i.e., in the State Education Board's curricula requires systematic emphasis. Draft new Education Policy also does not mention about HRE.

Recommendation : 61

51. Press Council of India under the PCA, 1978 is mandated to take immediate action on complaints of violence against journalists. However, incidents of violence against them have been reported.

Recommendation : 50

52. Civil society in India, as on previous occasions, actively participated in present UPR process.

Recommendation : 14

53. Section 377 IPC criminalizes same sex relations. Though the Delhi High Court had decriminalized these relations, it was overturned by the Apex Court. The Apex Court is seized of the matter again.

Recommendation : 27

54. Several human rights institutions have been set-up at National and State level. There is need for better coordination among these institutions and Government on one hand and among human rights institutions on the other.

Conclusion

55. The turmoil in Kashmir is on the spotlight now. It is augmented by trans-border terrorism and Jihadi funding from the neighbouring country. The use of plastic pellets by CAPFs is controversial. NHRC has taken up a case on the matter but withholds its comments now because human rights of both sides are involved, when young crowd pelt stones at the Police personnel.

56. The sporadic instances of violence concerning eating of beef have been reported in different parts of the country. The fringe of the right wing Hindutva Brigade is alleged to be behind these incidents which are few and far between. Though disquieting, it is too early to assess as to be a threat to secular and pluralistic structure of Indian society.

Annexure - I

Process Adopted by NHRC, India for Monitoring the Implementation of 67 Recommendations

First and foremost, NHRC, India developed a framework indicating action required on each of the 67. Recommendations along with its monitorable outcomes as it felt this would not only provide information about the existing ground realities on a range of issues but also facilitate in providing a road map for improving the gaps therein. The 67 recommendations were grouped under 16 major heads[1]. This exercise was initiated in October 2012 and continued in 2012 and 2013 with significant stakeholders who included among others national human rights institutions and civil society organizations. Simultaneously, the NHRC wrote to the respective Ministers of all the relevant Ministries to inform the progress it had made towards implementation of UPR-1 and UPR-2 recommendations.

The framework was completed in February 2014 wherein it identified the specific Union Ministries[2], 16 in all, on whose part action was required. The NHRC further ensured that the completed framework was forwarded to all these Ministries and other stakeholders besides posting it on its website (www.nhrc.nic.in) for wider dissemination. As reponse was received from only four Ministries (Minority Affairs Food & Public Distribution, Justice and Rural Development), NHRC again addressed Letters to the concerned Secretary of each of the 16 Ministries including NITI Aayog calling for a meeting in

1 Convention Against Torture, Police, Judiciary, Women/Sexual and Reproductive Health and Rights, Women/Other Issues Concerning, Child Labour, Protection of Children, Children - Right to. Education, Trafficking, Vulnerable Groups. Freedom--of Religion, Social Welfare Programmes, Right to Work and Labour, Disabled and Elderly, Cooperation with UN System/Special Rapporteurs, and Miscellaneous.

2 Ministries of Home Affairs; Rural Development; Women and Child Development; Human Resource Development; Law & Justice; Health & Family Welfare; Minority Affairs; Labour & Employment; Social Justice and Empowerment; External Affairs; Consumer Affairs. Food & Public Distribution; Drinking Water & Sanitation; Information & Broadcasting; Housing and Urban Poverty Alleviation; Finance; and Tribal Affairs.

the Commission. These meetings were convened by the Secretary General while some by the Joint Secretary (Training & Research) during the first half of 2015. In these meetings a brief orientation was given about the UPR along with the framework developed by NHRC. This was followed by a discussion on the action taken by their Ministry on the recommendation(s) pertaining to their work. Despite these efforts and reminders, exact information did not come forth from most of the Ministries, a handful of them failed to submit even this.

Thereafter, NHRC held five regional consultations and a national consultation with representatives of the government, human rights institutions including state human rights commissions (SHRCs), civil, society, technical institutions, academics and experts from the viewpoint of perceiving actual ground realities across the country given the diversity of India. More than 500 people took part in these consultations and the information shared was valuable. In the first and fourth consultation held in Chandigarh and Mumbai, government participation was limited, whereas in the second and third held in Kolkata and Bengaluru, the participation of civil society was poor. The same was also true for SHRCs, substantiating the fact that nothing much had changed so for as they were concerned since 2012.

Annexure - II

Abbreviations

ASER	Annual Survey of Education Reports
AP	Andhra Pradesh
APY	Atal Pension Yojana
ATUs	Anti-trafficking Units
BLSA	Bonded Labour System (Abolition) Act, 1976
CAPFs	Central Armed Police Forces
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBSE	Central Board of Secondary Education
CED	Convention on Enforced Disappearance
CSR	Child Sex Ratio
DPA	Dowry Prohibition Act, 1961
ERA	Equal Remuneration Act, 1976
ESCR Committee	Economic, Social and Cultural Rights Committee
Got	Government of India
HRE	Human Rights Education
ICDS	Integrated Child Development Services Scheme
ICPS	Integrated Child Protection Scheme Infant
IMR	Mortality Rate
IMWA	Inter-State Migrant Workmen Act, 1979
IPC	Indian Penal Code
ITPA	Immoral Traffic (Prevention) Act, 1956
JJA	Juvenile Justice (Care and Protection of Children) Act, 2015
JSY	Janani Suraksha Yojana
JSSK	Janani Shishu Suraksha Karyakram
MBA	Maternity Benefit Act, 1961
MCH	Maternal and Child Health
MDG	Millennium Development Goal

MGNREGS	Mahatma. Gandhi Nation Rural Employment Guarantee Scheme
MMR.	Maternal Mortality Rate
MP	Madhya Pradesh
MWA	Minimum Wages. Act, 1948
MWPSCA	Maintenance and Welfare of Parents and Senior Citizens Act, 2007
NCLP	National Child Labour Project
NCPCR	National Commission for Protection of Child Rights
NCRB	National Crime Records Bureau
NFSA	National Food Security Act, 2013
NRHM	National Rural Health Mission (now known as National Health Mission)
NRHM	National Rural Livelihoods Mission (Aajeevika) National Rurban Mission
NSAP	Rational Social Assistance Programme
PCA	Press Council Act, 1978
PIL	Public Interest Litigation
PMSBY	Pradhan Mantri Suraksha Bima Yojana
PMJJBY	Pradhan Mantri Jeevan Jyoti Bima Yojana
POCSO	Protection of Children from Sexual Offences Act, 2012
PWDs	Persons with Disabilities
PWD Act	Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995
PWDV	Protection of Women from Domestic Violence Act, 2005
RCH	Reproductive and Child Health
RSBY	Rashtriya Swasthya Bima Yojana
RTE	Right of Children to Free and Compulsory Education Act, 2009 .

SBA	Swachh.Bharat Abhiyan
SC & ST (PoA) Act, 1989	Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989
SHWW	Sexual Harassment of Women at Workplace, 2013
TN	Tamil Nadu
U5MR.	Under Five Mortality Rate
UP	Uttar Pradesh
UWSSA	Unorganized Workers' Social Security Act, 2008
UTs.	Union Territories
VAW	Violence Against Women

Oral Statement Made by NHRC, India at the Plenary Session

As the National Human Rights Commission, India had observed in its submission for this current review, challenges to the safeguarding of human rights in the country remain inspite of an independent and active judiciary, free media and an alert civil society.

It was also observed that several recommendations received during the second review are yet to be implemented. It is hoped and expected that there will be better implementation of the recommendations being accepted by the Government of India in this review.

The National Human Rights Commission, India proposes to work with both, the Government as well as the civil society towards implementation of these recommendations. It will also strive to disseminate and give publicity to the outcome of this review within the country amongst all the stakeholders for this purpose.

We, in NHRC - India, have examined the recommendations in detail. They pertain to both categories, civil and political rights as well as economic, social and cultural rights. They also cover the rights of disadvantaged sections of society. Several of them do have relevance to the human rights situation of our country and hence, require serious implementation. We had addressed the concerned Ministry in Government of India calling upon them to expeditiously examine all the recommendations for early decision.

We have also found that the recommendations are more in aggregate number and received from a larger number of participating countries. This trend is also indicative of coming to maturity of the UPR mechanism. At the same time, the process of successive reviews will have utility only if Governments work in a steadfast manner to achieve the implementation of recommendations they accept.

In the end, it is reiterated that the National Human Rights Commission, India will work with all stakeholders to assist in the process of implementationof all recommendations before the next review.

Recommendations of the Members of the UN Human Rights Council to the Government of India

1. Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (Estonia);

2. Consider adhering to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, and abolish the death penalty (Portugal)

3. Ratify the Optional Protocols to the International Covenant on Civil and Political Rights, to the Convention on the Elimination of All Forms of Discrimination against Women and to the Convention on the Rights of Persons with Disabilities (Guatemala);

4. Consider withdrawing the remaining declarations and reservations to the Convention on the Elimination of All Forms of Discrimination against Women (Rwanda);

5. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as previously recommended (Botswana);

6. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment urgently and in accordance with its commitments from the 2012 universal periodic review (Norway);

7. Ratify, before the next universal periodic review cycle, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Czechia);

8. Finalize the efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as other international instruments, as recommended by relevant treaty bodies (Bulgaria);

9. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Greece) (Guatemala) (Italy)

(Lebanon) (Montenegro) (Mozambique) (South Africa) (Sweden) (Turkey) (Ukraine) (United States of America);

10. Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Portugal);

11. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ensure that the instrument of ratification is consistent with the Convention (Australia);

12. Swiftly ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, ensure that domestic legislation defines torture in line with international A/HRC/36/10 12 standards, and extend an invitation to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for an official visit to the country (Germany);

13. Proceed with early ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the International Convention for the Protection of All Persons from Enforced Disappearance (Japan);

14. Ratify the Convention against Torture as soon as possible and further, ratify the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) of the International Labour Organization and the Optional Protocols to Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights and abolish the death penalty as recommended by the Law Commission of India (Ireland);

15. Finalize the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance (Kazakhstan);

16. Redouble its efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Republic of Korea);

17. Speed up the process for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Israel);

18. Advance towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Chile);

19. Consider completing the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Burkina Faso);

20. Complete the process of preparation for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Russian Federation);

21. Intensify efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Denmark);

22. Strengthen national efforts towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Indonesia);

23. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and swiftly move ahead with the Prevention of Torture Bill (Estonia);

24. Enact the Prevention of Torture Bill currently pending in the parliament in compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Turkey);

25. Adopt the draft law on the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment by complying with established international norms (Madagascar);

26. Adopt the draft law on the prevention of torture and ensure that it complies with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Senegal);

27. Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Uruguay); A/HRC/36/10 13

28. Promptly ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Guatemala);

29. Expedite efforts to ratify the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Sierra Leone);

30. Ratify the International Convention for the Protection of All Persons from Enforced Disappearance (Greece) (Ukraine);

31. Consider ratifying the International Convention for the Protection of All Persons from Enforced Disappearance (Burkina Faso);

32. Accede to and implement the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1951 Convention relating to the Status of Refugees and article 7 of the Convention on the Rights of the Child to end statelessness and guarantee nationality for affected children (Kenya);

33. Accede to and fully implement the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness and the 1951 Convention relating to the Status of Refugees (Slovakia);

34. Ratify the Rome Statute of the International Criminal Court (Estonia);

35. Accede to and fully align its national legislation with the Rome Statute of the International Criminal Court (Latvia);

36. Consider ratifying the Rome Statute of the International Criminal Court (Uruguay);

37. Develop a national strategy to tackle exploitative labour practices and to ratify the ILO Protocol of 2014 to the Forced Labour Convention, 1930, and continue to strengthen protections for children (United Kingdom of Great Britain and Northern Ireland);

38. Ratify the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) of the International Labour Organization (Slovenia);

39. Consider ratifying the ILO Domestic Workers Convention, 2011 (No. 189) (Uruguay);

40. Consider acceding to the ILO Worst Forms of Child Labour Convention, 1999 (No. 182) (Uruguay);

41. Ratify the international conventions to which it has committed itself (Madagascar);

42. Ratify other human rights conventions to which India is not yet a State party (Philippines);

43. Ratify the international human rights instruments to which India is not a State party yet (Côte d'Ivoire);

44. Adopt an open, merit-based selection process when selecting national candidates for United Nations treaty body elections (United Kingdom of Great Britain and Northern Ireland);

45. Respond positively to visit requests by the special procedures of the Human Rights Council (Latvia);

46. Put in place a specific mechanism for implementing previous accepted recommendations (Uganda);

47. Request all necessary technical assistance enabling the Government to meet its international commitments (Côte d'Ivoire);

48. Accede to and adapt its national legislation to the Rome Statute, including incorporation of dispositions to swiftly and fully cooperate with the International Criminal Court (Guatemala);

49. Bring into law the Prevention of Communal and Targeted Violence bill (2013) (United Kingdom of Great Britain and Northern Ireland);

50. Accede to and adapt its national legislation to the Arms Trade Treaty (Guatemala);

51. Criminalize marital rape (Portugal) (Sweden);

52. Include a provision in its Penal Code criminalizing marital rape (Australia);

53. Remove the exception relating to marital rape from the definition of rape in the Indian Penal Code and criminalize "honour crimes" (Slovenia);

54. Remove the exception relating to marital rape from the definition of rape in section 375 of the Indian Penal Code (Belgium) (Iceland);

55. Consider removing the exception relating to marital rape from the definition of rape in section 375 of the Indian Penal Code (Namibia);

56. Remove the exception of marital rape from the definition of rape in article 375 of the Penal Code, in line with the efforts already undertaken for the protection of women (France);

57. Criminalize all forms of sexual abuse of girls under 18 years of age, including marital rape and "honour crimes" (Zambia);

58. Take additional steps in criminalizing marital rape (Lithuania);

59. Consider introducing laws to specifically prevent and prosecute "honour" killings and prosecute those that order or sanction violence against women (Namibia);

60. Continue efforts to eradicate child and forced marriage (Peru);

61. Continues its endeavours in promoting and protecting the human rights of all its citizens in an inclusive manner (Nepal);

62. Adopt a national plan on human rights (Kenya);

63. Expand the scope of the Right of Children to Free and Compulsory Education Act and promote human rights education in the school curriculum (Slovakia);

64. Include human rights education in the draft new education policy (Zambia);

65. Continue and step up national efforts to train and guide security staff and other law enforcement officials in the field of human rights (Egypt);

66. In the spirit of its Constitution, which guarantees equal rights to all minorities, further invest in dedicated human rights training of police officials to register and investigate cases of discrimination and violence and to hold them accountable when they fail to do so (Finland);

67. Provide systematic training on women's rights to all law enforcement personnel, medical staff and judicial officials (Belgium);

68. Strengthen capacity-building with regard to human rights for civil servants involved in the protection of women and girl and boy victims of violence and sexual abuse (Mexico);

69. Adopt a comprehensive national plan on inclusion in order to combat persisting inequality, paying particular attention to persons in vulnerable situations such as women, children, persons with disabilities and minorities (Honduras);

70. Strengthen the national framework to reduce all kinds of discrimination (Iraq);

71. Intensify efforts to guarantee equality and non-discrimination in line with its international obligations by developing public human rights awareness programmes and taking concrete steps to advance the rights of women and girls, members of religious minorities, and lesbian, gay, bisexual, transgender and intersex persons and to combat caste-based discrimination, including to: criminalize marital rape; decriminalize consensual same-sex relations; and establish appropriate policies and practices for registering, investigating and prosecuting violence against women, girls and members of religious minorities (Ireland);

72. Ensure that laws are fully and consistently enforced to provide adequate protections for members of religious minorities, scheduled castes, tribes and other vulnerable populations (United States of America);

73. Take effective measures to combat rising instances of religious intolerance, violence and discrimination (Kazakhstan);

74. Enact the Prevention of Torture Bill (South Africa);

75. Adopt laws and implement policies to supress all forms of de facto discrimination against any person or group (Guatemala);

76. Repeal section 377 of the Indian Penal Code and ensure that consensual same-sex relations are not criminalized (Iceland);

77. Take steps to end the criminalization of same-sex relations (Israel);

78. end or revoke section 377 to decriminalize same-sex relations (Norway);

79. Repeal section 377 of the Indian Penal Code, which criminalizes same-sex conduct between consenting adults, and enact legislation consistent with the Supreme Court's recognition of the rights of transgender persons (Canada);

80. Adopt measures to effectively protect transgender persons, including the implementation of the Transgender Persons (Protection of Rights) Bill (Israel);

81. Continue the fight against discrimination, exclusion, dehumanization, stigmatization and violence suffered by scheduled castes (Peru);

82. Take urgent measures to repeal the norms that discriminate against castes, and investigate and sanction the perpetrators of acts of discrimination and violence against them, in particular against the Dalits (Argentina);

83. Take the necessary measures to ensure effective implementation of the Scheduled Castes and Scheduled Tribes Act, notably through the training of State officials (France);

84. Establish a national action plan for combating hate crimes, racism and negative stereotypes against people of African descent inside its territory, including appropriate programmes of public awareness that will address the A/HRC/36/10 16 problem of racism and Afro-phobia, in full consultation with those particularly affected (Haiti);

85. Consolidate the progress made towards reaching the Sustainable Development Goals and in the improvement of human development indicators (Islamic Republic of Iran);

86. Continue efforts in the implementation of sustainable development strategies for the year 2030 (Sudan);

87. Allocate adequate resources to realize the Sustainable Development Goal targets to reduce maternal mortality and end preventable deaths of newborns and children under 5 (Norway);

88. Continue facilitating equal access to justice for all and provide legal aid, in particular to vulnerable groups, minority groups and marginalized people (Angola);

89. Further promote equal access to justice for all, especially by providing more legal aid to the poor and marginalized (Ethiopia);

90. Establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards (Uganda);

91. Continue its efforts in relation to its environmental policies (State of Palestine);

92. Provide access to clean and modern energy to all its people and develop climate-friendly green cities (United Arab Emirates);

93. Continue implementing its international commitments to achieve its nationally determined contributions under the Paris Agreement of 2015 (United Arab Emirates);

94. Continue its efforts to effectively enforce its environmental policies and further increase the growth of forest cover in the country (Brunei Darussalam);

95. Take appropriate measures to avoid the excessive use of force by security officers (Greece);

96. Deepen the respect about principles of proportionality and necessity for armed forces and police (Peru);

97. Revise the Armed Forces (Special Powers) Act to bring it into compliance with the obligations under the International Covenant on Civil and Political Rights, with a view to fighting impunity (Switzerland);

98. Review the Code of Criminal Procedure as regards the use of force by law enforcement officials, in particular section 46 (Sierra Leone);

99. Prevent and pursue through the appropriate judicial means all violent acts against religious and tribal minorities, Dalits and lower castes (Holy See);

100. Strengthen efforts for the prevention of cases of intercommunal violence (Russian Federatin);

101. Step up its efforts against caste-based violence, discrimination and prejudice, including by eradicating all forms of caste-based discrimination in the educational system (Czechia);

102. Prohibit forced sterilization in line with requests by the Special Rapporteurs on torture, violence against women, and the right to health, and in line with the National Population Policy (Iceland);

103. Take concrete steps to prevent coercive, unsafe and abusive sterilization and create greater accountability for these practices, including A/HRC/36/10 17 ensuring free and full consent prior to conducting the procedure and compliance with international standards (Sweden);

104. Abolish the death penalty (Mozambique);

105. Consider the abolition of the death penalty (Greece);

106. Consider imposing a moratorium on the application of the death penalty with a view to abolishing it (Namibia);

107. Consider imposing a de facto moratorium on the use of the death penalty with a view to its total abolition (Rwanda);

108. Establish a moratorium on executions as a first step towards the abolition of the death penalty (Belgium);

109. Introduce an official moratorium on the death penalty (Lithuania):

110. Establish a de jure moratorium on capital executions and commute the existing death sentences with a view to fully abolishing the death penalty (Italy);

111. Consider establishing a moratorium on the death penalty with a view to its abolishment (Spain);

112. Establish a formal moratorium on the death penalty, with a view to ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (Australia);

113. Consider the establishment of a moratorium on executions during the process of consideration by the Government of the recommendations of the Law Commission of India on the issue of the abolition of the death penalty (Montenegro);

114. Consider establishing a moratorium on the death penalty (TimorLeste);

115. Introduce a moratorium on executions with a view to abolishing the death penalty (France);

116. Improve prison conditions in order to ensure the rights and dignity of all those deprived of their liberty (Zambia);

117. Continue with relevant consultations and adopt a law on combating trafficking in persons (Belarus);

118. Continue the consultation process with all concerned parties to elaborate a new draft of the law against trafficking in persons (Cuba);

119. Continue and redouble its efforts to combat trafficking in persons and modern slavery, including through better law enforcement to end impunity for human traffickers and through initiatives aimed at destigmatizing and rehabilitating victims of trafficking (Liechtenstein);

120. Continue to implement measures to stop the flow of trafficking in persons (Holy See);

121. Strengthen the national mechanisms to combat human trafficking and support victims and their rehabilitation (Lebanon);

122. Accelerate efforts towards combating human trafficking, particularly by protecting and rehabilitating victims (Philippines);

123. Continue combating human trafficking (Senegal);

124. Continue efforts to improve social services that provide support to victims of human trafficking, forced labour and those who have been sexually exploited (Maldives); A/HRC/36/10 18

125. Continue improving the national legislative framework on the rehabilitation of victims of trafficking (Ukraine);

126. Strengthen efforts to guarantee freedom of religion and belief, especially by retracting so-called anti-conversion laws (Holy See);

127. Take all necessary measures to protect the rights of persons belonging to religious minorities, and repeal laws which restrict religious conversion (Netherlands);

128. Abolish anti-conversion laws and grant access to justice to victims of religious violence and discrimination (Italy);

129. Repeal the requisite legislation to stop violence and discrimination against religious minorities (Kenya);

130. Take visible policy and other measures to ensure the freedom of religion and belief and address the alarming trend of racism, racial discrimination, xenophobia and related intolerance including mob violence committed, incited and advocated by right-wing parties and affiliated extremist organizations against minorities, particularly Muslims, Christians, Sikhs and Dalits (Pakistan);

131. Ensure that any measure limiting freedom of expression, assembly and association on the Internet is based on clearly defined criteria in accordance with international law including international human rights law (Sweden);

132. Continue to develop laws and make efforts to ensure freedom of religion and belief (Lebanon);

133. Guarantee freedom of religion or belief by implementing existing laws to better protect individuals belonging to minority groups from hate speech, incitement to religious violence, discrimination on religious grounds and forcible conversions (Canada);

134. Enact a law for the protection of human rights defenders (Lithuania);

135. Amend the Foreign Contribution (Regulation) Act to ensure the right to freedom of association, which includes the ability of civil society organizations to access foreign funding, and protect human rights defenders effectively against harassment and intimidation (Germany);

136. Revise the Foreign Contribution (Regulation) Act to ensure benign working conditions for civil society in India (Norway);

137. Improve the Foreign Contribution (Regulation) Act so that it could fund a broader scope of non-governmental organizations (Republic of Korea);

138. Ensure consistent, transparent application of the Foreign Contribution (Regulation) Act regulations to permit full exercise of the right to freedom of association (United States of America);

139. Review and amend the Foreign Contribution (Regulation) Act, which may restrict the access of NGOs to foreign financial assistance and lead to their arbitrary shut-down (Czechia);

140. Lift legal restrictions or hurdles to the work of civil society individuals or organizations and ensure that they can undertake their legitimate activities without fear of reprisals (Switzerland);

141. Carry out independent investigations in all cases of attacks against journalists (Lithuania);

142. Put an end to all curbs on freedom of expression and association (Pakistan);

143. Guarantee freedom of expression, association and peaceful assembly for all individuals and promote meaningful dialogue that embraces and allows freely organized advocacy of diverging views by civil society (Canada);

144. Continue its efforts to protect religious freedom and the rights of minority groups based on its Constitution and other relevant laws (Republic of Korea);

145. Bring all legislation concerning communication surveillance in line with international human rights standards and especially recommend that all communication surveillance requires a test of necessity and proportionality (Liechtenstein);

146. Take the necessary steps to ensure that all operations of intelligence agencies are monitored by an independent oversight mechanism (Liechtenstein);

147. Continue efforts to reduce corruption and increase accountability (Sudan);

148. Strengthen the independent functioning of the judiciary in order to reduce delays in judicial proceedings, enhance transparency of the processes and guarantee the right to speedy trial (Estonia);

149. Allocate appropriate resources to reducing backlog and delays in the administration of cases in courts (Ethiopia);

150. Promote and facilitate universal access to birth registration, especially

for people living in extreme poverty, belonging to religious minorities or living in remote areas of the country, through the implementation of mobile units and carrying out awareness-raising campaigns (Mexico);

151. Ensure children's rights to acquire a nationality in accordance with article 7 of the Convention on the Rights of the Child, regardless of the parents' legal status or ethnicity (Slovakia);

152. Remove barriers prohibiting scheduled castes and schedule tribes from registering their children's births and obtaining birth certificates (Bahrain);

153. Continue strengthening efforts aimed at promoting food security and eradicate all forms of malnutrition, in particular among children under the age of 5 (Libya);

154. Continue its programmes for the promotion of socioeconomic development, with a particular focus on the country's rights-based approach to food security targeting the most vulnerable groups (Sri Lanka);

155. Implement a human rights-based, holistic approach to ensure access to adequate housing as well as to adequate water and sanitation, including for marginalized groups, Dalits, scheduled castes, the homeless, the landless, scheduled tribes, religious and ethnic minorities, persons with disabilities and women (Germany);

156. Expand the Housing for All scheme to realize the right to adequate housing for vulnerable people and eliminate homelessness by 2030 (South Africa);

157. Continue the Housing for All policy led by the Government to eradicate by 2030 the problem of homelessness, in conformity with Sustainable Development Goal 11 of the 2030 Agenda (Algeria);

158. Ensure the systematic functioning of all mechanisms for the delivery of financial and other forms of assistance to those in need which have been established within the framework of the National Social Assistance Programme (Russian Federation);

159. Ensure that the implementation of a set of socioeconomic policies, such as the Stand-Up India scheme, is targeted, accountable and transparent, so that their benefits reach all sections of society (Singapore);

160. Continue efforts and measures aimed at enhancing social security and labour policies, and expand the development model in rural areas (Egypt);

161. Continue studying the possibility of a universal basic income as a way to further reduce poverty levels with a view to possibly phasing out the existing social protection system, in full consultation with all stakeholders (Haiti);

162. Continuously improve its endeavours to eradicate poverty in the country (Indonesia);

163. Continue its efforts towards socioeconomic development and poverty eradication (Islamic Republic of Iran);

164. Further strengthen its efforts towards socioeconomic development and poverty eradication (Myanmar);

165. Continue efforts to realize social and economic development and eradicate poverty (Saudi Arabia);

166. Continue efforts to reduce poverty, improve the well-being of the people, protect and enforce the rights of vulnerable groups of the population (Uzbekistan);

167. Continue its efforts to achieve sustainable development and eradicate poverty (Yemen);

168. Continue its fight against poverty, lack of adequate food, safe water and sanitation, while paying special attention to the need to introduce a child rights-based approach in all policies (Bulgaria);

169. Continue national efforts to realize social and economic development and eradicate poverty, and achieve comprehensive sustainable development for all (Egypt);

170. Continue to increase access to safe and sustainable drinking water in rural areas and to improve sanitation coverage, especially for women and girls (Singapore);

171. Carry on its efforts and action in the promotion of social security and labour policy (Islamic Republic of Iran);

172. Implement further actions in promoting social and work security, as well as efforts to spread the country's growth model in rural areas (Uzbekistan);

173. Continue promoting sustainable economic and social development and raising the living standard of its people so as to lay down a firm basis for the enjoyment of human rights by its people (China);

174. Accelerate the process of consolidating existing labour laws to, inter alia, promote the right to equal opportunities for work and at work, as well as to achieve occupational safety (Zimbabwe);

175. Increase public spending on the health sector in accordance with the 2017 National Health Policy and take further steps to strengthen health facilities (Kazakhstan);

176. Continue to provide access to health services for the elderly under the National Programme for Health Care of the Elderly (Colombia);

177. Take steps towards improving access to health, especially access to maternal health and to adequate obstetric delivery services so as to reduce maternal and child mortality (Zimbabwe);

178. Continue its efforts to ensure that the universal health-care scheme covers disadvantaged groups, including persons with disabilities and persons living in remote rural areas, who still face obstacles in accessing basic healthcare services (Lao People's Democratic Republic);

179. Continue furthering the sexual and reproductive health and rights of all women by immediately putting an end to camp-based sterilization operations in accordance with the Supreme Court order of 14 September 2016, by ensuring all women access to counselling on and access to the full range of modern contraceptives in a voluntary, safe and quality manner, and by providing comprehensive sexuality education (Finland);

180. Redouble its efforts in maternal health, sexual and reproductive health and comprehensive contraceptive services (Colombia);

181. Increase the government expenditure in the field of education (Iraq);

182. Continue its efforts to ensure that all children have access to education at all levels and all categories (Lao People's Democratic Republic);

183. Continue to take steps to provide inclusive and quality education for all (Myanmar);

184. Continue its efforts in implementing its comprehensive policies to ensure quality education for all children (Qatar);

185. Promote children's right to education, especially education on climate change adaptation and mitigation (Viet Nam);

186. Step up its efforts to carry out the second phase of its Education for All programmes to focus on providing affordable and quality secondary education in the country (Brunei Darussalam);

187. Increase investment in universal, mandatory and free education by giving priority to measures to eradicate discrimination and exclusion that affect girls, children with disabilities, Dalits and marginalized persons (Mexico);

188. Accept more efforts to increase girls' secondary education, including ensuring that schools are girl-friendly in all parameters (Kyrgyzstan);

189. Continue to ensure access to education for all, especially children of scheduled castes and tribes (Holy See);

190. Strengthen the integration of the gender perspective in the formulation and implementation of policies (Colombia);

191. Ensure implementation of the Gender Budgeting Scheme in all states and union territories (South Africa);

192. Continue incorporating the gender perspective in the design and implementation of policies, and guarantee that the development agenda pays equal attention to the concerns of women (Cuba);

193. Redouble efforts on ensuring gender equality and take measures to prevent gender discrimination (Timor-Leste);

194. Continue its efforts to ensure women's equal participation in the workforce and generate employment opportunities for women in rural areas (State of Palestine);

195. Take urgent measures to put an end to harmful traditional practices such as so-called "honour killings", selective abortion on the basis of the sex of the fetus, sati, devadasi, early and enforced marriage,

bringing the perpetrators to justice and guaranteeing assistance for victims (Argentina);

196. Implement existing laws on all forms of violence and sexual violence against women and girls, including "honour" crimes, female feticide and female infanticide; expand the definition of rape and sexual assault to include marital rape; and end harmful practices such as child, early and forced marriage (Canada);

197. Improve the enforcement of the legal provisions prohibiting harmful and discriminatory practices against women and girls, in particular child marriages, dowry-related murders and honour killings, and ensure that all women, without discrimination, have access to public services (Czechia);

198. Step up efforts for comprehensive protection of women and girls, in particular against sexual violence (Greece);

199. Combat violence against women through effective legislation and law enforcement measures (China);

200. Take more effective measures to protect and promote the rights of women and girls, as they continue to be subjected to widespread violence, discrimination and exploitation (Japan);

201. Take additional serious measures to eliminate violence against women and children, including sexual violence (Kyrgyzstan);

202. Continue and strengthen measures to prevent and repress offences and violence against women and girls, including through early childhood education, awareness-raising and enhancing effective mechanisms of reparation (Viet Nam);

203. Eliminate traditional harmful practices, such as the rising number of deaths due to dowry and burning of widows (Bahrain);

204. Continue its efforts to promote the empowerment of women and to combat violence against women, in line with the recommendations of the Verma Committee (Brazil);

205. Continue strengthening institutions to eliminate discrimination and violence against women, in particular sexual violence, and adopt

specific measures to achieve gender equality in the labour market (Chile);

206. Increase the resources so that female survivors of violence and domestic abuse can denounce the crimes with guarantees they will be not repeated (Spain);

207. Punish domestic violence, as well as promote awareness-raising campaigns on gender violence, including "honour" crimes (Spain);

208. Reinforce the legal framework for the prevention of violence against women, including running a national awareness campaign and ensuring comprehensive investigation and prosecution in cases of domestic violence (Italy);

209. Adopt a comprehensive law to combat all forms of violence against women, including domestic violence and marital rape (Honduras);

210. Strengthen the protection of women's rights in accordance with the Protection of Women from Domestic Violence Act and other relevant laws (Republic of Korea);

211. Ensure effective implementation of the law on the protection of women against domestic violence (Gabon);

212. Further the implementation of relevant laws and policies as well as training for public officials, to tackle sexual offences and unfair treatment to women (Thailand); A/HRC/36/10 23

213. Redouble its efforts to enforce its legal provisions prohibiting harmful and discriminatory practices that violate the rights of women and girls (Liechtenstein);

214. Strengthen legislation to combat sexual offences against children and women (Timor-Leste);

215. Enhance activities aimed at eliminating discrimination against women, which particularly affects women from lower castes (Kyrgyzstan);

216. Implement the Protection of Children from Sexual Offences Act to increase the protection of children from sexual abuse (Kenya);

217. Ensure that legislation defining the minimum legal age of marriage at 18 is enforced at all levels, everywhere in the country (Iceland);

218. Step up its efforts to eradicate child marriage and so-called "honour crimes" (Israel);

219. Step up efforts to combat and eliminate child, early and forced marriages (Sierra Leone);

220. Adopt legislative measures and policies to prevent early or forced marriages (Honduras);

221. Continue and intensify the actions to prohibit child marriage (Gabon);

222. Strengthen the adoption of socioeconomic programmes which promote the empowerment of women and their participation in public and political life (Angola);

223. Enact the Women's Reservation Bill providing for the reservation of seats for women in the parliament and legislative assemblies, in order to enhance the political participation of women (Netherlands);

224. Adopt the law on quotas which aims to reserve at least 33 per cent of seats in legislative bodies of the central and state governments for women (Senegal);

225. Adopt the law on quotas which aims to reserve seats for women in legislative bodies of the central and state governments (Algeria);

226. Accelerate work on the protection of the rights of children and women in particular (Turkey);

227. Prohibit child labour in family enterprises and extend the list of dangerous activities in line with the recommendations of the Committee on the Rights of the Child (Spain);

228. Consider repealing the provision that allows children to work in family-based occupations (Slovakia);

229. Continue strengthening national strategies to combat child labour (Brazil);

230. Continue to take all necessary measures to enhance the effectiveness of the protection of children, in particular in cases of sexual violence against children (Portugal);

231. Continue strengthening institutions to protect children and adolescent girls and boys, with a view to eradicating child labour, sexual exploitation and the practice of child marriage (Chile);

232. Develop specific guidelines for protection and support for victims of child sexual abuse and their families undergoing trial (Slovakia);

233. Introduce legislation to prohibit corporal punishment of children in the home and in all other settings, including as a sentence under traditional forms of justice (Liechtenstein);

234. Introduce comprehensive and continuous public education, awareness-raising and social mobilization programmes on the harmful effects of corporal punishment (Liechtenstein);

235. Establish a database of all cases of violence against children and explicitly prohibit all forms of corporal punishment of children under 18 years of age in all settings (Zambia);

236. Increase efforts to improve the rights of the child, notably through the effective application of the prohibition of child labour, as well as the rights of women (France);

237. Establish a monitoring mechanism to oversee the effective implementation of the Child Labour (Prohibition and Regulation) Amendment Act, the National Child Labour Policy and the Accessible India Campaign to prevent exploitation of children and protect the rights of persons with disabilities (Thailand);

238. Take all appropriate measures in the implementation of the 2015 Juvenile Justice Act to give children aged 18 years and below an opportunity for rehabilitation (Botswana);

239. Continue efforts to promote opportunities for persons with disabilities to benefit from development gains (Libya);

240. Continue efforts aimed at improving the access of persons with disabilities to education, vocational training and health care (Oman);

241. Expand the integration of persons with disabilities into programmes and plans for sustainable development (Qatar);

242. Take holistic measures to protect the rights of persons with disabilities, the elderly and other vulnerable groups (China);

243. Continue policies aimed at ensuring the enjoyment of the rights and freedoms of persons with disabilities and access to resources and services under the Accessible India Campaign (Colombia);

244. Ensure that girls with disabilities are afforded the same right to education as all children (Australia);

245. Continue strengthening the policies in favour of the rights of peasants and other persons working in rural areas (Plurinational State of Bolivia);

246. Continue the endeavour to facilitate the access of elderly persons to preventive services and necessary treatment (Oman);

247. Immediately stop its atrocities and violations of human rights against the Kashmiri people, and allow them to exercise their right to self determination through a free and fair plebiscite in accordance with the United Nations Security Council resolution (Pakistan);

248. Repeal the Armed Forces (Special Powers) Act and the Public Safety Act and take credible actions to end the prevailing culture of impunity in "Indian-Occupied Kashmir" (Pakistan);

249. Immediately ban the use of pellet guns and hold accountable perpetrators who have used lethal force against unarmed civilians in "Indian Occupied Kashmir" (Pakistan);

250. Provide unhindered access to the United Nations and other international organizations, and accede to the call of the High Commissioner for Human Rights to allow an OHCHR fact-finding mission to "Indian-A/HRC/36/10 25 Occupied Kashmir" to investigate and report on the human rights situation there (Pakistan).

All conclusions and/or recommendations contained in the present report reflect the position of the submitting State(s) and/or the State under review. They should not be construed as endorsed by the Working Group as a whole.

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Recommendations accepted by the Government of India

1. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as previously recommended.

(Botswana)

2. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment urgently and in accordance with its commitments from the 2012 universal periodic review. (Norway)

3. 161.7 Ratify, before the next universal periodic review cycle, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Czechia)

4. 161.8 Finalize the efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as other international instruments, as recommended by relevant treaty bodies.

(Bulgaria)

5. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(Greece) (Guatemala) (Italy) (Lebanon) (Montenegro) (Mozambique) (South Africa) (Sweden) (Turkey) (Ukraine) (United States of America)

6. Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ensure that the instrument of ratification is consistent with the Convention.

(Australia)

7. Redouble its efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(Republic of Korea)

8. Speed up the process for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(Israel)

9. Advance towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Chile)

10. Consider completing the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Burkina Faso)

11. Complete the process of preparation for the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Russian Federation)

12. Intensify efforts to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Denmark)

13. Strengthen national efforts towards the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(Indonesia)

14. Ratify the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) of the International Labour Organization.

(Slovenia)

15. Consider ratifying the ILO Domestic Workers Convention, 2011 (No. 189).

(Uruguay)

16. Consider acceding to the ILO Worst Forms of Child Labour Convention, 1999 (No. 182).

(Uruguay)

17. Ratify the international conventions to which it has committed itself.

(Madagascar)

18. Adopt an open, merit-based selection process when selecting national candidates for United Nations treaty body elections.

(United Kingdom of Great Britain and Northern Ireland)

19. Respond positively to visit requests by the special procedures of the Human Rights Council.

(Latvia)

20. Put in place a specific mechanism for implementing previous accepted recommendations.

(Uganda)

21. Request all necessary technical assistance enabling the Government to meet its international commitments.

(Côte d'Ivoire)

22. Consider introducing laws to specifically prevent and prosecute "honour" killings and prosecute those that order or sanction violence against women.

(Namibia)

23. Continue efforts to eradicate child and forced marriage.

(Peru)

24. Continues its endeavours in promoting and protecting the human rights of all its citizens in an inclusive manner.

(Nepal)

25. Adopt a national plan on human rights.

(Kenya)

26. Expand the scope of the Right of Children to Free and Compulsory Education Act and promote human rights education in the school curriculum.

(Slovakia)

27. Continue and step up national efforts to train and guide security staff and other law enforcement officials in the field of human rights.

(Egypt)

28. In the spirit of its Constitution, which guarantees equal rights to all minorities, further invest in dedicated human rights training of police officials to register and investigate cases of discrimination and violence and to hold them accountable when they fail to do so.

(Finland)

29. Provide systematic training on women's rights to all law enforcement personnel, medical staff and judicial officials.

(Belgium)

30. Strengthen capacity-building with regard to human rights for civil servants involved in the protection of women and girl and boy victims of violence and sexual abuse.

(Mexico)

31. Adopt a comprehensive national plan on inclusion in order to combat persisting inequality, paying particular attention to persons in vulnerable situations such as women, children, persons with disabilities and minorities.

(Honduras)

32. Strengthen the national framework to reduce all kinds of discrimination.

(Iraq)

33. Ensure that laws are fully and consistently enforced to provide adequate protections for members of religious minorities, scheduled castes, tribes and other vulnerable populations.

(United States of America)

34. Adopt laws and implement policies to supress all forms of de facto discrimination against any person or group.

(Guatemala)

35. Adopt measures to effectively protect transgender persons, including the implementation of the Transgender Persons (Protection of Rights) Bill.

(Israel)

36. Continue the fight against discrimination, exclusion, dehumanization, stigmatization and violence suffered by scheduled castes.

(Peru)

37. Take urgent measures to repeal the norms that discriminate against castes, and investigate and sanction the perpetrators of acts of discrimination and violence against them, in particular against the Dalits.

(Argentina)

38. Take the necessary measures to ensure effective implementation of the Scheduled Castes and Scheduled Tribes Act, notably through the training of State officials.

(France)

39. Consolidate the progress made towards reaching the Sustainable Development Goals and in the improvement of human development indicators.

(Islamic Republic of Iran)

40. Continue efforts in the implementation of sustainable development strategies for the year 2030.

(Sudan)

41. Allocate adequate resources to realize the Sustainable Development Goal targets to reduce maternal mortality and end preventable deaths of newborns and children under 5.

(Norway)

42. Continue facilitating equal access to justice for all and provide legal aid, in particular to vulnerable groups, minority groups and marginalized people.

(Angola)

43. Further promote equal access to justice for all, especially by providing more legal aid to the poor and marginalized.

(Ethiopia)

44. Establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards.

(Uganda)

45. Continue its efforts in relation to its environmental policies.

(State of Palestine)

46. Provide access to clean and modern energy to all its people and develop climate-friendly green cities.

(United Arab Emirates)

47. Continue implementing its international commitments to achieve its nationally determined contributions under the Paris Agreement of 2015.

(United Arab Emirates)

48. Continue its efforts to effectively enforce its environmental policies and further increase the growth of forest cover in the country.

(Brunei Darussalam)

49. Take appropriate measures to avoid the excessive use of force by security officers.

(Greece)

50. Deepen the respect about principles of proportionality and necessity for armed forces and police.

(Peru)

51. Prevent and pursue through the appropriate judicial means all violent acts against religious and tribal minorities, Dalits and lower castes.

(Holy See)

52. Strengthen efforts for the prevention of cases of intercommunal violence.

(Russian Federation)

53. Prohibit forced sterilization in line with requests by the Special Rapporteurs on torture, violence against women, and the right to health, and in line with the National Population Policy.

(Iceland)

54. Take concrete steps to prevent coercive, unsafe and abusive sterilization and create greater accountability for these practices, including A/HRC/36/10 17 ensuring free and full consent prior to conducting the procedure and compliance with international standards.

(Sweden)

55. Improve prison conditions in order to ensure the rights and dignity of all those deprived of their liberty.

(Zambia)

56. Continue with relevant consultations and adopt a law on combating trafficking in persons.

(Belarus)

57. Continue the consultation process with all concerned parties to elaborate a new draft of the law against trafficking in persons.

(Cuba)

58. Continue and redouble its efforts to combat trafficking in persons and modern slavery, including through better law enforcement to end impunity for human traffickers and through initiatives aimed at destigmatizing and rehabilitating victims of trafficking.

(Liechtenstein)

59. Continue to implement measures to stop the flow of trafficking in persons.

(Holy See)

60. Strengthen the national mechanisms to combat human trafficking and support victims and their rehabilitation.

(Lebanon)

61. Accelerate efforts towards combating human trafficking, particularly by protecting and rehabilitating victims.

(Philippines)

62. Continue combating human trafficking.

(Senegal)

63. Continue efforts to improve social services that provide support to victims of human trafficking, forced labour and those who have been sexually exploited.

(Maldives)

64. Continue improving the national legislative framework on the rehabilitation of victims of trafficking.

(Ukraine)

65. Continue to develop laws and make efforts to ensure freedom of religion and belief.

(Lebanon)

66. Continue its efforts to protect religious freedom and the rights of minority groups based on its Constitution and other relevant laws.

(Republic of Korea)

67. Continue efforts to reduce corruption and increase accountability.

(Sudan)

68. Allocate appropriate resources to reducing backlog and delays in the administration of cases in courts.

(Ethiopia)

69. Promote and facilitate universal access to birth registration, especially for people living in extreme poverty, belonging to religious minorities or living in remote areas of the country, through the implementation of mobile units and carrying out awareness-raising campaigns.

(Mexico)

70. Continue strengthening efforts aimed at promoting food security and eradicate all forms of malnutrition, in particular among children under the age of 5

(Libya)

71. Continue its programmes for the promotion of socioeconomic development, with a particular focus on the country's rights-based approach to food security targeting the most vulnerable groups.

(Sri Lanka)

72. Implement a human rights-based, holistic approach to ensure access to adequate housing as well as to adequate water and sanitation, including for marginalized groups, Dalits, scheduled castes, the homeless, the landless, scheduled tribes, religious and ethnic minorities, persons with disabilities and women.

(Germany)

73. Expand the Housing for All scheme to realize the right to adequate housing for vulnerable people and eliminate homelessness by 2030.

(South Africa)

74. Continue the Housing for All policy led by the Government to eradicate by 2030 the problem of homelessness, in conformity with Sustainable Development Goal 11 of the 2030 Agenda.

(Algeria)

75. Ensure the systematic functioning of all mechanisms for the delivery of financial and other forms of assistance to those in need which have been established within the framework of the National Social Assistance Programme.

(Russian Federation)

76. Ensure that the implementation of a set of socioeconomic policies, such as the Stand-Up India scheme, is targeted, accountable and transparent, so that their benefits reach all sections of society.

(Singapore)

77. Continue efforts and measures aimed at enhancing social security and labour policies, and expand the development model in rural areas.

(Egypt)

78. Continue studying the possibility of a universal basic income as a way to further reduce poverty levels with a view to possibly phasing out the existing social protection system, in full consultation with all stakeholders.

(Haiti)

79. Continuously improve its endeavours to eradicate poverty in the country.

(Indonesia)

80. Continue its efforts towards socioeconomic development and poverty eradication.

(Islamic Republic of Iran)

81. Further strengthen its efforts towards socioeconomic development and poverty eradication.

(Myanmar)

82. Continue efforts to realize social and economic development and eradicate poverty.

(Saudi Arabia)

83. Continue efforts to reduce poverty, improve the well-being of the people, protect and enforce the rights of vulnerable groups of the population.

(Uzbekistan)

84. Continue its efforts to achieve sustainable development and eradicate poverty.

(Yemen)

85. Continue its fight against poverty, lack of adequate food, safe water and sanitation, while paying special attention to the need to introduce a child rights-based approach in all policies.

(Bulgaria)

86. Continue national efforts to realize social and economic development and eradicate poverty, and achieve comprehensive sustainable development for all.

(Egypt)

87. Continue to increase access to safe and sustainable drinking water in rural areas and to improve sanitation coverage, especially for women and girls.

(Singapore)

88. Carry on its efforts and action in the promotion of social security and labour policy.

(Islamic Republic of Iran)

89. Implement further actions in promoting social and work security, as well as efforts to spread the country's growth model in rural areas.

(Uzbekistan)

90. Continue promoting sustainable economic and social development and raising the living standard of its people so as to lay down a firm basis for the enjoyment of human rights by its people.

(China)

91. Accelerate the process of consolidating existing labour laws to, inter alia, promote the right to equal opportunities for work and at work, as well as to achieve occupational safety.

(Zimbabwe)

92. Increase public spending on the health sector in accordance with the 2017 National Health Policy and take further steps to strengthen health facilities.

(Kazakhstan)

93. Continue to provide access to health services for the elderly under the National Programme for Health Care of the Elderly.

(Colombia)

94. Take steps towards improving access to health, especially access to maternal health and to adequate obstetric delivery services so as to reduce maternal and child mortality.

(Zimbabwe)

95. Continue its efforts to ensure that the universal health-care scheme covers disadvantaged groups, including persons with disabilities and persons living in remote rural areas, who still face obstacles in accessing basic healthcare services.

(Lao People's Democratic Republic)

96. Continue furthering the sexual and reproductive health and rights of all women by immediately putting an end to camp-based sterilization operations in accordance with the Supreme Court order of 14 September 2016, by ensuring all women access to counselling on and access to the full range of modern contraceptives in a voluntary, safe and quality manner, and by providing comprehensive sexuality education.

(Finland)

97. Redouble its efforts in maternal health, sexual and reproductive health and comprehensive contraceptive services.

(Colombia)

98. Increase the government expenditure in the field of education.

(Iraq)

99. Continue its efforts to ensure that all children have access to education at all levels and all categories.

(Lao People's Democratic Republic)

100. Continue to take steps to provide inclusive and quality education for all.

(Myanmar)

101. Continue its efforts in implementing its comprehensive policies to ensure quality education for all children.

(Qatar)

102. Promote children's right to education, especially education on climate change adaptation and mitigation.

(Viet Nam)

103. Step up its efforts to carry out the second phase of its Education for All programmes to focus on providing affordable and quality secondary education in the country.

(Brunei Darussalam)

104. Increase investment in universal, mandatory and free education by giving priority to measures to eradicate discrimination and exclusion that affect girls, children with disabilities, Dalits and marginalized persons.

(Mexico)

105. Accept more efforts to increase girls' secondary education, including ensuring that schools are girl-friendly in all parameters.

(Kyrgyzstan)

106. Continue to ensure access to education for all, especially children of scheduled castes and tribes.

(Holy See)

107. Strengthen the integration of the gender perspective in the formulation and implementation of policies.

(Colombia)

108. Continue incorporating the gender perspective in the design and implementation of policies, and guarantee that the development agenda pays equal attention to the concerns of women.

(Cuba)

109. Redouble efforts on ensuring gender equality and take measures to prevent gender discrimination.

(Timor-Leste)

110. Continue its efforts to ensure women's equal participation in the workforce and generate employment opportunities for women in rural areas.

(State of Palestine)

111. Improve the enforcement of the legal provisions prohibiting harmful and discriminatory practices against women and girls, in particular child marriages, dowry-related murders and honour killings, and ensure that all women, without discrimination, have access to public services.

(Czechia)

112. Step up efforts for comprehensive protection of women and girls, in particular against sexual violence.

(Greece)

113. Combat violence against women through effective legislation and law enforcement measures.

(China)

114. Take more effective measures to protect and promote the rights of women and girls, as they continue to be subjected to widespread violence, discrimination and exploitation.

(Japan)

115. Take additional serious measures to eliminate violence against women and children, including sexual violence.

(Kyrgyzstan)

116. Continue and strengthen measures to prevent and repress offences and violence against women and girls, including through early childhood education, awareness-raising and enhancing effective mechanisms of reparation.

(Viet Nam)

117. Continue its efforts to promote the empowerment of women and to combat violence against women, in line with the recommendations of the Verma Committee.

(Brazil)

118. Continue strengthening institutions to eliminate discrimination and violence against women, in particular sexual violence, and adopt specific measures to achieve gender equality in the labour market.

(Chile)

119. Punish domestic violence, as well as promote awareness-raising campaigns on gender violence, including "honour" crimes.

(Spain)

120. Reinforce the legal framework for the prevention of violence against women, including running a national awareness campaign and ensuring comprehensive investigation and prosecution in cases of domestic violence.

(Italy)

121. Strengthen the protection of women's rights in accordance with the Protection of Women from Domestic Violence Act and other relevant laws.

(Republic of Korea)

122. Ensure effective implementation of the law on the protection of women against domestic violence.

(Gabon)

123. Further the implementation of relevant laws and policies as well as training for public officials, to tackle sexual offences and unfair treatment to women.

(Thailand)

124. Redouble its efforts to enforce its legal provisions prohibiting harmful and discriminatory practices that violate the rights of women and girls.

(Liechtenstein)

125. Strengthen legislation to combat sexual offences against children and women.

(Timor-Leste)

126. Enhance activities aimed at eliminating discrimination against women, which particularly affects women from lower castes.

(Kyrgyzstan)

127. Implement the Protection of Children from Sexual Offences Act to increase the protection of children from sexual abuse.

(Kenya)

128. Ensure that legislation defining the minimum legal age of marriage at 18 is enforced at all levels, everywhere in the country.

(Iceland)

129. Step up its efforts to eradicate child marriage and so-called "honour crimes".

(Israel)

130. Step up efforts to combat and eliminate child, early and forced marriages.

(Sierra Leone)

131. Adopt legislative measures and policies to prevent early or forced marriages.

(Honduras)

132. Continue and intensify the actions to prohibit child marriage.

(Gabon)

133. Strengthen the adoption of socioeconomic programmes which promote the empowerment of women and their participation in public and political life.

(Angola)

134. Accelerate work on the protection of the rights of children and women in particular.

(Turkey)

135. Continue strengthening national strategies to combat child labour.

(Brazil)

136. Continue to take all necessary measures to enhance the effectiveness of the protection of children, in particular in cases of sexual violence against children.

(Portugal)

137. Continue strengthening institutions to protect children and adolescent girls and boys, with a view to eradicating child labour, sexual exploitation and the practice of child marriage.

(Chile)

138. Develop specific guidelines for protection and support for victims of child sexual abuse and their families undergoing trial.

(Slovakia)

139. Introduce legislation to prohibit corporal punishment of children in the home and in all other settings, including as a sentence under traditional forms of justice.

(Liechtenstein)

140. Introduce comprehensive and continuous public education, awareness-raising and social mobilization programmes on the harmful effects of corporal punishment.

(Liechtenstein)

141. Establish a database of all cases of violence against children and explicitly prohibit all forms of corporal punishment of children under 18 years of age in all settings.

(Zambia)

142. Increase efforts to improve the rights of the child, notably through the effective application of the prohibition of child labour, as well as the rights of women.

(France)

143. Establish a monitoring mechanism to oversee the effective implementation of the Child Labour (Prohibition and Regulation) Amendment Act, the National Child Labour Policy and the Accessible India Campaign to prevent exploitation of children and protect the rights of persons with disabilities.

(Thailand)

144. Take all appropriate measures in the implementation of the 2015 Juvenile Justice Act to give children aged 18 years and below an opportunity for rehabilitation.

(Botswana)

145. Continue efforts to promote opportunities for persons with disabilities to benefit from development gains.

(Libya)

146. Continue efforts aimed at improving the access of persons with disabilities to education, vocational training and health care.

(Oman)

147. Expand the integration of persons with disabilities into programmes and plans for sustainable development.

(Qatar)

148. Take holistic measures to protect the rights of persons with disabilities, the elderly and other vulnerable groups.

(China)

149. Continue policies aimed at ensuring the enjoyment of the rights and freedoms of persons with disabilities and access to resources and services under the Accessible India Campaign.

(Colombia)

150. Ensure that girls with disabilities are afforded the same right to education as all children.

(Australia)

151. Continue strengthening the policies in favour of the rights of peasants and other persons working in rural areas.

(Plurinational State of Bolivia)

152. Continue the endeavour to facilitate the access of elderly persons to preventive services and necessary treatment.

(Oman)

Important Recommendations of the Commission

Proposal for Amendment to the PHR Act, 1993

For more effective adherence and compliance by NHRC, India with the Paris Principles, the following amendments to the PHR Act, 1993 are proposed:

i. Section 3: Amendment to the Section to redefine the discharge of functions by Deemed Members as defined in Sub-section (3) to only Section 12 (d), (e), (h) and (i), where no specific decision making and voting rights would be required to be exercised by them. This is to ensure that no undue external influence is able to be exercised upon NHRC and it remains fully independent in its decision-making as well as retaining its autonomy in its core functions.

ii. Section 3(2): Amendment to the Section to increase the number of Members (from present 5 to 7) in the National Human Rights Commission (NHRC), as well as ensuring that they belong to more diversified backgrounds (other than judicial background) so as to comply with the required pluralistic structure of the Commission. With this amendment, the total number of the members (including Chairperson)in the Commission will be seven. In order to ensure gender balance, one member will be a woman member.

iii. Section 11(1)(c): To add provision which states, "A person appointed as Secretary General and Director General (Investigation) shall hold office for a term of 05 years from the date on which he enters upon his office or until he attains the age of 62 years, whichever is earlier".

iv. Section 20(2): Amendment to the Section to delink the mandatory requirement as per the Act for having to submit the memorandum of action taken along with the Annual Report in order to expedite the process of laying of Annual Report before the Parliament. This will enable the Annual Report to be put in public domain each year at the earliest.

v. Section 21(7): To add provision which states, "A State Human Rights Commission (SHRC), may by notification, be entrusted with performing the assigned functions in so far as it may related to the territory of a Union Territory (UT) till such time as the Union Territory has its own Human Rights Commission".

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NHRC Recommendations on Preventive, Remedial, Rehabilitative and Compensation Aspect of Silicosis*

1. Survey on Silicosis

A. Mapping of Factories/Mines/Industries/Establishments:

Extensive survey should be undertaken by the States/UTs to know the extent and dimensions of the problem of silicosis. These surveys by every State should include identification of works/processes that expose the workers to silica dust, identification of areas where such processes are carried out and listing of factories / mines / industries / establishments engaged in these processes. The survey should cover the following points:

- Identification of districts and areas therein having silica prone factories/mines /industries/ establishments.
- Collection of details/carrying out a census of all such factories /mines/ industries/ establishments in both organized and unorganized sector including the number of persons employed in each such establishment. In cases of organized sector, it may also be ascertained as to under which Act such factory /mine/ industry/ establishment is registered.
- Whether the employers of various industries are maintaining a proper employment record, including registers for purposes of recording the daily attendance of workers, wages paid to each worker, leave given to each worker, including medical leave.
- Whether the employer of every silica prone establishment is carrying out initial and periodic medical examination of the workers as for the detection of silicosis and whether they had reported cases of silicosis to the prescribed authority in the past.

* These recommendations were made based on the series of meetings held with the experts on Silicosis on 23 January, 7 February and 6 April 2017. These recommendations were mentioned in the affidavit filed by the NHRC in the Supreme Court of India in writ petition (Civil) No. 110 of 2006 People's Rights and Social Research Centre Vs Union of India.

- Whether silicosis victims identified in the past had been provided appropriate health care and treatment.
- Whether the employer has any (post employment) scheme for silicosis affected persons including healthcare, rehabilitation, compensation and family pension and whether the benefits of such a plan have been extended to silicosis victims in the past and in case of death of a victim, to his family.
- Measures undertaken by employer if any, for prevention of silicosis.

B. The States/ UTs while conducting the above survey, will also conduct survey regarding persons who are working in silica prone factories, mines, industries, establishments and will also prepare a list of persons who are suffering from Silicosis.

C. The above survey [A + B] should be completed by each State/ UT in three months and the result of the survey with complete details should be put on the website of each state/ UTs. This survey will be known as the State/ UT inventory. On the basis of this inventory, within one month thereafter, a national inventory will be prepared by the Union of India, which will be put on the websites of Ministry of Environment and Forests, Ministry of Labour and Employment, and Ministry of Mines. The information contained in the State/UTs inventories will be updated initially after every six months for three years and thereafter every year regularly. Accordingly, the changes will be made to the National Inventory.

D. Once the inventory of each State/UT, as well as national inventory is prepared on the basis of the survey conducted above, the very first requirement will be to provide medical treatment to those who had already been identified as silicosis patients. The treatment of these silicosis patients be ensured within a month in the district/ state hospitals which are equipped to provide them treatment.

2. Laying of Standards:

A. The CPCB, DGMS and DGFASLI should prepare a uniform standard for permissible limit for respirable silica dust for different factories/

mines/ industries/ establishments, keeping in mind public health and the international standards. The present standard of 100 microgram/ m3 for dust particles in the air should be revised. It is recommended that the most stringent standard should be laid down for silica-prone industries. In the US, permissible exposure limit (PEL) for respirable crystalline silica is 50 micrograms /m3. This exercise should be completed by the above said agencies within one month. Within the same time period, the said agencies should also prepare a checklist of pollution control devices/safety devices which should be installed/ used by all silica prone factories/ mines/ establishments. Thereafter, within three months, the State Pollution Control Boards along with DG, Mines for mines and quarries and Inspector of Factories for factories should carry out the inspection of all the industries/ units and take appropriate actions against unit(s) which fail to install/deploy pollution control devices and implement such safety measures as per the checklist. All such defaulting units should be closed down. Similar inspections in respect of civil construction sites employing 20 building construction workers or more shall be carried out by the State Pollution Control Board in association with Building and other Construction Workers Welfare Boards of States. In their case also, failure to deploy pollution control devices should invite similar punitive action.

Thereafter, a periodical check-up should be done by the State Pollution Control Boards in association with DGMS/Inspector of Factories of all States/ UTs, on a quarterly basis, initially for three years and thereafter, on six-monthly basis, that is, twice in a year to ensure/ascertain that these units are complying with the pollution control measures/safety measures. The CPCB should do a random yearly check-up. The yearly report of the status of compliance and action taken should be put on State/ UTs website of Ministry of Labour and Employment, and Ministry of Mines.

B. Once the National Occupational Health and Safety Commission comes into existence, the task of further revising the standards for permissible limits for respirable silica dust for different factories/ mines/industries/establishments shall be taken over by the said Commission.

C. The State Governments/UTs may prohibit manufacture and sale of cutting/ drilling equipment used in mining/ quarrying/ stone carving,

sculpting, crushing industries without proper inbuilt dust control systems. The use of wet drilling and dust extractors may be enforced by respective regulatory authorities.

D. Change of Clothes: All mineworkers should mandatorily change their clothes before starting their work and again before leaving place of work. In this regard standards already exist for asbestos industries; the same could possibly be adopted for silica-prone industries.

3. Medical Aspect

A. **Medical Examination in Silicosis Prone Industries:** All the individuals who express their willingness to join a silica prone industry must be medically examined before commencing their employment. The workers should be clinically examined with Chest radiography and Pulmonary Function Test to rule out any respiratory disorder. The periodicity of the subsequent medical examination should be based on silica content produced in a particular industry/mine/process. In case of the workers of stone crushing, carving and sculpting industry, medical examination should be conducted at the time of appointment and then after two years and subsequently every year thereafter. In case of factory workers, the medical examination should be undertaken at the time of appointment and then after every three years.

B. **Issuance of Smart Cards:** The State Government shall issue smart cards to the workers working in silica prone hazardous industries. These smart cards may include the medical history and details of medical examination as well as the history of occupation of the worker. These smart cards will be issued to all the employees of silica prone industries/ establishments working in any capacity, whether regular, temporary, contract or job work (labour). The day such an employee joins a silica prone industry, such smart card shall be prepared. Entering the occupation history of the workers in the smart card database should be the responsibility of the employer. Suitable software protocols for this will have to be laid down. The DGMS/ Chief Inspectorate of each state shall ensure that no employee whether permanent/temporary, contract or job worker is allowed to work in any silica prone industry to whom smart card has not been issued. The Inspector of Factories shall take appropriate action against the silica prone factory if any

employee therein is found to be working there without a smart card. The mechanism of smart card be introduced throughout the country within a fixed time period of, say, 2 years.

C. Identification of Tuberculosis as an Occupational Disease and Recording of Occupational History of TB Patients: Tuberculosis must be notified as an occupational disease for all such victims who demonstrate that they had worked in mine/factory/stone carving or crushing industry and such a TB patient should also be entitled to all the rehabilitative measures available to a silicosis patient.

Directorate of the State Health Services should carry out regular statistical analysis of the incidence of tuberculosis at primary health care level and identify areas reporting higher incidence. These areas should be thoroughly investigated for presence of silica prone industries/other establishments or presence of silica in the atmosphere otherwise.

The occupational history of every patient detected positive for Tuberculosis should be taken and be placed on record. The register maintained under the National TB Control Programme should contain a separate column describing the occupational history of the patients.

D. Integrating Silicosis Control Programme with Revised National Tuberculosis Control Programme: The Government of India should evolve a National Programme on Silicosis. Since silicosis and tuberculosis are closely related diseases, and there already exists a Revised National Tuberculosis Control Programme (RNTCP), Silicosis Control Programme should, while being separate and independent, have an integral linkage with RNTCP. State Governments should prepare independent comprehensive silicosis prevention and control programme on the basis of results of the silicosis mapping which they would be carrying out.

E. Identify a facility for diagnosis of silicosis: In each of the districts, where silicosis prone industries, quarrying or big construction projects exist, there should be a designated hospital for diagnosis and treatment of silicosis. This designated hospital should include an OPD and an inpatient facility for the silicosis affected persons. States should create the facility for diagnosis and treatment in all the endemic districts within one year.

F. **Separate Pneumoconiosis Medical Board for Certification of Silicosis:** Every district where silicosis is endemic must have a separate Pneumoconiosis Board for Certification of Silicosis. The District Pneumoconiosis Board should include a chest physician, a general physician and Radiologist failing which an occupational health physician failing which any other senior physician. State governments must bring out a Standard Operating Procedure (SOP) for identification and certification of silicosis so as to bring about uniformity in the examination and certification procedure. A one week training should also be imparted to the members of the Pneumoconiosis Board for diagnosis and detection of silicosis. Every State should also have one or more Appellate Boards for dealing with dispute in certification.

4. Rehabilitative Measures

A. The NHRC had recommended interim compensation of Rs. 3 lakhs to the next of kin of the deceased which was accepted by the Supreme Court vide orders dated 04.05.2016. By further order dated 23.08.2016, the Supreme Court has directed that amount of 3 lakhs be given in all cases of death due to silicosis. All States/UTs Governments should be directed that interim compensation of Rs. 3 lakhs shall be paid to the next of kin in all cases of death due to silicosis so that the family of the deceased does not suffer. The NHRC recommends that the interim relief of Rs. 3 Lakhs should be enhanced to Rs.5 Lakhs in all future cases of death due to silicosis. For that purpose, each state should create a fund.

B. In addition to the interim monetary relief as above, in cases of death due to silicosis, the widow of deceased victim should also be provided a monthly pension by the State/UTs along the lines of old age pension. States must make a provision for regular revision of pension every 3 years on the basis of change in Consumer Price Index (CPI).

C. If both husband and wife die due to silicosis and their children become orphans, with nobody to look after them, the Women and Child Development department of the State/ UT shall provide them shelter, protection and education.

D. The benefit of Pradhan Mantri Awas Yojana, MNREGA, PDS and other Central and State welfare schemes should be extended to the silicosis victims and in case of a deceased victim to their families.

E. In case a person is suffering from silicosis, he should be provided alternate job or a sustenance pension by the respective State Governments/ UTs. Skill training should also be provided to the silicosis patients and to the family members so that they can get employment in other areas of work.

F. **Welfare Schemes for Workers:** The National/State Social Security Boards set up under the Unorganized Worker's Social Security Act, 2008 should formulate welfare schemes for the welfare of the workers of mines/stone quarries/stone crushing/stone carving industries who are at the risk of contracting silicosis as well as for those already affected and their families. The funding of such schemes could be through a cess collected by State Government. The Welfare Schemes formulated by these Boards shall be in addition to the existing BOCW/DMFT/ REHAB Welfare Schemes and not in lieu of them.

G. **Extending Rashtriya Swasthya Bima Yojana (RSBY) to silicosis victims and their families:** Silicosis patients should be treated as BPL families. The Central Government may consider extending Rashtriya Swasthya Bima Yojana (RSBY), a health insurance scheme for BPL families to all the workers employed in silica prone mines/industries/ stone carving/cutting/processing units.

H. If a person affected due to silicosis or his next of kin wishes to claim compensation/ damages in law, the District Legal Services Authority should provide legal help for processing of such claims.

I. The recommendations made above are the minimum which should be provided to the affected persons. The Central Government/State Government/UT should come out with a scheme which is most beneficial to the silicosis-affected persons.

5. Strengthening of Legislative Framework

Under section 85 (1) of the Factories Act, 1948, the States /UTs which have not yet notified smaller units having potential to cause silicosis irrespective of the number of workers employed therein, as factories may immediately declare all such small units as factories. Further, under section 87 of the Factories Act, 1948, the manufacturing processes or operations which are being carried out in factories in which manipulation of stone or any other material containing free silica is

being cut/carved/processed, they need to be notified as dangerous operations by the concerned State Governments.

All the mining, quarrying, stone crushing units irrespective of the number of employees should be covered under one of the Health and Safety Acts namely The Mines Act, 1952, The Factory Act 1948 and The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act,1996.

6. Regulatory Mechanisms

A. National Occupational Health and Safety Commission

The Central Government should appoint a National Occupational Health and Safety Commission. The functions of the Commission shall be to formulate and recommend to the Government legislative measures, implement and periodically review a coherent national policy for the establishment and promotion of Occupational Health and Safety, Management Systems. The Occupational Health and Safety Commission should consist of Chairman, three members and a Secretary. One of the three members should be an Occupational Health and Safety expert. They should be assisted by such officials as considered necessary.

(i) The National Commission on Occupational Health and Safety shall establish general principles and procedures to:-

a. Formulate comprehensive standards on Occupational Health and Safety.

b. Recommend steps for continuous improvement in occupational health and safety programmes, while avoiding unnecessary administration and costs.

c. Provide for research, information, education in the field of occupational health and safety.

d. Provide a model occupational health and safety policy for organizations.

e. Develop and authorize an audit mechanism for assessing effectiveness of occupational health and safety in industry.

f. Develop proforma for collection of occupational health and safety statistics and communicate to the State Commission. Suggest changes/improvements in occupational health and safety standards on the basis of data received from State Commissions, preferably in consultation with them.

(ii) The Occupational Health and Safety Commission may have the power to conduct or direct the conducting of inquiries in matters of occupational health and safety.

B. National Occupational Health and Safety Committee

(a) The Central Government may set up an Occupational Health and Safety Committee to advise and assist the Occupational Health and Safety Commission in its functions.

(b) The Occupational Health and Safety Committee should comprise of DGFASLI, DGMS, Director, National Institute of Occupational Health, Director, National Institute of Miners Health, Controller of Explosives, Chairman, Central Pollution Control Board, Chief Labour Commissioner (Central), Labour Commissioners of atleast 3 States, Chief Inspectors of Factories of 3 States, DG ESI, DG Health Services of atleast 3 States, 3 representatives of employers, 3 representatives of employees, 3 eminent persons connected with the field of Occupational Health and Safety, Chairman, Members and Secretary of National Occupational Health and Safety Commission.

(c) The Committee may constitute sub-committees for different issues/challenges. The sub-committees may visit various industries to gain firsthand knowledge of the conditions relating to occupational health and safety prevailing in such industries.

C. State Occupational Health and Safety Commission

The State Governments should also appoint a State Occupational Health and Safety Commission in lines with National Occupational Health and Safety Commission. The function of the State Occupational Health and Safety Commission would be distinct from the National Occupational Health and Safety Commission and may be as follows:

a. Facilitate and improve voluntary arrangements for systematic identification, planning, implementation and improvement of occupational health and safety activities at state and organizational level.

b. Promote participation of workers and their representatives in various aspects of occupational health and safety at all levels.

c. Promote participation of members of the public in general and people working or living near the industry, in the occupational health and safety programmes of the industry.

d. Promote participation of members of the medical profession working near the industry in the occupational health and safety programmes of such industry.

e. Promote awareness about occupational health and safety of students at school and college level and also in engineering, medical, agriculture and veterinary institutes and colleges and in polytechnics and Industrial Training Institutes.

f. Collect, compile and analyse occupational health and safety statistics for analysis and for being shared with National Commission.

D. Incentives: Incentives may be provided to the employers and stakeholders who faithfully implement dust control measures leading to either complete removal or reduction of dust in mines/quarries/ factories.

E. Formation of Joint committee: There is a complete disconnect between DGMS, DGFASLI and State Government officials. A joint committee comprising of representatives from DGMS, DGFASLI, Central Pollution Control Board, State Pollution Control Boards, State Mining Department, State labour Department, State Inspectorate Factories and Boilers and state government officials may be formed so that proper coordination is established among these organizations and recommendations made by the DGMS and or DGFASLI are discussed and appropriate action is taken by State governments. These Committees will have to be formed state-wise for each State/UT of the country.

7. **Size of the Lease:** The state government must increase the minimum size of the land leased for mining by fixing a minimum size of land. At present even 0.1 acres of land can leased out for mining. The minimum area for giving mining lease should be five hectares to ensure scientific and systematic mining.

8. **Public Hearing by District Magistrate:** In every silicosis prone area, District Magistrate should conduct public hearings on Silicosis once in every three months.

9. **Regular Inspection by DGMS/Chief Inspectorate of State:** DGMS or Chief Inspectorate of State depending upon the nature of establishment must conduct regular inspections of all workplaces with silica hazard. The inspection should consist of measurement of the air borne silica levels in the workplace.

   Presently, both Chief Inspectorate of Factories of various States and the office of DGMS are understaffed. Central/State Governments must strengthen the manpower of both Chief Inspectorate of State and DGMS.

10. **Disposal of Silica Waste:** At present, there are no norms for disposal of silica waste. Central Pollution Control Board (CPCB) should declare waste silica arising out of industrial processes as hazardous waste and should lay down the norms for its disposal. These norms could be on the lines of BIS Standards for disposal of asbestos waste. In addition, instructions should be issued to ensure that trucks carrying waste materials containing silica should be covered with tarpoline, speed of the truck should not be more than 20 km/hr and tracks be water sprayed. Silica powder should be transported in sealed bags.

11. **Training and Creating Awareness**

A. **Creating Awareness:** All the stakeholders and the workers vulnerable to silicosis need to be made aware of the disease including their legal rights and precautions required to be taken through wide publicity campaigns with the use of electronic and print media. This will also improve self-reporting of cases and facilitate early detection. Creating and spreading awareness among all stakeholders in particular the employers, Public Representatives, Civil Servants at district level and doctors of endemic States should also be done.

Every silica-prone industry should have a display board informing the hazardous effects of airborne silica.

B. **Training:** A training programme should be developed to impart training to all public health doctors/paramedics for early diagnosis and detection of silicosis.

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Recommendations of the NHRC Core Group on Disability*

1. Section 3(3) of the Rights of Person with Disability Act, 2016 mentions that no person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving the legitimate aim. Since the Act is silent on what constitutes the 'legitimate aim', it would give unfettered power to the executives to discriminate on the ground of disability. It was suggested that this issue could be taken care of while framing Rules by the Government.

2. The RPD Act, 2016 provides for grant of limited guardianship by District Court under which there will be joint decision – making between the guardian and the persons with disabilities. In the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, there is a provision for appointing guardians as such this issue needs to be harmonized. The plenary guardianship has been totally abolished in the Bill. It was suggested that instead of limited guardianship, there should be need based guardianship.

3. There is a lack of sensitization among the doctors of the Medical Board authorized to issue disability certificate to persons with disability. In the absence of one of the members of Medical Board, the disability certificate is not issued. Thus the persons with disability run from pillar to post in order to get disability certificate. It was suggested that only one doctor should be enough to identify the disability of the person and to be assigned responsibility to issue disability certificate. Many doctors are not aware of the exhaustive circular and thus there is a need for sensitization of doctors. Therefore, there is a need to

* These recommendations were made on the basis of the meeting of Core Group on Disability held in the Commission on 23 December 2016. These recommendations were sent to the Department of Empowerment of Persons with Disabilities, Ministry of Social Justice & Empowerment, on 13 June 2017.

evolve system where disability certificate could be issued quickly and preferably with one month's time.

4. In the schedule of the RPD Act, 2016 which classify Specific Disability, under the para 7 of the schedule there is a provision that any other category of disability could be notified by the Central Government as a Specific Disability. Therefore, other disabilities could be identified and added in the list.

5. As per the Circular of D/o Revenue, M/o Finance, there is a provision of excise duty exemption on cars bought by persons with physical disabilities who could drive. There are certain categories of persons with disabilities who could not drive but need a car. Therefore, it suggested that provision of exemption of excise duty should be extended to all persons with disabilities.

6. Rehabilitation Council of India (RCI) Act, 1992 needs to be amended as it does not cover all the disabilities. There is a need for a thorough revision of the RCI Act, 1992 in light of the RPD Act, 2016. Keeping the UN Convention on Person with Disability in view, there are two broad functions played by National Trust. Firstly, it appoints guardians through local committees and secondly, implements schemes belonging to four categories of disabilities. But now, the concept of guardianship has been modified in the RPD Act, 2016, as it talks about the limited guardianship which has no mention in National Trust Act 1999. Thus, the National Trust needs to be amended in light of the RPD Act, 2016.

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Recommendations of NHRC Core Group on Protection and Welfare of the Elderly Persons*

Recommendations to the Ministry of Health and Family Welfare, Government of India

(i) The National Programme for Health Care for Elderly has been launched in 2010. Presently the plan covers only 418 districts or 60 per cent of the total districts in the country however even in these 418 districts the plan is yet not fully implemented. It is suggested that the Ministry of Health and Family Welfare may ensure immediate implementation of the plan in all the 418 districts. Further, the programme may also be extended to all the districts of the country by the end of FY 2020-21.

(ii) Government may also get a third party audit conducted of the implementation of National Programme for the Health Care of Elderly in order to assess the service delivery of the plan and also as to whether the funds for the Programme are being properly utilized.

(iii) PG Courses in Geriatric Medicine in all the Medical colleges of the country be started. Action in this regard needs to be taken by President, Medical Council of India (MCI), M/o Health and Family Welfare, Government of India and respective state governments. You may please take up the matter immediately with the respective State governments/governments of UTs and the President, MCI.

(iv) Since a very large number of elderly persons suffer from mental problems there is an urgent need for separate Centres/Institutes for Geriatric Mental Health care in various parts of the country. The M/o Health and Family Welfare may consider financing the setting up of one such Institute of Mental Health Care for Geriatrics in each Region of the country by the host State Government utilizing the funds received from the GOI under National Mental Health Programme (NMHP) or otherwise.

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* These recommendations were made on the basis of the meeting of the Core Group on Protection and Welfare of the Elderly Persons held on 13 January 2017.

Recommendations to the Ministry of Social Justice and Empowerment, Government of India

(i) It is recommended that the Ministry of Social Justice and Empowerment may also lay down detailed common minimum standards for the buildings of Old Age Homes and adherence to these common minimum standards may be made mandatory when old age homes are constructed. Similarly, the Ministry may also consider laying down common minimum standards for the services which should be available in an old age home.

(ii) The coverage of the old age pension is limited to Below Poverty Line (BPL) families and it is not reaching every elderly person. It is suggested that the Ministry of Social Justice and Empowerment may make Old age pension universal for all those who are non-tax payers and do not receive pension from any source. Further, the Ministry of Social Justice and Empowerment should enhance the old age pension making the pension amount reasonable. It is suggested that the old age pension may be raised to Rs 2500 p.m.

(iii) Construction of old age homes in all the districts of the country deserves to be taken up on top priority. GOI may consider part/fully financing the scheme for construction of old age homes in the districts of the country by the various state governments.

(iv) Regular auditing and monitoring of the functioning of old age homes may got done by third parties i.e. there should be an independent audit of the functioning of old age homes.

Recommendations to the Medical Council of India

(i) PG Courses in Geriatric Medicine in all the Medical colleges of the country be started. Action in this regard needs to be taken by the Medical Council of India (MCI), Government of India in conjunction with the state governments.

(ii) Since a very large number of elderly persons suffer from mental problems, separate Centres/Institutes for Geriatric Mental Health care may be established in each Region of the country.

Recommendations to all the States and UTs

(i) As around 40 per cent of the elderly persons suffer from some disability or other, all the public buildings must be immediately modified to be accessible to the disabled and also to disabled elderly. This is also a requirement of the Rights of Persons with Disabilities Act, 2016.

(ii) Construction of old age homes in all the districts of the country be done on top priority. All the old age homes should conform to a standard building design which the state governments may prescribe. They may also provide services as per a common minimum standards which again may be laid down by the State Government/UT.

(iii) Regular auditing and monitoring of old age homes should be got done by a third party i.e. there should be an independent audit of the functioning of old age homes.

(iv) PG Courses in Geriatric Medicines may be started in all the Medical Colleges of the State/s/UTs, after following the due process in association with the Medical Council of India.

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Recommendations of NHRC Core Group on Mental Health*

1. The roadmap prepared by the Ministry of Health & Family Welfare for the improvement in mental health services in the country is elaborate. However, it is deficient in terms of fixing a timeline or a target date for achieving the various milestones which find place in the roadmap. For instance, under the first head in the roadmap viz. Strengthening Human Resources Mental Health, the first goal is *"Develop short duration in-service training modules for the psychologists, social workers, nurses and medical doctors, to equip them with knowledge and skills to provide mental health care services."* However, the roadmap is totally silent as to in what time frame will the in-service training for Medical Doctors, Psychiatrists, Social Workers and Nurses shall be completed. Similar shortcoming is observed with regard to all other goals mentioned in the roadmap.

2. It is recommended that among the goals which find mention in the roadmap, those which are more important and therefore, deserve to be acted upon immediately should be identified and for all such goals timelines for achieving them should be specified in the roadmap itself. This may necessitate consultation with the other stakeholders such as the State Governments, the Medical Council of India (MCI) and the Ministry of Finance being the controller of purse strings. Such a meeting should be held to finalize the timelines and time lines incorporated in the roadmap.

3. A very important step towards bringing about a quantum change in the state of mental healthcare in the country is enhancing the component of teaching of Psychiatry at the level of undergraduate medical degree programme i.e., MBBS degree. Presently psychiatry forms a part of the medicine paper in the MBBS degree programme. Psychiatry should be carved out from the medicine paper and should be taught as a separate subject, qualifying which should be an essential requirement for the MBBS degree to be conferred on a student.

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* These recommendations were made on the basis of the meeting of the Core Group on Mental Health held on 30 November 2016 and sent to all States/UTs in 2017..

4. Every Medical College in the country, both Government and private, should have a separate Department of Psychiatry so that psychiatry is taught in each and every Medical College of the country. All the Medical Colleges where the Department of Psychiatry does not exist at present, should be identified and they should be made to open a separate Department of Psychiatry in their respective College w.e.f. academic year 2018-19. Wherever Psychiatry Department already exists and Post-Graduate courses in psychiatry are being conducted, seats in the same should be increased as accepted/approved by the MCI.

5. In the next four years i.e., by 31.12.2020, each and every Doctor in service in the State and Central Government must be imparted training in Psychiatry, to be able to treat mentally ill patients in the country. A suitable training module for these in-service Doctors may be guided/ devised by the Ministry of Health & Family Welfare with the help of NIMHANS, Bengaluru of a duration not less than one month.

6. In the same way, timeline for increasing the number of Clinical Psychologists, Psychiatrists, Psychiatric Social Workers and Psychiatric Nurses should also be initiated in coordination and consultation with Rehabilitation Council of India and Indian Nursing Council. They may also be associated for developing training programmes for Nurses already working in healthcare sector so that they are trained as Psychiatric Nurses.

7. While strengthening of the three Central Mental Health institutions should be done in a time bound manner is a laudable idea, it is a fact that there is distinct level of difference between the NIMHANS, Bengaluru on the one hand and Lokopriya Gopinath Bordoloi Regional Institute of Mental Health (LGBRIMH) & Ranchi Institute of Neuro-Psychiatry and Allied Sciences (RINPAS), Jharkhand on the other. Immediate steps may therefore be taken to upgrade these latter two institutions to the level of NIMHANS in terms of availability of beds and mental healthcare experts. They may also be renamed as National Institute of Mental Health & Neuro Sciences on the lines of some of the existing engineering colleges being renamed as Indian Institute of Technology.

8. As there is a felt need for similar national level institutions in other parts of the country i.e., in North India and West India, hence institutions like NIMHANS, Bengaluru may be created in these parts of the country as well. For this, even the existing institutions such as IHBAS, Delhi could be considered for upgradation. Similarly, hospitals even though they may be in control of State Government in Western India, could be considered for being taken over and upgraded or else a new institution could be created. Efforts could be made to complete the task of upgradation of the existing institutions by the beginning of the academic year 2018-2019.

9. In view of uneven regional dispersion of Psychiatrists, it was felt that there is a need to carry out the mapping of availability of Psychiatrists, Psychologists, Psychiatric Nurses, Psychiatric Social Workers, Mental Health Counsellors, Community Mental Health Workers in different regions of the country, so that additional funds are allocated and additional effort is made in the commissioning of a mental healthcare network in those parts of the country where the mental healthcare infrastructure and the number of Psychiatrists is found to be less vis-a-vis other regions. The survey may be got carried out by the Ministry of Health & Family Welfare in association with one of the mental health institutions which it chooses for the purpose.

10. The population of the country will soon start aging and in another fifteen years time, the age profile of the population of the country is likely to undergo a significant change. To deal with the mental health problems of the elderly, there is a need to start Post-graduate Programmes in medical colleges in Geriatric Mental Health. Steps in this direction need to be taken immediately by the Ministry of Health & Family Welfare and the MCI so that the country is prepared to deal with this impending challenge.

11. DMHP should be extended to all the districts of country in a phased manner over the next three years.

12. It should be the aim of the National Mental Health Policy that by 1.1.2020, each district hospital in the country has a Psychiatric O.P.D and also has a Psychiatric inpatient ward.

13. The goal of the National Mental Health Policy should be to integrate mental health care with the general healthcare system. Then the specialised mental hospitals shall provide the secondary and tertiary medical care. This will go a long way in removing the stigma which is presently attached to it and which prevents a mentally ill person from seeking medical help till the problem becomes too acute.

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NHRC Recommendations on Bonded Labour 2017*

Ministry of Labour & Employment, Government of India

A) Central Sector Scheme of 2016

1. **Creation of Corpus Fund:** The Central government must issue directions to the State Governments to maintain corpus fund for providing immediate finance for rehabilitation at all district levels which will be utilised directly for the aid of the released bonded labourers.

2. **Revision of National Minimum Wages:** The Central Government should adopt scientific method to ascertain minimum wages. Minimum wages should be fixed of Rs 300 per person in every State for unskilled labour and maximum of Rs 600 per person as per the Seventh Pay Commission. The Minimum wages paid to the labourers shall be periodically revised to create an atmosphere that would focus on the growth and welfare of the labour force in India. Further the law should also incorporate the concept of living wages in labour laws.

3. **Release of Payment:** The Central Government shall issue proper directions relating to release of payment under Clause 6.2 and Clause 6.3 of the Central Sector Scheme of 2016. Whether the conviction is an essential condition which needs to be fulfilled for disbursement of assistance or the final disbursement shall be made upon the proof of bondage and other legal consequences as per the judicial process needs to be elaborated by the Central Government.

4. **Linkage of the Welfare Schemes:** The Rehabilitation package has been revised with effect from 17th May 2016. However the benefits such as land development, allotment of the agricultural land to be linked with other government welfare schemes.

5. **Digitalizing Funds Transfer:** Adoption of technology especially in the digital age to provide transfer of funds for relief and rehabilitation would bring transparency and accountability in the usage of funds.

* These recommendations were made on the basis of National Seminar held on 14-15 February 2017 at New Delhi.

6. **Implementation of Scheme:** The Central Government shall see that the Central Sector Scheme for Rehabilitation of Bonded Labourer-2016 should be implemented in each State/Union Territories in its letter and spirit.

7. **Creation of National Level Task Force:** The National Level Task Force should be created on the sole purpose of abolition of bonded labour in India. The function of the task force initially would be to examine the obstacles and the challenges in the implementation of the Act and Rules of 1976 and Scheme of 2016. The task force may enable to make appropriate recommendations to the various issues of bonded labour.

8. **Rehabilitation Package:** A comprehensive rehabilitation package should be included in the scheme of 2016 indicating all social welfare schemes which can guarantee transparency and access should be available to the released bonded labourers.

B) Bonded Labour System (Abolition) Act And Rules of 1976

1. **Guidelines on Section 21 of the Bonded Labour System (Abolition) Act 1976:** Section 21 of the provides that the offences under the said Act be tried by the Executive Magistrates who would be conferred the powers of the Judicial Magistrate and, on such conferment of powers, the Executive Magistrate on whom the powers are so conferred, shall be deemed, for the purposes of the Code of Criminal Procedure, 1973 (2 of 1974), to be a Judicial Magistrate of the first class, or of the second class, as the case may be. Notification under Section 21 of the Act of 1976 to be issued conferring powers on the Executive Magistrates to conduct Summary Trial in a time bound manner.

2. **Quantum of punishment:** The Act should be effectively implemented which will ultimately lead to more convictions of the creditors and middlemen who not only infringes the basic human rights but also destroys the dignity of labourers.

The State Governments

1. **Creation of Corpus Fund:** The State Government and Union Territories should create and maintain corpus fund for providing immediate finance for rehabilitation at all district levels which will be utilised directly for the aid of the released bonded labourers.

2. **Conducting Surveys:** The State Government shall conduct surveys on bonded labourers half-yearly to know the number of bonded labourers in their State, the reasons for their being in bondage and also understand the reasons for inter-state migrants workers becoming bonded labourer.

3. **Registration of Migrant Workers And Contractors / Agents / Middle Men:** Migration of workers is a phenomenon where the search for labour is the source of survival. Identification of migrant workers is difficult due to lack of effective procedure of registration. The State Government should take effective measures to register the migrant workers by issuing identity cards at the source State and also their destination State (or place of work). The State Government should also take proper measures for registration of which contractors/ agents/middlemen in order to make them accountable.

4. **Sensitise People/Employer on the issue of Bonded Labour:** There is a need to sensitise people to the evils of bonded labour in our society. The State Government along with a participative citizenry needs to address the challenges and work towards a solution to eradicate bonded labour. All the employers shall be sensitised about the Bonded Labour Act/Schemes and the various programmes.

5. **Prevention and convergence model:** Multi-stakeholders response is needed from the Central Government, State Government, NHRC, SHRC, NGOs and other social actions groups to participate in the discourse, decision-making and implementation of solution to the common goal of eradication and abolition of bonded labour.

6. **Medical Check-up of Released Bonded Labourers:** Proper health screening of the released bonded labourers should be done at Government Hospitals. The report of the medical health check up along with all necessary details should be attached with the release certificate.

7. Released child bonded labourers or children of released bonded labourer shall be admitted in schools immediately after their rescue.

8. **Vocational Training and Skill Development:** The State Government should start programmes that would ensure proper vocational training and skill development to the released bonded labourers and their

families at district level. Vocational Training and Skill Development would ensure economic opportunities to the released victims. Adequate funds be made available for skill development of released bonded labourers and potential bonded labourers.

9. **Training of District Magistrates:** There is a need to prepare and conduct an effective Training Programme to train the concerned field officers i.e District Magistrate/SDM of each state through coordinated and coherent action. The training must be carried out by administrative training institutes. Online course for 5 days duration be inculcated in the training programme within one month of joining as District Magistrate in the district.

10. **Release Certificate:** Release Certificate issued by the State should be standardized in all States and Union Territories. The Release Certificates should be in a specific Performa and should be provide all the details of the released bonded labour. It mandatory that while issuing the release certificates in respect of bonded labour to affix the photographs to each of the released bonded labourer along with full permanent address for accurate identification at his/her native place at a subsequent date within this period.

11. **Financial Assistance to the Released Bonded Labourer:** The released bonded labourer be given financial assistance by the designated district magistrate and balance financial assistance funds/package be given by the District Magistrate of the home State.

12. **Rehabilitation of the Released Bonded Labourers:** The State Governments should ensure that necessary and effective steps are taken to rehabilitate the victims.

13. **Filling up Vacancies in the State Labour Department:** The Commission has come across that on account of large vacancies in the State Labour Department, the inspections are not being carried out. The State Government's shall ensure to fill up all the posts of labour inspectors in the department lying vacant for better enforcement of labour laws.

14. **Compliance of Sustainable Development Goals:** In light of Goal 8 of the SDG immediate and effective measures needs to taken to eradicate forced labour, end modern slavery and human trafficking

and secure the prohibition and elimination of the worst forms of child labour. Promotion of labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants and those in precarious employment needs to undertaken.

15. **Multilingual Help Line Number:** There should be a multi-lingual helpline number. So that bonded labour cases can be reported directly from all over India and effective action can be taken accordingly.

16. **Inter-State Education Scheme:** Inter-State Education scheme shall be initiated by the State Governments where the children of the migrant workers can continue their education. This Scheme can co-ordinate between the source state and the destination state (of place of work) and facilitate the right to education of the children of the migrant workers.

17. **Open counselling Centre at District/State Level:** Counselling Centre shall be opened at the District Level and State Level to provide assistance to the bonded labourers, released bonded labourers and potential bonded labourers. The Counselling Centre should have psychological and other experts to provide proper guidance to the victims.

18. **Creation of Data Base and Online Portal for Bonded Labourers:** Data based should be created for identifying bonded labourers and potential bonded labourers. The data base would ensure coordination amongst the States. In fact the data base will facilitate information flow among all the States amongst each other. With the rise of cases of bonded labour the data base will integrate knowledge and information in addressing the menace of bonded labour. The data base can be prepared with the assistance of professional research organisation. The data can base shall be online and also be linked through GPS.

19. **Review Meeting with the State:** Review Meeting of the all stake holders should be held within 3 months. This review meeting would ensure understanding the various issues of bonded labour and work towards a solution oriented approach to eradicate bonded labour.

20. **Accountability of all stakeholders:** Accountability of Stakeholders involved in the abolition of bonded labour shall be clearly defined and will be fixed for effective implementation and monitoring.

Miscellaneous

1. **Strict Vigilance:** Strict vigilance should be maintained towards the occupations that are more prone to bonded labour, for instance, rice mill, brick kilns, etc. Licenses should be provided to the contractors/ middle men in order to prevent any kind of bonded labour. Moreover the vigilance committees should be more pro-active on such industries through vigilance committees and shall make effort to prevent and protect the bonded labourers.

2. **Aadhar for Identification:** Inter-State Migration have thrusted the problem of bonded labour and identification of bonded labour needs to be done by the inclusion and usage of Aadhar identification number.

3. **Social Awareness:** social awareness and sensitization about the Act amongst all state holders/DM's/SP's/Local administration at the grass root level.

4. **Regional Workshops in North-Eastern States:** Regional workshops to be conducted in North-Eastern States either at Guwhati or Aizwal.

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Recommendations of NHRC on Good Governance, Development and Human Rights*

1. **Sharing and Adoption of Best Practices amongst the States/UTs**

Best practices of all states should be shared and uploaded on the State Portal; so that other states can replicate rather than reinvent the wheel. The best practices will further enable the states to learn from each other. For instance, **a) Medical Services Corporation Limited of Tamil Nadu** encourages transparency, accountability and quality of stores and this could be replicated by other States; **b) Right to hearing (Rajasthan)**, this is one of the major steps towards facilitation and Good Governance. It includes provisions for public hearing, setting up of an information facilitation centers, citizen's care centers, call centre's and help desks. This act provides an opportunity to the individual citizens for a time bound response. c) e-PDS System of Chhattisgarh has made PDS a success by using digitalization and automation with appropriate intervention of information and communication technology, thus, making it efficient, transparent and equitable. These good practices may be replicated by other States and UTs.

(Action: CS of all States/UTs)

2. Maximize Governance and Minimize Government

The hallmark to minimize government and maximize governance is proactive investment in empowering the people. This includes simplification of procedures, identification and repeal of obsolete law, identification and shortening of various applications and reporting forms like registration of house, opening of bank accounts, leveraging technology to bring in transparency in public interface and putting up a robust public grievance redress system in place. We need to reduce decision making layers to the minimum. This would help in building a knowledge economy, capacity building, digital literacy and infrastructure.

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* These recommendations were made on the basis of National Seminar held on 21-22 September 2017 at New Delhi.

For instance, a) P2G2 model of Gujarat where State government has made the government accountable to the masses; Accessibility, Decentralization, Efficiency, Innovation and Participation with the adoption of P2G2 Model by putting people at the center of the development process. b) Jeevan Pramann scheme; where pensioners can avoid standing in long queues and can avail their pension by the use of biometric credentials based on Aadhar are some of the salient examples.

Research be encouraged to create a data baseline for the Governance issues.

(Action: All Ministries, GOI/CS of all States/UTs)

3. Dovetailed Technology in Good Governance Initiatives and in Promotion of Human Rights

Technology should be dovetailed in Good Governance initiatives keeping in mind aspirations of the people. Technology is a means of empowering oneself and others. Technology enhances the flow of data. Digital India will enable the government more accessible to people and in making people's ideas and feedback more accessible to the government. For instance, Social Networking Sites could be used to create awareness about job opportunities, skill development and sharing of information of good welfare schemes. Use of GIS Technology in imparting citizen services, security and effective delivery system and e-filling of FDI applications by Foreign Investment Promotion Board (FIPB).

Today due to gaps in flow of information, conflicts, physical separation of different departments and the organization stereotypes; there is internal-communication gaps that are widening within the state organizations. The use of technology should identify and rectify such issues and attempt to bridge the inter-departmental gaps with all organs of Bureaucracy/ Administration. The increase in such integration and cohesion between the departments is a key to good governance. There is also a discrepancy between people who have access to resources and access to technology. Such Digital Divide should be bridged for the success of e- governance. Thus, there is a need to promote innovation, 'out of the box' thinking and encourage public participation through online mechanism.

(Action: All Ministries, GOI/CS of all States/UTs)

4. Swach Bharat Abhiyan

There is a need to raise awareness and change the mindset of people towards cleanliness which could be achieved by self introspection and 'build a culture of safai- in and around us'. Physical cleaning of garbage at both individual and society level at large should be undertaken by dovetailing technology and have innovative cleaning mechanisms. Collection, segregation and disposal of waste at the source with the citizens partnership needs to be highlighted. Have dedicated working hours and encourage 'Shram Daan' as part of Swach Bharat Abhiyan. Littering in public spaces can be made an offence and have a system of 'Zero Hour' in every school and institutions earmarked towards cleanliness. Incentivize and honour Good Safai karamchari at regular intervals. We need to clean rural areas, towns and big cities by an integrated effort for all stakeholders.

(**Action: All Ministries, GOI/CS of all States/UTs)**

5. Participatory Decision Making: Including People in Decision Making Loop

Human dignity is the fulcrum of human rights. Government should engage with people and encourage them to participate in the policy making & while devising mechanisms for delivery of services impacting their daily lives. People should participate in the decision making processes will lead to greater ownership, accountability, competency and respect for law. For example any policy in the draft format could be widely circulated in the public domain to seek diverse opinions, encourage public consultation and have 360 degree opinion sharing through online mechanisms and state web portals. There should be social, financial and digital inclusion for the success of good governance practices.

(**Action: All Ministries, GOI/CS of all States/UTs)**

6. Good Governance should not be an Exception but it should be a Rule of Law.

Good Governance and development initiatives should focus on holistic public participation, inclusive growth, social justice, check

menace of corruption and enhance accountability of all stakeholders. We need to have an efficient delivery system and need to bring in systemic changes in the entire system which needs to be aligned with the aspirations of common man. For instance the Multi source stakeholder feedback (MSF), Transparent processes in Railways, Banks and CPSE's, Formation of Bank Board Bureau (BBB), CPSE Executive and performance appraisals through online APAR are some of the examples that can be replicated as per the needs of the States.

Transparency, responsiveness, commitment and co-operation of all stakeholders are the fundamental pillars of good governance. There is a need to bring more awareness about various welfare schemes and flagship programmes at the grassroot level through the use of Media. Emphasis should be given to make the system more accountable and efficient with the use of technology.

(Action: All Ministries, GOI/CS of all States/UTs)

7. Benchmark for Service Delivery

Benchmarking in all departments of service delivery system should be established and implemented in a time bound manner. The service delivery by the State shall be through a twofold review of the experience with contracting out services and performance-based approaches. There shall be full awareness about the services provided by the State and process to evaluate about the quality of services provided. The State can set "benchmark" for all services and departments and make them achievable in a time bound manner. Community mobilization is an effective way of participation and demanding public officials to deliver quality services. Clear responsibility in the system should be fixed at various levels.

(**Action: CS of all States/UTs)**

8. Role of Media and Civil Society including NGOs in Raising Awareness of Good Governance Initiatives

Media is a force multiplier and an important stakeholder in improving the governance and protection of human rights. To improve the quality of governance it is essential to point out the loopholes in the procedures, policies and schemes that are already in place while acknowledging the positive efforts. The media needs to play a proactive

role by focusing on facts and presenting a pragmatic and unbiased view on issues affecting our governance. Social media could also be used for monitoring of public work and take the feedback from the public. As conscious citizens, we cannot hope for good governance without civil society's engagement. A well-functioning democracy needs everyone's participation and investment. This responsibility of good governance being a general mission of any government makes it imperative to emphasize on and highlight ways for civil society and the government to interact and collaborate to ensure its effective implementation.

The role of the civil society is central to solving large scale complex problems in a sustainable way. The Role of Civil Society in drafting of country reports submitted before the Child Rights Committee in UN is a reflection of such participation. NGOs should be made partners with the Government in designing of development projects.

Thus, all stakeholders should work in a coordinated manner in raising awareness about Good Governance, Development and Human Rights

(Action: Ministry of Information Technology, GOI/CS of all States/UTs)

9. Effective Implementation of Laws

There are a lot of Laws protecting the rights of the individuals but more focus should be given on the implementation of these existing laws. The rights guaranteed to our citizens may be self-evident and constitutionally secured but there is a need for effective implementation of laws. There are a large number of laws but there is a wide gap between the implementation of those prevailing laws. The need of the hour is to spread legal literacy and develop an effective enforcement mechanism with effective checks and balances.

(Action: Ministry of Law and Justice, GOI/CS of all States/UTs)

10. Speedy Redressal of Grievances through Single Window System

The service delivery module should be based on 'single delivery system' and speedy redressal of grievances. This would help in timely delivery and optimum efficiency and simplification of the procedures for common man. This delivery system will be the central point of service delivery, fulfilling the essence of good governance. 'E-District'

by the NCT of Delhi, Umang Application launched by the Ministry of IT which incorporates all other applications by various Ministries are examples that could be replicated by other states. Public servants should be made accountable to ensure timely redressal of grievances, including visible action against the defaulters as per the government rules on the subject.

Single window redressal system should be created which will result in quick delivery of services. Simplified procedures will make technology accessible and affordable to all. Single Window System will increase the efficiency through time and cost in dealing with the government. This will make governance better and development faster and would also ensure timely delivery of the servcies. Single Window System will ease out the process of disbursement of pensions, payment of electicity bill and other benfits. The content of the web portal must be uniform, user friendly and easy to access. Initiatives like SAKALA, is a success story of the Service Delivery Mechanism by Karnataka Government, even the Rajasthan Government has the **Rajasthan Enterprises Single Wingow Enabling and Clearance Rules, 2011** and such other best practices may be adopted by the other States.

(Action: All Ministries, GOI/CS of all States/UTs)

11. Combating Corruption

Corruption adversely affects promotion and protection of human rights. Corruption is a cross-cutting problem which affects all our policies and ultimately affects our governance. Corruption harms all parts of society and deprives them in the worst case of their most fundamental rights, including fair access to health services or education or having a fair trial and investigation. There are laws but these are not implemented. Hence we need to bridge this gap by removing corruption, timely and effective implementation mechanism. Effective actions to fight corruption and ensuring development may be taken. Prevention of Corruption Act, RTI Act, effective implementation of RTI Act, Digital India, E-governance, Demonetization and formation of Special Investigation Team (SIT), to fight black money and corruption are steps that will greatly help to combat corruptions and facilitate holistic development thereby promoting transparency, accountability and equitability.

(Action: All Ministries, GOI/CS of all States/UTs)

12. Improvement of Health Care and Infrastructure

a) Health Care of all individuals is one of the most important tool of Good Governance. Health initiatives should be such designed so that it is within the reach of the common man. For example, any patients when goes to the hospital should be immediately attended by the Doctor, given emphatic listening about the illness, must inform the patient about the treatment and side effects of the medicines. Only essential diagnostic tests should be done and the patient should not be over medicated. These patients should further be given regular follow-up sessions and treatment be recorded properly.

b) Adequate budget allocation towards holistic health care, including creation of health care infrastructure is needed. At present, less than 2% of GDP is allocated to health sector. Hence, additional allocation of funds should be allocated within a short time space of 3-4 years to effectively bridge the gap.

c) Create 'digital doctors' with tele-consultation: India is still largely Rural-India. Specialized doctors are not available in many remote parts of the country. This creates a need for tele-consultants. TISS Study shows that 85% of diseases can be detected without the doctor-patient being present in the same premise/location through tele-medicine.

d) Senior citizens are in need of special care and protection. There should be provisions for the fulfillment of those needs and requirements that are unique to senior citizens. Thus, there should ne an exclusive geriatric ward in all the hospitals for elderly population. Specialized doctors and para medical staff in geriatric care should be appointed.

(Action: Ministry of Health and Family Welfare, GOI/CS of all States/UTs)

13. Need for Focus on Quality Education

Education is the process of facilitating the process of learning, skills, values, beliefs, and habits. Education should focus on the process of learning, acquisition of knowledge, skills and have values. To enhance the quality of education the following adaptations are required:

a) Modification of curriculum of education which includes quality infrastructure, quality of teachers and building a culture of human rights is required. Thus, brining Human rights curriculum not only

into colleges but also in the NCERT Curriculum at a primary level holds importance.

b) Develop teaching/training curriculum for making enabling Apps in a structured norms for the school students. This technology should be accessible, affordable and should add value.

c) Develop technology driven initiatives, which can check/ plug leakage of mid day meal scheme/ ICDS/MNREGA etc.

d) The Assam government has launched a unique initiative "Maitre Ek Gyan Yatra" to link primary school to high school to college.

(Action: Ministry of HRD, GOI/CS of all States/UTs)

14. Demographic Dividends of India

India is at an advantage in terms of demographic dividends as 65% of the population is less than 35 years of age. The youth are energetic, tech-savvy and understand nuances of digital India. The youth can play a vital role in development of Good Governance and management of change. These young minds should be optimally channelized to promote innovation and out of box thinking. New equation: India Today + Information Technology= India Tomorrow +India Talent.

(Action: CS of all States/UTs)

15. Encourage Research and Create Data Baseline

A data bank of knowledge base system consisting of all government development projects must be created. We have limited research initiatives and there is a need to encourage research and development at all levels and create data which facilitates in policy intervention. New research is essential for finding ways to prevent or mitigate the impact of economic, climate and population changes as well.

More than 93 percent of workers work in the Unorganized Sector and migrate from one State to another State; till now there is the process of registration of the unorganized workers have not started under the Act of 2008. Such workers are not even paid minimum wages and are exploited due to their vulnerability. The Recipient State should register; maintain data of migrant workers working in organized and unorganized sector on an online portal which should be regularly updated by the State.

(Action: Ministry of Social Justice and Empowerment/MoLE, GOI/CS of all States/UTs)

16. Creation of Effective Vigilance Committee at the District and Sub-District Level

There should be effective vigilance committees at the State, District and Taluka levels to identify, rescue, release, rehabilitate and reintegrate bonded and child labourers into society. The Vigilance Committee shall provide for the economic and social revalidation of the freed labours, to keep an eye on the number of offence of which cognizance has been taken and to make a survey as to whether there is any offence of which cognizance ought to be taken. Further, there should be counseling and capacity building- training and skill development of released labourers.

Vigilance Committee should be fully functional and contact details of all members with the phone numbers, e-mail details should be uploaded on the State web portal.

(Action:CS of all States/UTs)

17. Enhance Gender Sensitivity

Gender sensitization shall be done to create awareness about the importance of gender sensitivity in organizations, to make the participants understand the measures an organization can take to become gender sensitive and to develop gender sensitivity of participants.

Gender sensitive capacity building initiatives can contribute to poverty reduction and sustainable development for improving the wellbeing of people in the country. To enhance gender sensitivity there is a need to change out mindset and attitudes of the people towards women, gender sensitization programmes should be held in various government offices through sensitization campaigns, training, workshop, programs etc. at regular intervals. For instance, the centrally sponsored scheme of Rajiv Gandhi Scheme for empowerment of Adolescent Girls (SAMLA) and its related interventions; Bhamashah Scheme by Rajasthan Government and Ladli Beti Scheme by the Jammu and Kashmir, Sukanya Samridhi Yojana which are in line with 2030 Agenda of SGD. Moreover, to prevent sexual harassment at workplace, all employers or persons in charge of work place, whether in public or private sector, should take appropriate steps to prevent sexual harassment.

(Action: Ministry of Women and Child Development, GOI)

18. Automation and Computerization

Computerization is not e-governance alone, but application through automation and computerization is e-governance. Automation means the mechanization-and usually the speeding up--of production, not only in manufacturing but also in service, where Computerization is an advanced form of automation.

The policy initiatives for e-governance should focus upon enhancing and improved the Central, State and District Level administration. The Modernization of Targeted Public Distribution System (TPDS) including its end-to-end computerization for the Department of Food & Public Distribution (DoF&PD) have been progressive steps towards good governance. All States should incorporate automation and computerization of PDS.

Moreover through digital technology online surveys should be conducted for effective feedback.

Also, earlier opening of Bank Accounts had a 4-5 pages long application form but now through, KYC- Know your customer- online one page forms can be filled which takes lesser time and makes the life of citizens much easy.

(Action: Ministry of E. & I.T., GOI/CS of all States/UTs)

19. Capacity Building and Training of all Stakeholders

There is a need for developing knowledge economy, enhance infrastructure and capacity building-training of administrative staff at all levels. This training program allows strengthening skills that are needed to improve the knowledge of the administrative staff. This awareness will enable all employees to have similar skills and knowledge conforming to higher standards.

Through the help of civil society, digital bankers, doctors, teachers and NGOs, such awareness and capacity building programmes should be conducted for promoting good governance and human rights. One such example by the Central Government is the Disha Program which teaches people how to make use of Digital resources.

(Action: Ministry of E. & I.T., GOI/CS of all States/UTs)

20. Constitution of State High Power Committee in every State

A State High Power Committee for Good Governance, Development and Human Rights should be constituted in every state under the Chief Secretary. Further, they should meet at regular intervals, preferably at a frequency of three months to review the progress and follow-up with all the other Government Departments. This includes synergy of efforts among the departments. The High Power Committee will assess, identify, determine and recommend measures for continual improvement of governance. The focus of the committee should be in accordance with the four major principals of Good Governance i.e. transparency, participation, accountability and responsiveness. This will also promote greater commitment, cooperation and coordination of all the stakeholders.

(Action: CS of all States/UTs)

21. Corporate Social Responsibility

Corporate houses have enormous resources – they should also make efforts to protect and promote good governance initiatives. The corporate ensure that they provide for occupational health safety of employees and promote and protect of their Human Rights through their business operations as well as protect land rights and labour rights of employees. The corporation should ensure timely arrangement and payment of minimum wages and prevent harassment at work place. Corporate social sector must integrate with all stakeholders to promote Good Governance initiatives.

(Action: Ministry of Finance/Commerce & Industry, GOI)

22. Creation of Institutional Checks and Balances

There is urgent need for checks and balances in our functionality of our institutional mechanisms for preventing fraud, misconduct, criminality and corruption. Creating a monitoring and evaluation board within the institution will help check large scale cases of corruption. Therefore, there is a need to have institutionalized checks and balances in order to maintain transparency and accountability.

(Action: CS of all States/UTs)

23. Police Initiatives

Police is a service; the general perception that it is a force needs to change. Police does not violate human rights of people and people should not be scared to go to the police. The attitude should be changed by sensitization programmes.

a. Sensitization of all police officials is required for protection and promotion of Human Rights.

b. All FIR's should be uploaded on the website as per the orders of the Supreme Court.

c. Cashless challans should be issued for traffic violations.

d. Prisoners should be treated humanely and their right to dignity to be protected. They should be provided with employment opportunities, rehabilitation facilities after their release.

e. There should be capacity building- training and skill development of released prisoners and, in order to not fall back into the vicious circle there is a need for a proper follow-up mechanism.

(Action: Ministry of Home Affairs, GOI, CS/DGPs/IGPs of all States/UTs)

24. Regulation of Traffic through Technology:

There is a need to put in Intelligent Transportation Systems referring to the use of technology (computing, communications, and sensors) to optimize the movement of vehicles over transport networks. This optimization covers areas as diverse as traffic signal control, automatic number plate recognition (ANPR), and on-line real-time traffic messaging. Moreover the range of cameras should be wider and dynamic. There shall also be Automation of number of number plates, use of Automatic Number Plate Recognition (ANPR) system, to improve identification of traffic rule violations, within a shorter time-frame, and without having to increase number of monitoring personnel. This would also check and reduce the number of road accidents per year.

(Action: Ministry of E. & I.T., GOI, CS/DGPs/IGPs of all States/UTs)

25. Cleanliness and Sanitation

Cleanliness and sanitation through public participation and making all departments accountable for maintaining high standards of cleanliness. Around 60 percent of Indian population does not have access to safe and private toilets. Such overwhelming majority of those without access to sanitation facilities poses a formidable obstacle in the development of the nation. In this backdrop, we need to address the challenges of clean drinking water, cleaning of rivers, sanitation, and hygiene and ensure success of National Rural Drinking Water Programme which provides universal and equitable access to safe and affordable drinking water for all by 2030.

Further, government should focus on using renewable energy, especially solar and green products which are cost effective, install garbage pits, biogas plants and bulk disposal plants to recycle waste in all urban and rural areas. Ideas need to be generated to raise awareness and change the mindset and behaviours of the masses towards hygiene and cleanliness. Existing laws and regulations should be made more stringent by imposing fine and penalties for defaulters.

(Action: Ministry of Water and Sanitation, GOI, CS of all States/UTs)

26. Social Audit

Social audits identify the potential and existing beneficiaries to evaluate the implementation of a programme by comparing official records with ground realities. Social audit helps for identification of accurate documents, priroritzation of developmental activities, check proper utilization of funds, and confirm the development activity with the stated goals and guarantee quality of service essential for good governance. Thus, making it available at district level will make the governance more effective, transparent.

(Action: CS of all States/UTs)

27. Fix Timelines and Standardized Procedures

A quantum improvement would come only when the Executive, Judiciary, and Legislature would work collectively for promoting good governance and protecting human rights which enables time bound

implementation of good governance initiatives and timely disposal of common man's grievances - fix timelines and standardized procedures. Further, there is a need for the change of the mindset and the attitudes of the administrations. The public servants should be self actualized and self motivate.

(Action: All Ministries, GOI, CS of all States/UTs)

28. Change of Mindsets and Attitudes of all Stakeholders

Changes in the attitudes and mindsets of all stakeholders are essential for sustainable development and protection of human rights. Human Dignity is the spine of Human Rights and it should be strictly protected. This change should be in alignment with the aspirations of common man, rule of law and based on equality.

(Action: All Ministries, GOI, CS of all States/UTs)

Miscellaneous

29. Most of the State governments authorities/agencies remain in a denial mode for issues like Bonded Labour, Child Labour and Trafficking. Sometimes, the denial is on account of the perceptions that acknowledging the existence of such social issues will bring a bad reflection on the image of the state. States should take initiatives to highlight these issues, if existing as acknowledging such social issues and providing timely relief to aggrieved victims is of utmost importance.

Compliance by all the stakeholders, including the States and UTs should be a natural and spontaneous process in a time bound manner.

(Action: All Ministries, GOI, CS of all States/UTs)

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Book Review

The Twilight of Human Rights Law (2014)*

Ranbir Singh[**]

The book[1] under review is a well-researched, impartial and critical analysis of the state of affairs of Human Rights Treaties, pointing out strength and weaknesses. The author laments the situation under the title 'The Twilight of Human Rights Law'. It raises many research questions and places these questions systematically in each of the seven chapters, plus the introduction.

In the introductory chapter the focus is on ever-increasing incidents of violations, especially in authoritarian regimes. The author has dealt with these concerns by examining different types of violations in different countries across the globe. However, he submits that small-scale intervention can promote good in the short term by relieving the worst forms of misery and poverty. The author, throughout, advances his argument that a Human Rights Treaty regime can do little to improve the wellbeing of people around the world. Authoritarian governments, such as Russia, keep power in subtler ways by controlling from behind the scenes. Even the most humane and liberal European countries have violated the Human Rights of immigrants and other non-citizens.

In chapter one he starts from moral obligations towards fellow citizens in the sense that morality becomes universal and applies to all human beings. He emphasizes that this idea can be found in one form or another throughout recorded history, including in all major religions, but especially in Christianity. He further submits that modern human rights thinking was developed only in the eighteenth century, while seeking to throw off the influence of religion and irrational tradition, locating the source of morality in human nature as is evident all human beings.

Coming to the 20th Century the author gives an overview of the Second World War, the allies versus the axis powers, the birth of the UN and the Universal Declaration of Human Rights and other International Treaties on

* Posner, Eric A.: The Twilight of Human Rights Law, Oxford University Press, 2014.

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1 Ibid

Human Rights. The author further advocates the idea of some legal theorist that a global constitution or international bill of rights, higher law, that supersede domestic law and to declare Human Rights as customary International Law.

The author has vividly discussed various institutional arrangements for implementing Human Rights Treaties by categorizing nine 'core' Treaties in the second chapter.

He has also contends that the common feature of all these treaties is to insist that states incorporate these rights into domestic law. But the author points out that, domestic laws of all countries overflow with ambiguities. He has dealt with the three types of International Institutions devoted to Human Rights, that is, the Human Rights Commission, the UN High Commissioner on Human Rights and the UN Council on Human Rights (replacing the UN Commission on Human Rights). The author further elaborates on International Criminal Law and International Human Rights Law and their common feature; that the individual must be protected from abuse at the hands of the state. He is also critical of the functioning of the International Criminal Court (ICC) and National Human Rights institutions (domestic enforcement) he comments that there are considerable variations in their effectiveness across countries.

The question, 'Why Do States Enter Into Human Rights Treaties?' is dealt with in the third chapter. The author points out inconsistencies and conflicting views when groups of states enter into human rights treaties. Liberal democracies do not expect to incur any costs but they have disagreed about entering into Human Rights Treaties over some questions, for example, whether the death penalty should be regarded as a Human Rights violation. Also, while ratifying a treaty, some have added reservations, because of which, they will not be compelled to comply with one or more of the provisions. Authoritarian States (except the most powerful) are poor and dependant on the West for foreign aid, technical assistance, defence and other benefits. Transitional States, such as the states in Eastern Europe and Latin America, are undergoing a change over from authoritarianism to democracy. They enter into human rights treaties in order to adopt liberal reforms. But a government might worry that liberal rights could be abandoned when an authoritarian government, supported by the people, replaces a liberal government.

The author further proceeds to discuss the costs of entering into human rights treaties, such as facing legislative or constitutional hurdles and independent judiciaries. Liberal democracies, interpret treaties contrary to the intentions of

the government. Non-democracies and democracies with weak human rights records, face either domestic pressure or foreign pressure, in the sense that it requires them to change behaviour in ways that they are not inclined towards. The author also recollects an old criticism of human rights, that it is a form of Western imperialism. At the same time he rebuts this argument on the grounds that it is symptomatic of a weakness in humanitarian thinking.

Chapter four deals with the question of compliance with human rights treaties by states. Relying on certain statistical data alone will not give a correct picture. For example, the concept that treaty ratification improves human rights performance must be evaluated with care. Studies and evidence show that after ratification some have improved, some have not and some incorporate them into their constitutions. Thus treaty ratification improves human rights in certain types of countries but not in all.

The question of why states comply (or do not comply) with human rights treaties is pondered in chapter five. The author discusses various international and domestic incentives to comply with human rights treaties. He also complains about ambiguity and inconsistency and vagueness in human rights treaties. He submits that there are 300 separate human rights, and states have limited resources, political will or institutional capacity to comply with them all . However, the author summarizes that human beings possess enough knowledge about the undesirability of certain types of government behaviour that they can rule them out. But concepts of human good and change-ideas about how best to trade-off human values and laws to implement them through government policy, are constantly evolving as people gain information, test and discard proposals, observe experiments in other places and so on. Because of this peculiar requirements of international cooperation, the International Human Rights Institutions lack authoritative agencies.

The sixth chapter deals with the following two important propositions, 1) If a government respected human rights, they would not go to war, in other words, the question of whether human rights law contributes to peace. Do Human Right Treaties or the effort to spread rights around the world, cause war? Should countries engage in 'humanitarian intervention' or military interventions to stop atrocities in other countries? The author considers various military interventions led by the US and NATO in Rwanda, Yugoslavia, Afghanistan, Iraq, Libya and Egypt. At the same time the author points out that military interventions were not launched in dozens of countries where human rights were routinely violated, for example, China and North Korea. The author also makes

observations about the consequences of military interventions. Experience shows they have not yielded good results in Iraq or Egypt; on the contrary, he points out, they have destabilized society.

In conclusion, the author submits that human rights law is ineffective because there are too many rights. The reason he gives is that some rights are frivolous where too many rights exist. A state can justify its failure to respect one right by insisting that it has exhausted financial and political resources trying to comply with other rights, which makes it difficult to criticize states for violating rights or to persuade them to enforce rights.

Finally, the author is of the view that human rights law will not end with a bang. States are not going to withdraw from Human Rights Treaties or denounce human rights in public statements, but there will be competing and unresolvable claims about which interests deserve human rights protection, which interests do not and how much weight should be given to each. Thus the author submits that human rights law is experiencing a twilight existence that may linger for quite a while.

Quoting Amartya Sen, in saying that rich countries can help people in poor countries by encouraging their governments to respect human rights, the author has stated that each country should be considered on its own terms and that development aid does not always work.

The insights of the author are supported by historical and current experiences inside and outside the state. The book under review is not a mere addition to human rights jurisprudence; it will impress the minds of young researcher, students, scholars and even governments and NGOs to see whether the twilight of human rights shall become 'brighter and brighter' to carry forward human rights movements and human development for all generations to come, to make the world a more peaceful place to live. The book is a welcome addition to the literature and works on human rights.

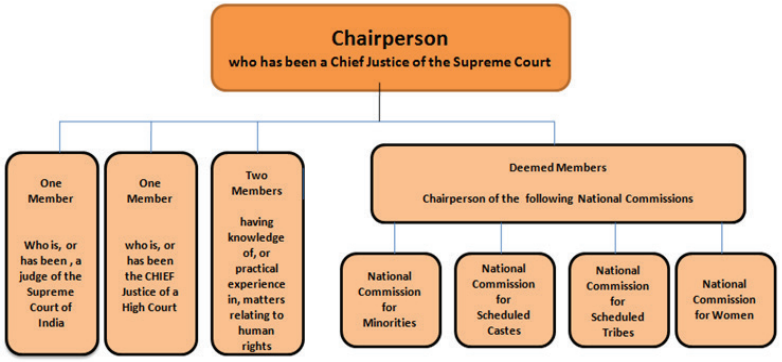
Major Activities of the Commission

Volume-16, 2017

National Human Rights Commission: Highlights of Activities (1 January to 31 October 2017)

The National Human Rights Commission (NHRC) was established on 12 October 1993. Its mandate is contained in the Protection of Human Rights Act, 1993 as amended vide the Protection of Human Rights (Amendment) Act, 2006 (PHRA). The constitution of NHRC is in conformity with the Paris Principles that was adopted at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights organized in Paris in October 1991, and endorsed by the General Assembly of the United Nations in Resolution 48/134 of 20 December 1993. The Commission is a symbol of India's concern for the promotion and protection of human rights.

The Commission consists of a Chairperson, four full-time Members and four deemed Members



The Chairperson and the Members of the NHRC are appointed by the President of India, on the recommendations of a high-level Committee, consisting of the following members:

- The Prime Minister- Chairperson
- Speaker of the House of the People- Member
- Minister in-charge of the Ministry of Home Affairs in the Government of India –Member

- Leader of Opposition of the House of the People-Member
- Leader of Opposition in the Council of States- Member
- Deputy Chairman of the Council of States- Member

The Chief Executive Officer of the Commission is the Secretary-General, an officer of the rank of Secretary to the Government of India. The Secretariat of the Commission works under the overall supervision of the Secretary-General.

There are five Divisions in the Commission. These are the – (i) Law Division, (ii) Investigation Division, (iii) Policy Research, Projects and Programmes Division, (iv) Training Division, and (v) Administration Division.

The subsequent paragraphs give an overview of the significant activities undertaken by the NHRC from 1 January to 31 October 2017.

National

Complaints Handling

Total number of cases registered in the Commission	48,543
Number of cases dismissed in limine	20,747
Number of cases disposed of with directions to the appropriate authorities	9,194
Number of cases transferred to the respective SHRCs for disposal in accordance with the PHR Act, 1993	13,300
Number of cases, and the total amount of interim relief /compensation recommended by the Commission	359 cases Rs. 6,97,80,000/-

Investigation of Cases

Total number of cases dealt during the above said period	4,951
Number of cases of deaths in judicial custody	2,547
Number of cases of death in police custody	237
Number of fact finding cases	2,167
Number of cases of deaths in police encounter	51
Number of spot enquiry cases of alleged violation of human rights	55
Number of cases in which enquiry has been completed	39
Number of cases in which enquiry is pending	16

Training Programmes Organized

Training programmes on human rights related issues	70
Students given the opportunity of Short-Term Internship	117
Delegations of students from universities/colleges and representatives/officers from other institutes	821

Workshops, Regional/National Seminar, Regional/ National Conference

Sl. No.	Event	Date and Place
1.	Southern Region Conference on Business and Human Rights	17 January 2017 Chennai
2.	Meeting with the Experts on Silicosis	23 January, New Delhi
3.	Meeting with the Experts on Silicosis	7 February 2017 New Delhi
4.	National Seminar on the issue of Bonded Labour	14-15 February 2017 New Delhi
5.	Western Region Conference on Business and Human Rights	22 February 2017 Mumbai
6.	National Seminar on 'Gender, Social Justice and Human Rights'	15 March 2017 Kohima
7.	National Seminar on 'Literature, Society and Human Rights'	23-24 March 2017 Raipur
8.	Meeting with the Experts on Silicosis	6 April 2017 New Delhi
9.	Northern Region Workshop and National Seminar on 'Good Governance, Development and Human Rights'	28-29 April 2017 Union Territory of Chandigarh
10.	Workshop on 'Elimination of Bonded Labour'	19 May 2017 Guwahati
11.	Eastern Region Conference on Business and Human Rights	2 June 2017 Kolkata

12.	Workshop on 'Role of Media in Promotion and Protection of Human Rights'	22 June 2017 Bangalore
13.	Workshop on 'Elimination of Bonded Labour'	21 July 2017 Patna
14.	Southern Region Conference on Juvenile Justice Act and POCSO Act	5-6 September 2017 Chennai
15.	National Seminar on 'Good Governance, Development and Human Rights'	21-22 September 2017 New Delhi
16.	Workshop on 'Elimination of Bonded Labour'	6 October 2017 Pune
17.	Workshop on 'Elimination of Bonded Labour'	27 October 2017 Goa
18.	National Training Workshop on Promoting and Protecting the Human rights of Women and Children for the officers and for the staff	30 October to 2 November 2017
19.	North-Eastern Region Conference on Juvenile Justice Act and POCSO Act	10-11 November 2017 Imphal

Research Studies Commissioned By NHRC

Sl. No.	Name of Research Studies	Date of Sanction & Duration of Project
1.	Corporate Duty to Respect Human Rights in Indian Context- An Empirical Study on the State of Human Rights Practices based on Ruggie's Framework in Business Firms in India	31 March 2017 12 months
2.	Status of Human Rights Education in Colleges and Universities	31 March 2017 12 months
3.	Challenges for Protection, Dissemination and Promotion of Human Rights Education through Law School: A Study of North India	31 March 2017 12 months
4.	Custodial Justice: An Investigation into Causes of Deaths in Uttar Pradesh, West Bengal, Maharashtra and Tamil Nadu	31 March 2017 13 months

5.	Assessing the Status of Health System Delivery and Factors Determining Access to Quality Health Care for Tribal Communities	31 March 2017 12 months
6.	A Study to Understand the Changing Dynamics and Challenges of Surrogates	31 March 2017 08 months
7.	Agrarian Crisis and Farmers Suicides – An Empirical Study of Endemic States – Issues and Concerns	31 March 2017 10 months
8.	Human Rights Education in Schools in India : A Comparative Study of Syllabus Prescribed by State Education Boards	31 March 2017 15 months
9.	Developing Human Rights Index and Human Rights Report	31 March 2017 12 months

Details of Special Rapporteur Visits

Sl. No.	Name of Jail/Institutions/Districts Visited	Date of Visit	Visit by
1.	Bhubaneswar, Ganjam and Kalahandi Districts of Odisha (Bonded / Child Labour) (Sukande, Kanamana, Balipada, Uparpada Villages, Residential School at Raghunathpur in Ganjam District	15-23 January 2017	Dr. Ashok Sahu
2.	Tezu, Lohit District of Arunachal Pradesh (Primary Health Centre at Loiland village, Drinking water supply Scheme, Changliang village, Auxiliary Line Corps (ALC) Anganwadi Centre, and Tankhakso Chai Memorial Government Upper Primary School, Tezu)	29 January – 3 February 2017	Sh. Anil Pradhan
3.	Patna, Bhojpur and Saran Districts of Bihar (Bonded / Child Labour) (Dechnabal and Balwahi Tota villages, District registration and Consulatation Centre and Children Home (Boys), Chhapra)	7 – 11 February 2017	Dr. Ashok Sahu

4.	Balasore District Jail, Odisha	1 - 2 March 2017	Sh. Damodar Sarangi
5.	Baran and Kota District, Raj. (Eklera Danda Bonded labourers Rehabilitation Colony, Janjati Balika Aavas Vidyalaya Kishanganj, and field visits to Brick Kilns at Mangrol, Kota & Jagpura)	17 March 2017	Sh. G.B.Panda
6.	Bhopal, Indore and Khandawa Districts of Madhya Pradesh (Bonded / Child Labour) (Vijay Nagar and Sarafa in Indore, Rajkiya Bal Sangrakhan Ashram and Bal Sakha Ashram Gruha, Indore and Khandwa)	19-25 March 2017	Dr. Ashok Sahu
7.	District Jail, Meerut	23 March 2017	Sh. Sunil Krishna
8.	Central & District Jail, Bareilly	28 March 2017	Sh. Sunil Krishna
9.	Mumbai, Raigad and Thane Districts, Maharashtra (child / bonded labour) (Dongri Nirikhana/Balgruha, Umarkhandi at Mumbai, Naik Frozen Foods Pvt. Ltd., MICD Taloja, Raigad, NCLP School No. 36, Fatima Nagar, Bhiwandi and Thane District Administration Skill Development & Apprenticeship Centre)	9-19 April, 2017	Dr. Ashok Sahu
10.	Lok Nayak Jai Prakash Narayan Jail, Hazaribagh	26 April 2017	Dr. Vinod Aggarwal
11.	Ernakulam District Jail	29 April 2017	Shri Jacob Punnoose
12.	District / Central Jails Nagpur, Chandrapur, Gadchiroli and Bhandara in Maharashtra	15-21 May 2017	Smt. S. Jalaja
13.	Beur Central Jail, Patna	7-8 June 2017	Dr. Vinod Aggarwal
14.	Birsa Muna Central Jail, Hotwar and Women Probation Home Namkun, Ranchi	22 June 2017	Dr. Vinod Aggarwal

15.	Lucknow, Barabanki and Sitapur Districts in U.P. (Bonded / child labour) (Amron Foods Private Ltd. Kursi village, Balgriha (boys and girls), Sitapur)	18-24 June 2017	Dr. Ashok Sahu
16.	Naini Central Jail, Govt. Children Home for Infant, Govt. Children Home for Girls, Govt. Shelter Home for Women & Govt. Observation Home for Juvenile (Boys), Allahabad	23-25 June 2017	Shri Sunil Krishna
17.	Inspection visit of Central Prison, Mumbai	25-26 June 2017	Shri S.C.Sinha, Hon'ble Member
18.	Flagship program in Dibrugarh District Assam (Dibrugarh Central Jail, Popular Boys' Club Anganwadi Centre, Sankerdev Primary School, PMAY and IAY houses in Gram Panchayat Dimona)	26-30 June 2017	Shri Anil Pradhan
19.	Trivandrum, Kerala (tribal areas) (Kindergarten for tribal students at Vlavetty, Mancod settlement Grade Learning Centre, MGLC at Pdoyakala, MGLC at Potomave settlement, Valippara settlement, GKM CBSE Model Residential School Kuttichal, Model Reisdential School for Girls at Kattela, Anganwadi at Potomave Settlement, CVBSE Model Residential School at Njaraneeli,	28-29 June 2017	Shri Jacob Punnoose
20.	Central Jail, Ghagidih, Jamshedpur	12 September 2017	Dr. Vinod Aggarwal
21.	Alipore Central Jail, Kolkata	14 September 2017	Dr. Vinod Aggarwal
22.	Buxar Central Jail and Buxar Open Jail	12 October 2017	Dr. Vinod Aggarwal

NHRC Camp Sittings and Open Hearings

Sl. No.	Place of Camp Sittings	Date
1.	Bhubaneswar, Odisha	9-11 January 2017
2.	Portblair, Andaman & Nicobar Islands	19-20 January 2017
3.	Kohima, Nagaland	24 April 2017
4.	Guwahati, Assam	17-18 May 2017
5.	Dehradun, Uttarakhand	13 July 2017
6.	Lucknow, Uttar Pradesh	9-11 August 2017

International

Sl. No.	Event	Date
1.	Regional Conference on Human Rights Defence Strategy	28 January 2017 Dhaka
2.	GANHRI Bureau Meeting	6-8 March 2017 Geneva
3.	Session of the Working Group on Ageing	5-7 July 2017 New York
4.	Conference on National Human Rights Commission, Bangladesh: Challenges and Way-forward	28 January 2017 Dhaka, Bangladesh
5.	Workshop on 'The Garment Industry & Business & Human Rights – Closing the Gap'	30-31 January 2017 Bangkok, Thailand
6.	GANHRI Bureau Meeting, Knowledge exchange, General meeting, Annual Conference, a one-day Commonwealth Forum of National Human Rights Institutions (CFNHRI) meeting and event with UNICEF on NHRIs and children's Rights	6-9 March 2017 Geneva, Switzerland

7.	Ongoing programme of cooperation between the APF and UNDP to strengthen the capacity of NHRIs in the region to work with LGBTI communities and better advocate for their human rights, - a 2 day regional conference: The Yogyakarta Principles: What have we learnt and where to now? 25-26 April, 2017, Bangkok, Thailand" - organised by APF	25- 26 April 2017 Bangkok, Thailand
8.	Training of NHRI opportunity on International Human Rights Mechanisms	1- 5 May 2017 Geneva, Switzerland.
9.	Partnership Programme for NHRI Human Rights Officers	29 May to 02 June 2017 Seoul, South Korea
10.	8th Session of the Working Group on Ageing	5-7 July 2017 New York
11.	Senior Executive Officers (SEO) Network Meeting	29-30 August 2017 Melaka, Malaysia
12.	GANHRI Bureau Meeting	1- 3 November 2017 Costa Rica.

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