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*The views expressed in the papers incorporated in the Journal are of the authors and not necessarily of the National Human Rights Commission.*

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**Justice A.S. Anand**
Chairperson
(Former Chief Justice of India)

# PREFACE

Section 12(h) of the Protection of Human Rights Act, 1993 gives mandate to the National Human Rights Commission (NHRC) to "spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means". In pursuance of this statutory responsibility, the Commission has been undertaking activities to spread human rights literacy. Publication of a Journal on Human Rights is one such endeavour.

On 10 December 2002, the inaugural issue of the Commission's Journal was released by the President of India. It was distributed amongst senior civil servants, NGOs, academics and others and was well received.

Continuing with this tradition, the second issue of the Journal seeks to present the contribution of a large number of experts on a wide range of issues concerning human rights such as right to development, rights of Women and Children, Human Rights and Criminal Justice System and rights of those affected by HIV/AIDS.

In addition to articles on key human rights issues, some recommendations and opinions of the Commission besides action taken by it on certain important human rights issues have also been included in the Journal.

I hope the Journal for the year 2003 would help in spreading awareness about Human Rights issues and also stimulate thinking and action on the subject.

November 21, 2003

**(A.S. Anand)**

*Journal of the NHRC*, Volume 2, 2003, 1-10

# *Human Right to Development*

Arjun Sengupta

Human rights have been recognized as standards of achievement and norms of behaviour of all members of a society, in particular of those in authority like the governments or other agencies who have the power to influence the behaviour of others. They form the foundations of a society and they are inviolable, as the society would disintegrate if they were violated. These rights are claimed by the people as their entitlement to certain objects or privileges or interests they value – what they want to have and to be – to protect and promote their dignity as human beings. The society is formed to ensure through its laws, constitution and institutions that every one enjoys these rights. The states, according to this perspective, derived their authority over the society from their responsibility to safeguard these rights.

Traditionally, the rights language had the power to mobilize public action to compel the social authorities, whether they were the kings or the sovereign rulers or the nation states, to protect these rights, at least not to violate them if not to promote them. Initially, whether it was for the *magna carta*, or the American War of Independence or the French Revolution, these rights were formulated essentially as negative rights which the authorities were charged to abstain from interfering with or preventing from the enjoyment of these rights. These were all presented in the form of freedoms which were considered basic to human dignity and which were threatened by the possible actions of the authorities. Indeed, the American Declaration of Independence was categorical about the rights of the people to rebel against and overthrow the state, if it failed to ensure the enjoyment of these freedoms.

After the second world war when attempts were made to rebuild the international system, so that the experience of the holocaust is not repeated, these rights were presented as civil and political rights that the nation states were obliged to protect and all

other actors in the international society, the states, international agencies as well as non-state actors, were also obliged to protect these rights. But at the same time the international community started talking about a system of positive rights, essentially in the form of economic, social and cultural rights with respect to which the nation states and other actors of the international community had the obligation of not only protecting them, but also of promoting and fulfilling them. These were positive rights requiring positive actions, involving use of resources and changing institutions and taking measures of realizing these rights in a step by step, progressive manner. The Universal Declaration of Human Rights which was adopted by the United Nations in 1948 included both the civil and political rights as well as economic, social and cultural rights and they formed the basic norms for all the nation states, as the foundation of the civilized international society that the world community was trying to reconstruct. The economic, social and cultural rights were regarded as fundamental as the civil and political rights.[1]

Soon, it was realized that the distinction between civil and political rights and economic, social and cultural rights was an extremely artificial one. Protecting the rights directly from violation might not require use of any resources as it involved what the states were not supposed to do or interfere. But if that protection had to be sustainable, adequate steps needed to be taken to build up mechanisms to safeguard these rights, to promote them and to prevent them from being violated by other non-state actors. These required positive actions that absorbed resources and also changing the institutions. So, even the civil and political rights were to become a combination of negative and positive rights. The economic, social and cultural rights would also be seen as integrally dependent on many of the negative civil and political rights such as the right to life, freedom of movement, of information, of association and basic liberties. Human rights came to be recognized as totally interdependent, as the level of realization of one right depended on the levels of realization of other rights.[2]

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1. Paul Gorden Lauren : The Evolution of International Human Rights, University of Pennsylvania, 1998 pp. 205-280
2. See Sengupta, Arjun : Development and Change, Volume 31, Number 3, June 2000, Institute of Social Studies, Blackwell Publishers, The Hague.

Besides interdependence, another major characteristic of human rights is their integrity, which follows from the premise that human rights are entailed by the concept of human dignity. Their fulfillment preserves human dignity and their violation destroys it. That human dignity is by its nature indivisible – one cannot lose it at one place and compensate that by increasing it at another. From this follows the integrity of human rights, a violation of one human right cannot be overcome by enhancement of another. If one is not free from hunger or one's right to education and health are violated, they cannot be compensated by an expansion of the rights to free speech or the freedom of association. Similarly, one can be well-fed and physically healthy but the right to food or the right to health, which relate to the dignity with which one can access food and health services, cannot be fulfilled if one is denied the rights to basic liberties and freedoms.[3]

The importance of these characteristics of human rights, related to interdependence and integrity, has not been always fully appreciated. People have gone around with the task of fulfilling individual rights, whether they are civil and political rights like free speech, free association or freedom from torture or they are economic and social rights to food, health, education or shelter, without bothering so much about the consideration that the fulfillment of anyone of these rights depended on the fulfillment of the other rights and that the violation of any one of them, violates all of them. This was also the reason why artificial distinctions were made between the first generation rights (civil and political rights) and the second generation rights (economic, social and cultural rights) that became a simple but misleading way of differentiating between the political stand of the first world and of the second and third world countries. Because of the cold war politics, the first world industrial countries appeared to defend the civil and political rights while the second world, pro-socialist and the third world developing countries seemed to be primarily concerned with economic, social and cultural rights. This political difference was projected to the conceptual plane, contradicting the principles of interdependence and integrity of human rights.[4]

3. The Fourth and Fifth Report of the Independent Expert on the Right to Development, in "The Right to Development" Franciscans International, 2002, Geneva.

4. Karl Vasak : "For the Third Generation of Human Rights : The Rights of Solidarity," Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, 2-27 July 1979.

The right to development, in the United Nations discourse, also came to be identified mainly with the third world developing countries, who wanted to carve a niche for themselves in the cold war politics, asking for a right that would give them a status equal to others, in international relations. The concept of the right to development, however, was much broader and would apply to any society where there were sections of people lacking in development, either absolutely or relatively to other sections of the society. The 1986 Declaration on the Right to Development, which was adopted by the United Nations, with an overwhelming majority, defined development as a composite right, as a process of development where all the human rights, civil, political, economic, social and cultural rights (as well as other rights such as those of children and women which came to be recognized later) are realized. The notion of a composite right explicitly recognizes the interdependence of all the rights and their integrity in the sense that if any one of these rights is violated, it cannot be sustained that any other right may be enhanced.

A distinction was clearly made between rights and the supply of any particular object of value. Rights would depend not only on the availability of corresponding goods and services but also the nature of access to them in a manner that is consistent with human rights standards. Development was described as a comprehensive economic, social and political process where all the rights can be and are realized over time, when the level of realization of any one right at a particular point of time, depended upon the levels of realization of all other rights at that time as well as the realization of that right over the successive periods. The availability and access of these rights are to be secured, consistent with human rights standards. The different instruments of human rights laws and the associated jurisprudence, have spelt out those standards in terms of principles of equity, non-discrimination, transparency, accountability and participation of the beneficiaries in the decision making and in the implementation of the measures for realizing these rights. These standards set the nature of the access to the objects of value, supplementing their availability in order to be reckoned as human right. Development then becomes a process and as well as the outcomes of the process, both claimed as human rights, as entitlements of the people of a country fulfilling which

will be the highest priority of all state actions, and supporting which would be the obligation of all members of international community.[5]

Let me elaborate this point little further. There are two major implications of recognizing development as a human right. First not any kind of development can qualify as a human right. It is not an expansion of GDP or industrialization, or export promotion or increasing the volume of employment. It is a particular process of realizing that development, which has to be equitable, i.e. without increasing the inequalities and with a fair sharing of benefits of development. There cannot be any discrimination in the sharing of the benefits and in the activities producing the benefits between different people, irrespective of gender or caste, religion or ethnicity. The decision-making and the product-sharing will have to be fully participatory where the process will have to be accountable and transparent. These characteristics of the process would be applicable both at the micro and at the macro level and the policies for development will have to be adopted to fulfil these requirements. A top-down centralized planning process will have no more role in that development, just as an unfettered market mechanism that increases the inequalities based on the initial distribution of wealth and assets, can no longer be the only method of development. It does not of course mean that there is no more role of markets or of plan coordination of policies and actions. It only emphasizes their instrumental role – neither the market nor the plan coordination by the states are goals in themselves, and as instruments for realizing development they have to be subjected to constraints of human rights standards.

Secondly, this particular process of development becomes the fundamental concern of all those who have the obligations to fulfil development. Human rights imply obligations. If a right is claimed, legitimately and justifiably by any agent in the society, then all other agents in the society whose actions have influence on the fulfilment of that right will have an obligation, to the maximum extent possible, to take measures to fulfil them. This is the strength of the human rights discourse. As we have mentioned at the very beginning, the human rights claims "trump" over all other claims of policies or social actions, particularly of the state authorities

5. Sengupta, Arjun : "On the Theory and Practice of the Right to Development", Human Rights Quarterly, Volume 24, Number 4, November 2002.

which have the highest influence, through laws, legislation, administration and public policies, to enable the fulfilment of the rights.[6] The state authorities cannot escape from using its resources, whether they are financial or administrative or institutional, meeting this first priority claim rather than devote them to other objectives of administration, defence, corporate profits or sectional interests. The state authorities not only have to pursue the policies to realize these rights but also must submit themselves to a system of accountability through a legislative, judicial and administrative process. They have to justify in concrete terms that they are devoting their maximum efforts to fulfil these rights and the people would have every right to overthrow the authorities if they do not satisfy the standards of accountability.

The state authorities have the primary responsibility of taking every measure to realize these rights, because of their command over the resources and activities within their area of jurisdiction. But in the human rights discourse all other agents are also responsible to help and cooperate with the state and the other agencies to fulfil these rights. This allows the invoking of the principle of international cooperation, which has been recognized in the different covenants of the International Bill of Rights and also by the United Nations Charter, where all members of international community have pledged to do their best to fulfil these rights. In other words, if a state adopts the policies that would enable fulfillment of these rights, all members of the international community, the nation states of the industrial countries, the international institutions like the World Bank, the IMF, WTO and the multinational corporations would have the obligations to cooperate to the maximum extent possible, with the state. This cooperation can take the form of resource transfer, debt rescheduling, opening up the trade barriers, dispensation on intellectual property rights or any other way that can help the fulfillment of these rights.

All these would follow if development can be recognized as a human right. The fact that the 1986 Declaration on the Right to Development was adopted by the United Nations and that a full

6. Ronald Dworkin : "Rights as Trumps" in Theories of Rights, ed.: Jeremy Waldron, Oxford, 1995.

consensus of all nations was created in 1993 at Vienna in favour of regarding this as a human right, goes a long way to this recognition in terms of human rights law. It does not have the status of a treaty as the conventions on civil and political and economic, social and cultural rights have. But since the right to development is a composite of all those rights, recognized by treaty, it will have all their force of implementation, as if it were a treaty right itself. In terms of positive law, therefore, the right to development can be said to have a full recognition as a human right. But that recognition is not enough to ensure its implementation. It will be necessary to incorporate these obligations in domestic laws and in the legal procedures of international institutions. That would require movements and campaigns to persuade all members of society to accept the legitimacy of this right to development.

There will be several issues of controversy related to this concept of a human right to development, which I like to touch upon now. First, a claim to be recognized as a human right must satisfy two tests. The legitimacy test and the coherence test.[7] The legitimacy test is related to establishing the claim as derivative of some basic moral principles which are universally acceptable. The notion of preserving human dignity has been used as the basis of human rights that lends a moral authority to such claims which supersede all other competing demands of the Sates' and other agencies' command over physical, administrative and financial resources. Can development be given the same status? The contribution of Amartya Sen in this regard has been seminal. Development discourse that was carried out earlier in terms of expanding gross domestic product or the supply of some basic need of commodities and services has been changed into a process identified with expansion of freedom – freedoms of people to do or to be what the people value, in order to fulfil their potential of full human beings. All the ingredients of development process are formulated as expansion of freedom and development is claimed as a right when those freedoms are claimed as rights. This moral legitimacy, together with the procedural legitimacy of getting this right recognized through the United Nations processes, should be sufficient to establish that development as a human right qualifies in the legitimacy test.

7. Amartya Sen : Development as Freedom, pp. 226-232, Oxford, India.

The coherence test implies a matching of the right with the obligations or specifying the agents who would have the obligations of taking the necessary measures that would fulfil that right. Once the agents with obligations and the duties or measures that they should adopt can be specified, it should be possible to subject them to a system of accountability, which is essentially required for any legal right. One should be able to say who should do what, and establish a mechanism to take remedial action if the duty holders do not perform the duty. It is not necessary that this accountability should be tested only in a court of law. There are administrative, legislative and international treaty bodies mechanism including those of the Human Rights Commissions which could monitor this accountability and enforce the remedies. But in order to identify the duty holder and the exact duties, it should be necessary to establish the feasibility of this right. If the rights cannot be realized or are not feasible even with appropriate institutional changes, legal processes and public policies, then there can be no duty which can be specified to deliver the rights.

It is important to appreciate the implications of this notion of feasibility. It does not mean that the rights should be immediately realizable or that it should be entirely subjected to the existing institutions and arrangements. Indeed the conditions of feasibility would often imply changing the institutions and social arrangements so that at least in principle, it can be demonstrated that if those changes take place then there would exist specific duties, to be carried out by the duty holders, which would fulfil these rights. Indeed, without such demonstration of feasibility, the rights remain "manifesto" rights or "background" rights. Establishing the feasibility would contribute to their becoming "valid rights" or "concrete rights".[8] Sen has invoked a concept of meta rights in that context, which says that if such rights are not realizable within a time frame or in a particular institutional set-up but if there exists a set of policies which would have a high likelihood of realizing these rights, within a reasonable period, then

8. These issues have been elaborated in Sengupta, Arjun, "On the Theory and Practice of the Right to Development", ibid. Also Sen: Martin E. Winston (ed.) The Philosophy of Human Rights, Belmont, 1989.

these policies can be regarded as rights, as valid objects of claims, with concomitant obligations and accountability.[9]

The right to development is obviously something which cannot be realized immediately. As a composite of all rights to food, health, education, employment, standards of living as well as freedom of speech, association and movement etc. it has to be realized progressively in a phased manner, and the most important constraint on that process would be the availability of resources - financial, material and international resources. So, a necessary condition, for making these rights realizable, would be economic growth, which expands gross domestic product, changes the institutions and technology and allows the resource constraints on the realization of these rights to be relaxed. It is in this sense, economic growth is essential for a sustainable realization of the right to development. This treatment of economic growth in the right to development has often been misunderstood. Economic growth has not been demanded as a human right but as a necessary instrument for realizing the human right to development. Economic growth is not sufficient for realizing that right, but it is necessary at least over a period. It is possible to realize some of the rights even without economic growth, if there is sufficient slack in the use of resources due to inefficiency and misallocation. But if all the rights have to be realized together, then at some time or other they will hit the resource constraint if the resources do not expand. As we have indicated earlier that realization of rights require both increase in the availability in the goods and services, corresponding to the rights as also the access to those goods and services. This is true of all rights, whether civil, political, economic, social and cultural rights. So, if resources do not expand, then continuous improvement of some rights making increasing demand of resources would lead to a short-fall of resources, for fulfilling some other rights which would then be violated. Since no right can be violated in the realization of the composite right to the development, the result would be that the right to development itself would be violated.

The economic growth which is considered as essential should also meet the standards of human rights. It should be equitable,

9. Sen, Amartya : "The Right not to be Hungry" in Alston and Tomasevski (ed.), The Right to Food, SIM, Netherlands.

participatory, accountable and transparent. Because if it were not so and a process of economic growth increased inequities or violated the principle of participation, a fulfillment of individual right according to the standards of human rights would not be possible. So, the economic growth that is admissible in the rights discourse should be achieved with equity and social justice.

If these arguments are accepted, it should be clear that the right to development would require the state authorities to adopt a development policy carried out with equity, participation and accountability at both the micro and macro level that is designed in coordination with the policies of sectoral development related to different rights, but in the context of over all development and economic growth. That would have to be sustainable and carried out in response to the existing financial, technological and institutional constraints. One of the most important requirements of that kind of sustainable growth would be macro economic stability, with fiscal and monetary discipline. Human rights community must be prepared to accept the imperatives of that concern. However, it also brings out the importance of harmonizing that process of growth with sectoral policies specifically aimed at realizing different rights. Mere economic growth is not enough and is definitely not consistent with the claims of development as human right. Economic growth that ignores or violates the principles of human rights in different areas is not admissible in the discourse of human rights to development.

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# *International Human Rights Law in Domestic Courts: Violence Against Women and Administration of Justice**

Sujata Manohar

With the globalization of human rights, it has become important for the judicial systems around the world, to examine the possibility of and the need for application, in their domestic jurisdiction, of human rights law. The two key questions are - Can judges apply international human rights treaty law and non-treaty instruments or their principles, in the adjudication of domestic litigation? If so, to what extent and in what manner which is jurisprudentially acceptable? I propose to examine how judges have answered these questions while dealing with violence against women and while applying equality norms in the administration of justice.

**Violence Against Women – Gender-specific human rights**

The emerging realization in the last decade that women's rights are human rights, has dramatically changed the interpretation of human rights since the writing of the Universal Declaration of Human Rights in 1948. Women's Rights movement has gone through two phases at the international level. The first phase was of equality as non-discrimination. This culminated in the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). The second phase which began in the 1980s highlighted issues relating to violence against women and women's rights as human rights, culminating in the Vienna

*Based on a presentation made at the Judicial Colloquium for African Judges held by United Nations, Department for Advancement of Women at Arusha, September 9 to 11, 2003.

Declaration in 1993. The United Nations Declaration on the Elimination of Violence Against Women, 1993 has emphasized the linkages between inequality, discrimination against women and women-specific violence – whether domestic or societal. The latter effectively perpetuates women's inability to exercise their basic human rights. In fact, Article 2 of CEDAW which enjoins State parties to condemn discrimination against women in all its forms has been explained by the CEDAW Committee in its general recommendation No.19 by stating that the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman, or that affects women disproportionately. Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, adopted in July, 2003 also includes violence against women as discrimination and denial of equality.

The Beijing Platform of Action (paragraph 112) describes violence against women as nullifying women's human rights and fundamental freedoms and as an obstacle to the achievements of equality and development and peace. The violence which women face, could be domestic violence in its various manifestations including harmful cultural or traditional practices such as dowry or female genital mutilation, female infanticide and female foeticide, "honour" killings, denial or neglect of health care, sexual abuse, physical violence, debt bondage or trafficking and women and girls being infected with HIV/AIDS or STD in the course of sexual abuse. In the public domain, kidnapping, rape, sexual harassment at the workplace or anywhere else, trafficking including sale of women and girls in sexual slavery or hard labour are some forms of violence that result in denial to women of basic human rights - the right to life with dignity, the right to equality and non-discrimination, the right to health care and the protection of their reproductive rights.

One of the important challenges to the universality of women's human rights comes in the form of cultural relativism such as ancient values, tribal values, clash of civilizations and so on which try to question the basic premise that human rights are universal and indivisible and that this premise is applicable as much to women's rights as to men's rights. Unfortunately, the issues that cultural relativism protects are mainly related to women's rights (or rather their absence) within the family, such as physical or

psychological assault, female genital mutilation, dowry deaths, honour killings, or a discriminatory family law which does not give women the same rights of inheritance, divorce, or custody of children. What one needs to appreciate is that historically, violence against women is a manifestation of an unequal power relationship between men and women which has led to domination over and discrimination against women and to the prevention of full advancement of women. Denial of rights cannot be considered as culture, nor can antiquated beliefs pretending to have religious sanction, be protected as a part of religion or culture. Even otherwise, cultures also need to change and improve to protect human rights within their own groups.

**Women with Disabilities:**

Women suffering from disabilities are doubly disadvantaged. They are likely to be subjected to violence and exploitation even in special institutions meant for their care such as mental homes. Custodial violence and sexual exploitation is common when women are in so-called protective homes or rescue homes.

**Women in Conflict situations:**

A recent UN study on Women, Peace and Security [submitted by the Secretary General pursuant to Security Council resolution No.1325 (2000)] says, while describing the condition of women in times of conflict that civilian women and girls face different risks and dangers in armed conflicts compared to those faced by civilian men and boys. Sexual violence and rape are a part of strategy of warfare. Women and adolescent girls in conflict situations have been tortured for holding prominent political, or community positions, for speaking out against opposing groups or for resisting violence against themselves and their families. They have been targeted as in Afghanistan, for being educators and for their role as cultural symbols of their communities. They have been tortured as a means to attack the men in their lives, whether fathers, husbands or other relations rather than on account of their own actions or public identity. These acts of torture have been carried out to violate the victim's sense of herself as a person and as a woman.

Fighting forces have often specially targeted women, adolescent girls and even girl children. The forms of violence used are torture, rape, mass rape, sexual slavery and forced prostitution,

forced sterilization and the forced termination of pregnancies and mutilation. What is worse, the international presence which often follows armed conflicts has also been linked to an increasing demand for prostitution and trafficking of women and girls. For example, an investigation of refugee camps in Guinea, Congo, Liberia and Sierre Leone revealed the sexual exploitation of women, girls and boys by humanitarian workers and peace keepers in exchange for basic provisions. All these add up to a massive violation of women's human rights.

A UNICEF special report on child soldiers (relying on the reports of Graca Machel and of Olara Otunnu) has referred to a research carried out in El Salvador, Uganda and Ethiopia which shows that almost a third of the child soldiers surveyed were girls. Girl soldiers can be raped and used as sexual slaves. As a result of the brutality that they endure, many of them are left with permanent scars that hinder their capacity to reintegrate into society. A recent report of the Amnesty International based on information and data gathered during an Amnesty International research mission to Central Kenya in June, 2003 states that about 650 Kenyan women claim that they were sexually assaulted by soldiers on military assignment to their country. The allegations cover a period of over 35 years, approximately from 1965 to 2001, though most of the incidents have occurred in the last 20 years. These Kenyan women have won a right to sue the Ministry of Defence in Great Britain for compensation. In the year 2002, about 461 women were killed by family members in 'honour' killings as per the 2002 Report of the Human Rights Commission of Pakistan. In India, the National Human Rights Commission, for the year 2002-2003 registered 2686 complaints of violence against women as against 2259 in the previous year. The report of the National Crime Records Bureau, India 2002 has registered a total of 1,43,795 reported crimes against women during 2001, recording 1.7% increase over the previous year and 24.2% increase over 1996, while the rate of crime in general in 2000 decreased by 0.1% from the previous year.

**State obligation to prevent and punish violations of Human Rights:**

What is the extent of State responsibility to prevent and punish such violence? It is increasingly accepted that the State has an

obligation not just to investigate and punish acts of violence whether perpetrated by the State or by private parties, the State also has an obligation to prevent gross violation of human rights whether by State agencies or by private parties. The State's negligence in preventing gross violations of human rights may render the State itself liable for compensation or reparation to the victim (See the landmark decision of the Inter-American Court of Human Rights in Velasquez Rodriguez v. Honduras, judgment of 29th July, 1988).

CEDAW places an obligation on the State parties in Article 2 to embody the principles of equality of men and women in national constitutions or other appropriate legislations and to ensure the practical realization of these principles. It also requires them to legislate for abolition of laws, customs, and practices which constitute discrimination against women and to repeal any penal provisions in national laws which are discriminatory. It also enjoins State parties to take all appropriate measures including legislation to suppress all forms of traffic in women and exploitation of prostitution of women. The protocol to the UN Convention on Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in persons, especially women and children as also the protocol dealing with Migrant Labour are also relevant in this context. ILO conventions dealing (inter alia) with equal remuneration, maternity protection and non-discrimination against women in employment would also be relevant.

**General Human Rights Treaties:**

In addition to these gender specific treaties or declarations, there are also human rights treaties of general application and regional human rights treaties or systems such as the African system, the Inter-American system or the Council of Europe system. Under the United Nations system, there are two major types of instruments adopted in the human rights field – treaties, and non-treaty instruments. The most famous of the latter is the Universal Declaration of Human Rights. The UN Declaration on Elimination of Violence Against Women is another such. Some of these declarations, though in themselves not legally binding as international law, have by their universal acceptance and reliance become a part of customary international law and can be used as such. Treaties on the other hand, bind the States formally as a matter

of international law once the States concerned have ratified or acceded to them. Some of the most famous are the U.N. International Covenant on Civil and Political Rights and the U.N. International Covenant on Economic, Social and Cultural Rights. Some of the other treaties relevant to the present theme are the International Convention against Torture, International Convention on Elimination of all Forms of Racial Discrimination and Convention on the Rights of the Child. There are also under each of the U.N. treaties, monitoring bodies. Some of them have a procedure under which individual complaints can be entertained. The decision of these committees are often brought to bear on domestic adjudication. In addition, some of the committees constituted under these conventions adopt general comments or general recommendations in which they set out their understanding of the provisions of the treaty which can be useful for the interpretation of constitutional doctrines adopted by a nation.

**Courts and Human Rights:**

The courts have increasingly turned to this body of international law whether customary or embodied in treaties, in the process of adjudication of cases which come before them. Under the countries governed by the principles of common law jurisprudence, there is a difference between international treaties that are signed by a country and the domestic law. The provisions of an international treaty signed by the country do not automatically form a part of the domestic law of the country. A treaty is required to be specifically incorporated in domestic law. In some jurisdictions, however, international law and domestic law form one body of law that can be enforced by domestic courts. Even when human rights treaties or customary human rights law does not automatically form a part of the domestic law of a country, the courts have utilized these principles in various ways:

(i) In the countries with a written Constitution containing a bill of rights, the courts have used these treaties and declarations for interpretation of the various rights embodied in the Constitution. An interpretation which is consistent with or which furthers international human rights norms, is preferred.

(ii) Comments and general recommendations of the various committees constituted under the treaties and the

interpretation and application of these treaties to individual cases by the Committees concerned, have all been used by the domestic courts for expanding or increasing the content of the rights which are provided in their national constitution such as the right to equality and the right to non-discrimination on the ground of sex.

(iii) At times, when the Constitution does not contain a bill of rights, the courts have interpreted basic constitutional structure as entailing human rights which are not expressly spelt out in the constitution. For example, a democratic form of government has been held to entail freedom of speech and expression and a right to access information without which people cannot effectively participate in the democratic processes.

(iv) In India, which is a common law country, the Supreme Court has said that international human rights law can be applied in domestic jurisdiction, if there is no national law which is inconsistent with it. Thus, international human rights norms can be used for expanding the connotation of fundamental rights and for covering areas not covered by existing domestic legislation, provided this does not conflict with any existing domestic legislation. This has enabled the Supreme Court in India to lay down guidelines for prevention of sexual harassment of women at the workplace-this being treated as denial of the right to equality and as discrimination at the workplace.

(v) The European Court of Justice has exercised its power of review by taking into account, where appropriate, of international human rights norms, even though those norms do not formally bind the community or formally form part of community law.[1]

(vi) The courts have used international human rights norms to evaluate domestic law- whether statutory or customary and have drawn public attention to the need for law reform[2].

1. see Francis G. Jacobs "The Right to Access to a Court in European Law", Interights Bulletin, 1996 Volume 10 No.2

2. Sarla Mudgal v. Union of India, AIR 1995 SC 1531; Dhungana v. His Majesty's Government, Nepal Supreme Court judgment dated 2 August, 1995 in Writ No. 8392 of 2050 BS (1993).

The courts around the world are increasingly using CEDAW and human rights treaties to deal with violence against women perpetrated through harmful customs. The Nigerian Court of Appeal, for example, considered a custom known as Nrachi that permits a man without a male heir to initiate a daughter into promiscuity to beget a male heir. It held the custom as repugnant to equity and good conscience. The Court relied on article 5 of CEDAW to strike down the custom[3]. However, the constitutions of a few African countries like Zimbabwe, Sierre Leone, Kenya, the Gambia and Zambia have elevated customary law above the Constitution which would make it difficult to apply CEDAW principles to override customs[4]. Similarly, Article 13(1) of the Indian Constitution which declares that all laws in force immediately before the commencement of the Constitution shall be void insofar as they are inconsistent with fundamental rights, has been interpreted by the Supreme Court as excluding from its ambit all non-statutory laws including customary law. It is moot whether this would preclude courts from re-examining customs prevailing after the coming into force of the Constitution, which violate fundamental rights.

The constitutional validity of equality legislation can be examined by the court with the aid of Human Rights Law. In Aldridge versus Booth (1988) 80 ALR 1), the Federal Court of Australia dismissed a challenge to the constitutionality of the sexual harassment provisions of the Federal Sex Discrimination Act holding that CEDAW imposes a very clear obligation to eliminate sex discrimination in employment; and sexual harassment is a form of sex discrimination within the meaning of the Convention. In Regina Versus Ewanchuk, [(1999) 1 SCR page 330 (Canada)], the Supreme Court of Canada observed that Canada was a party to CEDAW which requires respect for and observance of human rights of women. Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. The Court deprecated myths and stereotypes in relation to the offence of rape and interpreted the provisions of the Canadian

3. Emeka Muojekwu versus Okechukwu Ejikeme, 2000 (5) Nigerian WLR (Part 657) 402-423

4. See "Customary Law and Women's Inheritance Rights in Commonwealth Africa" – Chidi Anselm Odinkalu, (2000) 13 Interights Bulletin, p.39.

law to negative implied consent by the woman in a case involving sexual assault. More interestingly, in Vishakha Versus State of Rajastan (1997 6 SCC 241), the Indian Supreme Court which was dealing with sexual harassment, interpreted Article 15 of the Constitution of India which prohibits discrimination on the ground (inter alia) of sex, in the light of international human rights declarations and treaties and in particular, in the light of Article 11 of CEDAW which enjoins State parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on the basis of equality of men and women, the enjoyment of the same rights. The Court also referred to general recommendations 22,23 and 24 of the CEDAW Committee under Article 11 stating that equality in employment can be seriously impaired when women are subjected to gender specific violence such as sexual harassment at the workplace. The Supreme Court observed, "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including sexual harassment or abuse. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them". The Court laid down guidelines against sexual harassment, which would operate until a domestic law on the subject is enacted. In Apparel Export Promotion Council v. A.K. Chopra (1999 1 SCC 759), the Supreme Court dealt with sexual harassment similarly, in the light of international human rights norms and dealt with proper approach to disciplinary proceedings against the wrong-doer.

Recently, in Forum for Women, Law and Development (Dhungana) versus His Majesty's Government, in Writ No.55 of the year 2058BS (2001-2002), the Supreme Court of Nepal considered a challenge to rape law in the country code, in the light of Article 88 (1) of the Nepalese Constitution. The petitioners had contended that since the definition of rape excludes marital rape, this provision was unconstitutional, being a denial of women's right to equality. The Court relied upon Article 1 of the Universal Declaration of Human Rights, 1948, and on the International Covenant on Civil and Political Rights, 1966 and observed that a marriage does not turn women into slaves; they do not lose human rights because of marriage and therefore, it could not be said on a true interpretation

of the section that it permitted marital rape. The Court also relied upon CEDAW definition of discrimination against women, and the United Nations Declaration on Elimination of Violence Against Women.

In X&Y versus Netherlands (European Court of Human Rights judgment of 26 March 1985), the European Court of Human Rights upheld a complaint that the existence of a gap in Dutch law which meant that a prosecution could not be brought against a man who had sexually assaulted a mentally retarded girl, constituted a violation of the State's obligation to take steps to ensure respect for the girl's private life. In Aydin v. Turkey, European Court of Human Rights (application No. 2317/94, judgment dated 25 September, 1997), held that the young woman who had been raped and otherwise ill treated while in detention had been subjected to torture. This was in contrast to an earlier case of the same court in Cyprus vs. Turkey (Application No.6780/74 & 6950/75, 62 ILR 4) where the Court had earlier held that widespread rape by Turkish soldiers during military operations in Cyprus did not amount to torture but to a lesser crime of inhuman and degrading treatment[5]. There is now a sharper realization of women's rights, particularly to the integrity of their body as individual human beings and not as a property of somebody. In Carmichele v. Minister of Safety and Security & Anr. [2001 10 BCLR 1995 (CC)], the South African Constitutional Court referred to CEDAW's General Recommendation 19 on violence against women with particular reference to the obligation of the State to take preventive, investigative or punitive steps in relation to private violations.

**Humanitarian Law and Violence against women:**

Traditional humanitarian law did not list rape or sexual slavery as a war crime or a grave breach of the Geneva Conventions. The Nuremberg and Tokyo statutes also did not mention rape as a war crime or crime against humanity. After the events in Bosnia and Rwanda, the attitude has now changed and the International Criminal Tribunal for Rwanda has recognized rape as a crime

5. See Andrew Byrnes : "Using International Human Rights Norms in Constitutional Interpretation to Advance the Human Rights of Women" – presented at the 50th Anniversary Conference, Faculty of Law, University of Colombo, Sri Lanka, 23-26 July, 1998.

against humanity. It has recognized rape as torture. It has also recognized enslavement and willful killing as evidence of genocidal intent. The Statutes of Rome setting up International Criminal Court also include as war crimes rape, sexual slavery and forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence. Enslavement is also now expanded to include trafficking in women and children.

**Domestic Violence and the State:**

Since most of the violence against women is perpetrated by private actors often in the privacy of the home, and since violence by private actors has not been traditionally of interest to the human rights community, the new doctrine which bridges this private-public distinction should be of great relevance for women's rights. The decision in Velasquez case has held the States to a due diligence standard to prosecute private individuals who violate human rights. Thus, States are required to give up their traditional attitudes with regard to the privacy of the home and are required to intervene effectively to prevent domestic violence. The proposal of the Indian Government to have a legislation on domestic violence against women should be viewed in this context. The National Human Rights Commission has suggested that the draft bill needs to be widened to include all kinds of domestic violence – whether against children, against the daughter-in-law, against the elderly, against other dependents, and not just violence by husband against the wife. The Commission has also suggested improvements in the law enforcement machinery – the role of Protection Officers, involvement of non-governmental or civil society groups and the role of the court.

There is a growing acceptance that a State which is negligent in preventing gross violations of human rights of its citizens can be held internationally accountable[6]. It follows that the State must train its police, its investigators, its judiciary and medical experts in issues relating to violence. The State must set up support services for victims, should collect data and research on the problem of violence, engage in educational programmes to raise awareness and prevent harmful practices. These are new ideas in human rights

6 Cf. The Statute of Rome.

jurisprudence and in a sense, an expansion of the doctrine which makes the State liable for the actions of even private individuals. The other area where jurisprudence is promoted by women's movements is the area of reproductive rights and the right to sexuality where also much violence, overt or covert, prevails[7]. Population policies which do not take into account this violence against women may unwittingly promote further violence against women and their disempowerment. The two-child norm policy for example, is being used to prevent women from holding offices at the village panchayat level. The policy ignores women's social inability to have freedom of choice in the area of their reproductive rights. It may promote female foeticide and may further disempower women.

Claims of violation of women's rights are likely to be made first within domestic tribunals and not before the international fora. In fact, such attempts must be made before there can be recourse to individual complaints procedure of the Committees set up under International treaties. Therefore, effective use of international standards in domestic litigation will depend upon whether the constitutional law of the State in question accepts the doctrine of self-executing treaties or whether the human rights treaties have to be incorporated into domestic law. It will also depend upon the willingness of individual judges to accept the applicability of the international standards. Often, the judges are not aware of international human rights treaties. A survey which was carried out by a women's organization in India about ten years ago found that most of the judges especially of lower courts were unaware of the existence of CEDAW. Since the survey was conducted, there is now a far greater and growing awareness of human rights treaties amongst the same judges. In contrast, the judges in India of the High Courts and the Supreme Court have often referred to international human rights norms in interpreting the law or the constitution and this sensitivity is slowly extending to women's rights as well, as is evident from the way in which rape cases are dealt with even under domestic law. In Gaurav Jain v. Union of India (AIR 1997 SC 3021) the Supreme Court of India dealing with

7. see Radhika Coomaraswamy : Women's Rights and International Human Rights Law, Interights Bulletin, 1998 Vol XII No.1.

prostitution and children of prostitutes cited international conventions, particularly the Convention on the Rights of the Child.

**Decisions of Treaty bodies:**

The decisions of treaty bodies such as the Human Rights Committee or other committees under individual complaints procedure are not as such formally binding under international law in the same way as a judgment of the European Court of Human Rights or Inter-American Court of Human Rights. Nevertheless, these decisions have considerable persuasive force on decision makers in the domestic system. For example, national courts have described the general comments and views of the Human Rights Committee as a major source of interpretation of the International Covenant on Civil and Political Rights[8]. These have also been described as essential points of reference for the interpretation of national constitutions and legislations and the development of common law[9]. The High Court of Australia in this context has also commented, "The opening up of international remedies to individuals brings to bear on the common law the powerful influence of the ICCPR and the international standards it imposes". It has described international law as a legitimate and important influence on the development of common law especially when the international law declares the existence of universal human rights[10].

There have been other interesting cases dealing with violence not specific to women as such where international human rights law has been used to expand constitutional rights. In Peoples Union for Civil Liberties v. Union of India [(1997) 3 SCC 433], the Supreme Court of India held that provisions of international conventions, treaties or covenants which elucidate and effectuate fundamental human rights which are also guaranteed by the Constitution of India, can be relied upon by the courts in India as facets of those

8. see Ameeruddy-Cziffra versus Mauritius: extracts in 1995 38 Japanese Manual of International Law 118 at 129-131 .

9. see Northern Regional Health Authority 1998 2 NZLR 218 at 235.

10. Mabo versus Queensland 1992 175 CLR 1 at 42.

See also (Kartinyeri v. Commonwealth (1998) 152 ALR 540 at 598), Matadeen versus Pointu (1999) AC 98 (Judicial Committee of the Privy Council on appeal from the Supreme Court of Mauritius) Also see in general, the Report of the Committee on International Human Rights Law and Practice submitted to the International Law Association at the New Delhi Conference, 2002.

fundamental rights and hence enforceable as such. The Court also said that law must be interpreted, as far as its language permits, in a manner that brings it in conformity and not in conflict with the established rules of international law and cited with approval the observations of the Australian Court in Mabo v. Queensland that an international covenant can also play a part in the development by the courts of the common law as a legitimate guide. The court awarded compensation as being available in public law for two persons killed by the police[11].

There is thus, a growing awareness in the judiciary of different parts of the world about the need to be aware of international human rights instruments and the need to enforce them in their own jurisdictions so far as their Constitutions and their laws will permit. Different judges and different courts often adopt their own logic for this purpose. But whenever they could, and whenever the courts have felt the need to overcome harmful customs or discriminatory laws with the help of constitutional doctrines of equality and nondiscrimination, they have backed up their decisions with the common understanding of such constitutional doctrines as embodied in international human rights law instruments.

## Access to Justice

An important area where a seemingly egalitarian system of law administration works to the disadvantage of women is in the area of access to justice. All vulnerable or disadvantaged groups are at a considerable disadvantage in availing of legal remedies to right their wrongs, though in theory, access to justice is available to everybody. Ignorance of law, of international human rights instruments and the possibility of their enforcement, and lack of social and economic independence make it extremely difficult for women to access justice in the same manner as the more empowered sections of society. Women in most developing countries have lower literacy rates and poor participation in the economic life of the community. Their vulnerability and lack of alternatives to their

11. Cf. also D.K. Basu v. State of West Bengal, 1997 1 SCC 416,438; Nilabati Behera v. State of Orissa, 1993 2 SCC 746.

existing deprived lifestyle, make it hard for them to resist violence and to enforce their rights through the legal system[12].

The Constitutional Court of South Africa, in the State v. Baloyi (Case CCT 29/99 decided on 3rd December, 1999) examined the functional clauses of the Constitution promising non-sexist society in the context of domestic violence. It observed, ".....despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and the justification for non-interference. This contributes to the ambivalence and a reluctance on the part of the victims to go through with criminal prosecutions". Dealing with the constitutional challenge to summary procedure provided when the perpetrator of such violence disobeyed a court order, the court said, ".....the Constitution and South Africa's international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence. At the same time, the Constitution insists that no one should be arbitrarily deprived of freedom or convicted without a fair trial. The problem then is to find the interpretation of the text which best fits the Constitution and balances the duty of the State to deal effectively with domestic violence with its duty to guarantee accused persons the protection involved in a fair trial".

The Australian Law Commission which was one of the first Commissions to examine how the legal system functions in respect of protecting women against violence and other crimes, found that the legal system fails to deal effectively with violence perpetrated by men on women. Often violence against women is hidden but influential, directing a woman's actions. It affects the way the law operates in relation to her. For example, where the Court directs the parties to attend counseling or recommends conciliation, it must take into account any allegation of violence or reluctance of a party to attend because of violence. In considering custodial access orders, the court often fails to take into account the need to protect the child from abuse, ill-treatment or exposure to violence. There may

12. That is why right to legal aid has been read as a part of fundamental rights by the Indian Supreme Court in Madhav Hoskote v. State of Maharashtra, AIR 1978 SC 1548.

be a need to re-examine concepts of self-defence and provocation taking a woman's perspective into account.

There may also be a hidden and sometimes unconscious bias in the legal process while dealing with women. For example, gender bias may include lack of credibility given to women as witnesses. Women often claim that they lacked credibility in Court and their experience ranged from being humiliated or patronized, to simply not being understood.

The women also had difficulty in dealing with the law enforcement machinery. The police are often not interested in registering a case of domestic violence treating it as a domestic personal affair rather than an offence. Crimes against women are also in many jurisdictions investigated on a low priority basis, thus leading to loss of important evidence particularly in cases of rape or sexual assault.

In order that the system functions fairly and impartially and is able to take into account women's perspective, it is also necessary to have special programmes of awareness generation, training and education in women's human rights not just for the judiciary but for all law enforcement agencies. Similar programmes for awareness of their own rights and for information relating to access to remedies are required for women themselves, particularly, in our part of the world where women are denied or discouraged access to justice. Institutions such as the National Human Rights Commission, the State Human Rights Commissions, Women's Commissions, both National and State-wise, and institutions such as the Legal Services Authority, as well as civil society organizations can make vital contributions to such awareness generation and sensitization.

But ultimately, judiciary must ensure enjoyment of human rights by all by coming down on violations. Common judicial norms for using international human rights instruments can go a long way in making these rights a reality for the disadvantaged people of the world.

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# *Population stabilization: The case for a rights-based approach*

A.K. Shiva Kumar

Considerations of human rights are often overlooked in the emotions that frequently confound discussions on population policy. Combined with a disregard for human dignity, this has led many experts to advocate coercive 'birth control' measures for achieving rapid population stabilization when in fact arguments and empirical evidence in favour of coercive population policies are extremely weak. This paper underscores the importance of understanding the nature of the population 'problem' as a prerequisite for thinking about population policies. It argues for urgently reducing human poverty, promoting women's freedoms, improving child survival and expanding reproductive health choices as being essential for achieving rapid population stabilization. Experience from across the world – and within India too – establish that these measures contribute more speedily to population stabilization than 'birth control'; they enhance the quality of people's lives; and they are vital for accelerating and sustaining economic progress as well. Many practical and humane solutions emerge when a rights-based approach guides policies for slowing down population growth.

## Population and economic prosperity

There is an overwhelming tendency among many people to blame population per se for the low levels of income prevailing in different countries across the world. Such a perception or belief is highly misplaced. There is no automatic association between population size and economic well-being.

**Table 1: Population size and Economic prosperity**

| | Population in millions 2002 | Per capita Gross National Income in PPP US$ 2002 |
|---|---|---|
| China | 1,281 | 4,390 |
| India | 1,048 | 2,570 |
| *Similar Populations, different incomes* | | |
| Nepal | 24 | 1,350 |
| Malaysia | 24 | 8,280 |
| Zambia | 10 | 770 |
| Belgium | 10 | 27,350 |
| *Similar incomes, different populations* | | |
| Tunisia | 10 | 6,280 |
| Turkey | 70 | 6,120 |
| Angola | 14 | 1,730 |
| Bangladesh | 136 | 1,720 |

*Source: World Development Report 2003, The World Bank, Washington, D.C.*

It is difficult to associate population size with economic prosperity in any predictable manner. Table 1, for instance, reveals that China, the only country with a larger population than India, reports a per capita income that is almost 70 per cent higher than India's. Nepal and Malaysia have the same population – 24 million – and yet Malaysia's per capita income is more than six times higher than Nepal's. Zambia and Belgium have the same population size – 10 million. Yet, Zambia's per capita income is barely 3 per cent of Belgium's.

At the same time, there are many countries that have similar levels of incomes, but very different population sizes. Tunisia and

Turkey, for instance, have similar per capita incomes even though Turkey's population is seven times larger than Tunisia's. Angola and Bangladesh report similar levels of per capita income, even though Angola's population is barely 10 per cent of Bangladesh's.

The lack of any obvious association between population size and per capita is evident even within India. For example, Andhra Pradesh (76 million) and Madhya Pradesh (80 million) reported similar levels of population in 2001. Yet, most recent estimates reveal that, in 1997-98, the per capita Net State Domestic Product in Madhya Pradesh was only Rs.8,114 – almost 30% lower than the per capita Net State Domestic Product (Rs. 10,590) in Andhra Pradesh. Similarly, Karnataka and Rajasthan report similar levels of population -- 53 million and 56 million respectively in 2001. Yet in 1997-98, per capita Net State Domestic Product in Rajasthan was only Rs.9,356 – almost 20% lower than the per capita Net State Domestic Product (Rs. 11,693) in Karnataka.

These examples reconfirm that economic well-being is not a function of population size per se but is influenced significantly by a host of other factors including natural endowments, human resource capabilities, quality of governance and investment priorities of a region, state or country.

Many also believe that a large population slows down economic growth. Once again, there isn't any obviously predictable link between population growth and economic expansion. Table 2 shows the economic growth rates among the ten most populous countries of the world.

**Table 2: Economic growth rates in the ten most populous countries**

| | | Population in millions 2002 | Per capita Gross National Income in PPP US$ 2001 | Annual rate of Growth of GDP per capita(%) 1990-2000 | Total Fertility Rate 2001 |
|---|---|---|---|---|---|
| 1 | China | 1,281 | 4,390 | 8.0 | 1.9 |
| 2 | India | 1,048 | 2,570 | 4.3 | 3.1 |
| 3 | United States | 288 | 35,060 | 2.2 | 2.1 |
| 4 | Indonesia | 212 | 2,990 | 1.1 | 2.5 |
| 5 | Brazil | 174 | 7,250 | 1.4 | 2.2 |
| 6 | Pakistan | 145 | 1,940 | 0.8 | 4.7 |
| 7 | Russian Fed. | 144 | 7,820 | -0.3 | 1.2 |
| 8 | Bangladesh | 136 | 1,720 | 3.2 | 3.1 |
| 9 | Nigeria | 133 | 780 | -0.4 | 5.3 |
| 10 | Japan | 127 | 26,070 | 0.8 | 1.4 |

*Note: Countries are ranked in descending order of population size.*
*Source: World Development Report 2003*

Levels of per capita income in the ten most populous countries vary enormously from a low of PPP US$ 780 in Nigeria to a high of PPP US$ 35,060 in the USA. China and India, two of the world's most populous countries, grew at a much faster rate during the decade of the 1990s than the other eight countries with smaller populations. As a matter of fact, the Indian economy grew much more rapidly than most other countries with a lower fertility rate.

A similar picture of weak association between population growth and economic expansion emerges within India as well.

**Table 3: Population and economic performance across Indian states**

| | Population in millions 1991 | Per capita Gross State Domestic Product at current prices Rupees1991 | Annual rate of Growth of Gross State Domestic Product(%) 1980-1 to 1990-1 | Annual rate of population growth (%) 1981-91 |
|---|---|---|---|---|
| 1 Rajasthan | 44 | 4,191 | 6.6 | 2.50 |
| 2 Haryana | 79 | 7,508 | 6.4 | 2.42 |
| 3 Maharashtra | 79 | 7,439 | 6.0 | 2.29 |
| 4 Andhra Pradesh | 67 | 4,531 | 5.7 | 2.17 |
| 5 Tamil Nadu | 56 | 4,983 | 5.4 | 1.43 |
| 6 Punjab | 20 | 8,318 | 5.3 | 1.99 |
| 7 Karnataka | 45 | 4,598 | 5.3 | 1.92 |
| 8 Gujarat | 41 | 5,891 | 5.1 | 1.92 |
| 9 Uttar Pradesh | 139 | 3,590 | 5.0 | 2.27 |
| 10 West Bengal | 68 | 4,673 | 4.7 | 2.21 |
| 11 Bihar | 86 | 2,660 | 4.7 | 2.11 |
| 12 Madhya Pradesh | 66 | 4,049 | 4.6 | 2.38 |
| 13 Orissa | 32 | 3,077 | 4.3 | 1.83 |
| 14 Kerala | 29 | 4,200 | 3.6 | 1.34 |

*Note: States are ranked in descending order of economic growth.Source: Census of India 2001 and Kurian (2000)*

Table 3 reveals that Kerala, the state with the lowest growth rate of population between 1981-91 recorded the lowest growth rate. On the other hand, Rajasthan's Gross State Domestic product grew the fastest in the 1980s despite the State recording the highest rate of population growth as well. Similarly with Haryana. Despite ranking second in terms of income expansion, the annual rate of population growth in the state was next only to Rajasthan. Data also reveal that, between 1991-2 and 1997-8, per capita income (State Domestic Product) grew by 7.6 per cent every year in Gujarat – a state with a population of 50 million in 2001. On the other hand,

per capita income (State Domestic Product) grew by only 2.8 per cent in Punjab – a state with a population of only 24 million in 2001.

Thinking on population policy is also clouded by the mistaken notion that rapid fertility decline will solve the problems of poverty. Many associate high birth rates with high levels of income poverty. While a lower rate of population growth is conducive to poverty alleviation, reducing fertility rates by itself does not guarantee economic prosperity. In recent years, Bangladesh has recorded impressive reductions in fertility rates – from almost 7 in 1975 to 3.1 in 2001. Yet Bangladesh continues to remain one of the poorest countries in the world. In 2000, Gujarat reported a birth rate of 25.2 per 1,000 population – similar to that of Orissa's 24.3. Still twice the proportion of population in Orissa lives below the poverty line than in Gujarat. Similarly, Kerala and Haryana report very similar proportions of population living below the poverty line – around 24-25 per cent. Yet Kerala's birth rate is 18 whereas it is 27 per 1,000 population in Haryana. Even states like Goa, Kerala and Tamil Nadu that have lowered fertility to replacement levels have not done away with problems of human poverty.

Clearly, the linkages between population size, birth rates, economic well-being and economic growth are complex. Few will dispute the position that rapid population growth, in most situations, imposes many pressures on society. It exerts severe pressures on the environment, on social and physical infrastructure, and on many vital public services needed for decent living. At the same time, high fertility rates, especially if they are the result of unwanted pregnancies and births, suggest limited access that women have to reproductive health choices. Unwanted births also raise issues of bodily control and gender justice especially in situations where patriarchy and other social norms limit the freedoms and choices that women have to regulate fertility. And therefore a proper understanding of the various influences on birth rates and fertility decisions ought to be the starting point for population policy formulation.

**Key influences**

Four factors are commonly associated with falling birth rates: women's empowerment, reduction in human poverty, reduced

child deaths, and improved access to reproductive health care and services. These factors are closely inter-connected. As a result, together, they exert many times more influence on lowering birth rates than any one of them acting alone.

**Women's empowerment**

Bok (1994) points out, as many others have done, that the largest burden of population policies falls on women, and it is they who are most often at risk from errors in, or abuses of, policies, customs and rules. She observes: "No matter how diverse the conditions of the women's lives... their responses to pregnancy and childbirth are strikingly similar." Undoubtedly, empowering women has direct implications on fertility decisions and women's rights.

The 'human development' framework offers a practical way of approaching the idea of women's empowerment. 'Human development' is defined as an expansion of human capabilities, a widening of choices, an enhancement of freedoms and a fulfillment of human rights.[1] Rising incomes and expanding outputs, in the human development framework, are seen as *means* and not the *ends* of development. The need to draw this distinction may not have been so important if there had been an automatic or obvious pattern of association between economic prosperity and the well-being of people in society. Unfortunately, this is not the case. There are several countries that are 'rich' in the narrow sense of having a relatively

1. For an elaboration, see essays on human development in Fukuda-Parr and Shiva Kumar (2003). Also, UNDP's global Human Development Reports published annually discuss the human development approach. The philosophical underpinnings of the human development paradigm can be traced to the writings of Amartya Sen and his articulation of the "capability approach." In this approach, human life is seen as a set of "doings and beings" - or "functionings." According to Sen (1989): "A functioning is an achievement of a person: what he or she manages to do or to be, and any such functioning reflects, as it were, a part of the state of that person. The capability of a person is a derived notion. It reflects the various combinations of functionings (doings and beings) he or she can achieve... Capability reflects a person's freedom to choose between different ways of living. The underlying motivation – the focusing on freedom – is well captured by Marx's claim that what we need is "replacing the domination of circumstances and chance over individuals by the domination of individuals over chance and circumstances". *Empowerment is about people acquiring the 'freedom to do what they want to do,* and to be what they want to be'. For a discussion on development as freedom, see Sen (1999).

high per capita income, but 'poor' in terms of the condition of human lives and the freedoms that people enjoy in society.

Women get empowered when they begin to enjoy and exercise greater freedoms – economic, social, political and cultural. This occurs with higher levels of education, improved health and nutritional status, greater economic freedoms, improved access to employment and higher earnings, and more meaningful participation in decision making within and outside the family. Expanding job and work opportunities bring with them additional incomes for women. When women earn an income, it changes society's perceptions regarding their contribution and it also enhances their status. This in turn gives many women independence and control over money and expenditures. Empirical studies reveal that of these factors, more education and increased employment opportunities for women have the strongest impact in terms of lowering birth rates.[2]

Early pregnancy and frequent births contribute significantly to high birth rates. More education, better access to health care, additional incomes, and greater freedoms for women have the effect of influencing these factors as well. More educated women tend to marry late and they also enjoy better health and nutritional status. These in turn have a positive impact on the health and survival of newborn babies and infants. And improvements in child survival, as discussed below, contribute in many ways to lowering birth rates.

A related concern, central to population debates, has to do with gender equality, and particularly the freedom and ability of women to exercise choices freely and without fear. To the extent that fertility decisions are taken by a family, tackling the issue of gender equality necessarily implies addressing hard social realities that perpetuate male dominance, nurture unequal power relations within the family and in society, and obviate social constraints (or unfreedoms) that women face. The unequal situation of Indian women vis-à-vis men is well known and has been well documented. Girls and women face strong discrimination in Indian society, and the anti-female biases manifest themselves in significantly fewer

2. This is discussed, for instance, in Dreze and Murthi (2001).

freedoms for them.[3] Promoting gender equality within the family has to be based on partnerships within the family. However, effective partnerships cannot be based on relationships of domination or subordination. Neither can they be built on extreme notions of dependence and independence. Partnerships flourish when they are built on the strength of mutual self-respect and shared concerns. To that extent, women's empowerment is not only a woman's issue. Every effort must be made to involve men in the promotion of women's rights. Women's empowerment is about improving the quality of life for all, not just women.

**Reduction in human poverty**

Income poverty, or the lack of purchasing power to enjoy a decent standard of living, is only one aspect of an individual being 'poor'. According to the Human Development Reports, human poverty (as distinct from income poverty) represents a denial of opportunities and choices most basic to human development.[4] Just as life is multidimensional, so is human poverty. Thus, illiteracy, ill-health, malnutrition, social exclusion, lack of say in decision making are some of the unfreedoms that constitute human poverty. Human poverty is thus concerned with deprivations along multiple fronts. It is concerned with the poverty of all opportunities – economic, social, legal and political. As a matter of fact, it is deprivations of these kinds that account for income poverty. In other words, very often, poverty of incomes is the outcome; poverty of opportunities is the underlying cause.

Reducing human poverty implies enhancing human capabilities or expanding people's freedoms. It is generally observed that poor families with low incomes tend to have more children than well-to-do families. It is also the case that these poor families face a congruence of deprivations. In other words, low incomes, unemployment, illiteracy, malnutrition, poor health, unsafe living conditions and discrimination tend to be concentrated on the same set of 'poor' families. Convergence of efforts is therefore essential to ensure an equitable expansion of opportunities to include improved access to basic social services, enhanced quality

3. For a discussion on equality and freedoms of women, see Menon-Sen and Shiva Kumar (2001)

4. For a full discussion, see Human Development Report 1997.

of education, increased employment opportunities, and better conditions for political participation. It is important for the State to ensure that jobs are created for the poor and that their incomes are enhanced. But it is also equally important to ensure simultaneously universal access to basic education and health, safe drinking water, adequate food and nutrition and so on – all of which are critical components of a decent quality of life. These interventions are identical to the ones needed to empower women and enhance people's sense of security. To that extent, efforts to reduce human poverty mutually reinforce attempts to empower women, and together, they contribute to lowering birth rates in society.

**Reduced child deaths**

Public support for improving child survival conditions has sometimes been inhibited by the argument that, inasmuch as such efforts are successful, they are ultimately self-defeating because they serve only to aggravate the problem of rapid population growth. Such an argument is not only morally repugnant, but it is also demographically unsound.

Several mechanisms connect lower child death rates to lower birth rates. First, the physiological factor. An infant death means the end of breast feeding, an important 'natural contraceptive'. In the absence of any other method of birth planning, a new pregnancy becomes more likely. Second, the replacement factor. The death of a child prompts many couples to "replace" the loss by a new pregnancy sooner than would otherwise have been the case. Such families, which experience the death of a child, are also much less likely to use any method of family planning. Third, the insurance factor. When child death rates are high, many parents compensate for the anticipated loss of one or more of their children by giving birth to more children than they actually want. Compounded by such factors as son preference and the time lag between changes in death rates and changes in perceived risks, this 'insurance' factor is a major reason for the persistence of high birth rates. Fourth, the confidence factor. Empowering parents with today's child survival knowledge helps build confidence which is a crucial factor in the acceptance of family planning.

Three of the most important strategies for reducing child deaths – the education of women, the well-informed timing and

spacing of births and breastfeeding – also happen to be the most direct methods of reducing child births. Reducing child deaths can help societies move towards family building by design than by chance. The interventions for improving child survival are well known – better education, improved access to health care, better nutrition, higher earnings, safe drinking water, and better sanitation. Not surprisingly, these are the same interventions that are needed for empowering women, for improving standards of living, and for stabilizing population.

**Improved access to reproductive health care**

High fertility rates are often a reflection of the extremely limited access that women have to decent health care and reproductive health services. Surveys repeatedly reveal that even poor women do not want to have many children. For example, in order to assess women's ideal number of children, India's National Family Health Survey-2 of 1998-99 asked each woman the number of children she would like to have if she could start all over again. Women with no children were asked, "If you could choose exactly the number of children to have in your whole life, how many would that be?" Women who already had children were asked, "If you could go back to the time you did not have any children and could choose exactly the number of children to have in your whole life, how many would that be?" Almost half (47 per cent) of ever-married women in India consider two to be the ideal number of children and 72 per cent consider two or three to be ideal. The survey also revealed that 72 per cent with two living children and 86 per cent of women with four or more living children do not want to have any more children.

The lack of access to family planning interventions combined with poor knowledge and limited freedom to make choices leads to a situation of unwanted fertility. It is important to enlarge the contraception mix, expand the provisioning of quality health care and services, and simultaneously empower women and communities to make informed choices. Many women are left with no choice but to go in for abortion adding to risks of maternal morbidity and mortality. Developing and providing the widest choice of appropriate contraceptives to meet women's multiple needs must be given priority. Technological research in this area

must be respectful of the rights of women to full information and free choice as well.

Empowering women, reducing human poverty, lowering child deaths, and improving access to reproductive health care require, at a minimum, strong political commitment, active partnerships between the State and civil society, and adequate resources.

**A matter of rights**

Human rights activists and women's groups have strongly influenced the approach to policy formulation for population stabilization in recent years. They have brought into the discussion on population policy critical ethical principles of human dignity and women's freedoms. Correa and Petchesky (1994), for instance, point out that "the grounds of reproductive and sexual rights for women consist of four ethical principles: bodily integrity, personhood, equality, and diversity. Each of these principles can be violated through acts of invasion or abuse – by government officials, clinicians and other providers, male partners, family members, and so on – or through acts of omission, neglect, or discrimination by public (national or international) authorities." The principle of bodily integrity, or the right to security in and control over one's body, lies at the core of reproductive and sexual freedom. Bodily integrity, they argue, is not just an individual but a social right, 'since without it women cannot function as responsible community members.' Similarly, the Initiators of the Women's Declaration on Population Policies drafted in preparation for the 1994 International Conference on Population and Development list the following fundamental ethical principles[5]:

1. Women can and do make responsible decisions for themselves, their families, their communities, and increasingly, for the state of the world. Women must be subjects, not objects, of any development policy, and especially of population policies.

2. Women have the right to determine when, whether, why, with whom, and how to express their sexuality. Population policies

5. Extract from Women's Declaration on Population Policies cited in Gita Sen et al (1994)

must be based on the principle of respect for the sexual and bodily integrity of girls and women.

3. Women have the individual right and the social responsibility to decide whether, how, and when to have children and how many to have; no woman can be compelled to bear a child or be prevented from doing so against her will. All women, regardless of age, marital status, or other social conditions have a right to information and services necessary to exercise their reproductive rights and responsibilities.

4. Men also have a personal and social responsibility for their own sexual behavior and fertility and for the effects of that behavior on their partners and their children's health and well-being.

5. Sexual and social relationships between women and men must be governed by principles of equity, non-coercion, and mutual respect and responsibility. Violence against girls and women, their subjugation or exploitation, and other harmful practices... violate human rights."

Using the rights framework, Germain et al (1994) argue that the objectives of any population programme ought to extend beyond simply fertility or birth control and include the following:

- enabling women to manage their own fertility safely and effectively by conceiving when they desire to, terminating unwanted pregnancies, and carrying wanted pregnancies
- promoting a healthy, satisfying sexual life, free of disease, violence, disability, fear, unnecessary pain, or death associated with reproduction and sexuality
- enabling women to bear and raise healthy children as and when they desire to do so.

Addressing reproductive health needs implies reducing unwanted fertility as well as the burden of reproductive morbidity and mortality. It calls for the removal of fertility 'targets' as a necessary step for changing the emphasis from numbers to a focus on the quality of services. It entails promoting an essential package of reproductive and child health services that includes services for the prevention and management of unwanted pregnancy, the

promotion of safe motherhood and child survival, nutritional services for vulnerable groups, services for the prevention and management of reproductive tract infections and sexually transmitted infections, as well as reproductive health services for adolescents. Accordingly, Jain and Bruce (1993) suggest the need to:

- promote policies and legal frameworks to create conditions conducive to voluntary fertility decline – for example, give priority attention to girls' education, increase women's access to and control of valued resources, reduce child mortality and morbidity, and distribute cost-benefits of children more equitably between parents;
- redefine family planning programmes to emphasize helping individuals achieve their reproductive intentions in a helpful manner;
- increase attention to those aspects of reproductive health that interact directly with the avoidance of unwanted and unplanned childbearing

Pachauri (2000) elaborates on the reproductive health approach by highlighting that it:

- provides the rationale for the design and implementation of client-focused programmes based on the principles of choice, equity and quality of care
- promotes comprehensive reproductive health care for women by enhancing access to information and services, without excluding the reproductive health needs of men and adolescents
- legitimizes client demand as a right as well as the basis for the provision of information and services
- emphasizes the synergies between programs for population, health and development; and,
- encourages international cooperation and public-private partnerships to improve the quality of life of current and future generations

The global consensus reached at the 1994 International Conference on Population and Development (ICPD) on the way forward to stabilize the population of nations incorporates these and other rights-based considerations. It emphasizes that governments must ensure a basic package of social policies to promote education of girls, health of women, survival of infants and young children, and empowerment of women. It argues, that if comprehensive reproductive health services are provided to enable couples to freely and responsibly determine the number and spacing of children, the dual objectives of greater social equity and reduction of high rates of population growth will be achieved simultaneously.

**The senselessness of coercion**

Rights-based arguments reveal the futility and unfairness in the use of force to restrict the size of families. There are still many advocates in favour of 'controlling' population by forcibly limiting the number of children a woman can have. They argue that coercion and an authoritarian approach will yield the quickest results. Some even go to the extent of advocating that India should emulate China's one-child policy despite the many problems with the coercive approach. In China, for example, adoptions are reported to have risen sharply in the 1980s from around 200,000 before the one-child policy to almost 500,000 a year in 1987. A significantly higher proportion of girls is put up for adoption than boys. Others have pointed to the practice of forced abortions that jeopardizes the life of the mother. Some others have expressed concerns over the state of mental health of the population over time as society begins to deal with the specific problems of raising a single child – and that too a boy. Some fear that the shrinking child population will impose severe pressures on children who will have to care for aging parents. There are several other reasons why use of coercion is not necessary or justified.[6]

*First,* using coercive policies has little appeal especially when almost every other country in the world has been able to lower birth rates and fertility levels without the use of force or compulsion.

6. Sen (1995) presents several philosophical and other arguments denouncing the use of coercion and arguing in favour of cooperation as the preferred – and only- way to achieve rapid population stabilization.

Bangladesh and Indonesia have been able to lower their fertility rates without use of coercion. Within India, both Tamil Nadu, Goa and Kerala, states with low fertility rates, have done so without the use of any force or draconian measures. Under these circumstances, the logic of adopting a one-child policy makes little sense.

*Second*, imposing restrictions on the number of children violates people's freedoms and individual rights. Family planning decisions by their very nature are intimate personal decisions relating to love, affection, family security, and togetherness. Why should the State or any political party want to forcibly interfere?

*Third*, it makes little sense to impose penalties when people indeed want to have fewer children. Survey after survey points out that most people – even the poorest, those living in rural areas, and belonging to minority groups – want to have fewer children. At the same time, people's knowledge of family planning methods is also high. India's National Family Health Survey-2 in 1998-99, for example, reveals that the knowledge of contraceptive methods is nearly universal, with 99 per cent of currently married Indian women recognizing at least one method of contraception and at least one modern method of contraception. Ignorance is no longer the issue. The reality is that a majority of women lack adequate access to safe and appropriate reproductive health services, and the freedoms to make choices. Why penalize people if the State is not able to fulfill its obligation of ensuring adequate provisioning of basic social services?

*Fourth*, even in China, the coercive population policy was accompanied by a broad and equitable expansion of social and economic opportunities for women – the proven way to reduce population growth. People's access to basic education and health, as well as opportunities for women's employment are much better in China than in India. This is evident from the levels of social development indicators in the two countries. For example, the infant mortality rate in China (31) today is half that of India's (66). China's maternal mortality ratio of 55 deaths per 100,000 live births is one-tenth of India's. Only 6 per cent of children are born of low birth weight in China as against 25-30 per cent in India. Almost 80 per cent of adult women are literate in China as against 46 per cent in

India. And so it is not entirely clear how much of China's fertility decline can actually be attributed to the one-child policy. Much of it could have occurred due to people's enhanced access to education, health and employment opportunities.

*Fifth,* enforcing a one-child policy may be possible in an authoritarian country like China. But such measures are likely to have disastrous political consequences in any democracy. In India, the political and human wounds of the population 'control' measures initiated during the Emergency rule under Mrs. Indira Gandhi, some 25 years ago, are still to heal. The human suffering and disrespect for human rights and human dignity of women - and men - is fresh in the minds of people.

*Sixth,* in countries of South Asia and even in China, with a strong son preference, such restrictions on family size will inevitably promote further discrimination against girl children. In China, for instance, the sex ratio of boys to girls at birth is reported to be in the range of 112-117 – significantly higher than the expected ratio of 105 boys to 100 girls. Part of this could be explained away by the under-reporting of girls at the time of birth, and to excess infant mortality among girls. But experts point out that the high proportion of boys is the outcome of pre-natal sex determination and consequent abortions if a girl child is expected. A one-child policy in India is bound to aggravate the already prevalent discrimination against the girl child in India. In fact, it is a particularly serious concern given that the most alarming and disturbing results of the Census of India 2001 is the worsening female-to-male ratio in the child population aged 0-6 years.

*Seventh,* a common argument in favour of a one-child policy is that it can *quickly* lower birth rates and speeds up the process of population stabilization. There seems little evidence or justification for such a belief. China, with its one-child policy, was not able to lower its fertility rate any faster than Kerala that did it without coercion. In 1979, for instance, Kerala had a higher fertility than China. But by 1991, Kerala's fertility rate of 1.9 was lower than China's 2.0. Similarly, Bangladesh has shown that it is possible to reduce fertility rates rapidly without use of any coercion – by empowering women, educating people and improving access to reproductive health care.

There are other serious problems associated with the use of disincentives and penalties for reducing birth rates. For example, political parties and some state governments want to debar those with more than two children from contesting for elections – or holding elected office. Penalties tend to get reduced to tokenism, and they are difficult to implement. If anything, such a move is impractical. How can political parties meaningfully track births, deaths, marriages, remarriages and divorces among party members (existing and potential)? Many loopholes are already being discussed. There is, for example, talk of the pull of political office and the lure of power promoting 'divorces on paper' and even 'adoption on paper." Without a doubt, pushing any kind of ban on political participation is likely to reduce the entire system of elections to a mockery of democracy.

Also, imposing penalties has little ethical or moral justification. Penalties tend to be unfair and inequitable in terms of how they affect different groups of people in society. The National Family Health Survey – 2 for 1998-99 reveals that India's Total Fertility Rate (TFR) – the number of children a woman would bear during her reproductive years 15-49 years – is 2.85. However, there are large variations in TFR across the country.

- The TFR is 2.27 in urban areas (where only 26% of the population reside) whereas it is 3.07 in rural areas with 74% of the country's population.
- The TFR among Scheduled Caste and Scheduled Tribe communities is higher than among the rest of the population.
- The TFR among illiterate women is 3.47 whereas it is 1.99 among women who have been educated beyond Class X.

It is not difficult to understand why the Total Fertility Rate is higher among women in rural areas, those who are illiterate and those who belong to the disadvantaged communities. Clearly, these communities enjoy much less access to basic social services and opportunities than the rest of the society. The proposal, therefore, to impose penalties on people with more than two children is clearly biased against rural and tribal populations, against less educated persons, against those belonging to Scheduled Castes, Scheduled Tribes and Other Backward Castes, and the poor in general. It

favours urban residents, and those who have had access to education and proper health care. Penalties and disincentives unfairly favour the fortunate few who have historically enjoyed an unequal access to opportunities denied so far to a majority of Indians.

The Constitution of India assures every child – without discrimination – the fundamental right to free and compulsory education up to the age of 14 years. However, some State governments want to deny the third child free access to schooling. Denying the right to education – if the child happens to be the third – seems utterly unfair and unethical. It is shameful to penalize a child for no fault of hers. Such a move clearly violates the Convention on the Rights of the Child that India has ratified.

The most popular argument advanced in favour of imposing penalties is that by doing so politicians will set an example to others. Do politicians truly believe that the electorate is so naïve? Politicians who believe that they can redeem their political image by advocating and having less than three children must be living in a make-believe world. Citizens are concerned about the ethical and moral values of politicians, about the corruption and misuse of office, and about their lack of commitment to addressing serious issues of poverty and human deprivations.

The reality is that population stabilization is best achieved by seeking the cooperation of people, by treating women with respect, and by recognizing the human rights of individuals. It is critical for society to invest in its people - in their health, in their education, in expanding reproductive health choices and in enhancing their capabilities.

**Stabilizing India's population**

India's National Population Policy 2000 identifies three main factors responsible for the country's population growth. The first factor is the existence of a large size of the population in the reproductive age-group (estimated to account for 58 per cent of the projected population growth between 1991-2016). The implication is that even if India's fertility rates are brought down to the replacement level of 2.1, India's population will continue to grow largely due to the 'population momentum' which is an

outcome of a young age structure. The second factor is higher fertility due to unmet need for contraception (estimated to account for 20 per cent of the projected population growth between 1991-2016). And the third factor is high unwanted fertility due to the high infant mortality rates (estimated to account for 20 per cent of the projected population growth between 1991-2016). Adversely affecting population growth is also the fact that even today, almost 50 per cent of girls marry below the minimum legal age of 18 years. And this results in a reproductive pattern that is characterized by "too early, too frequent, too many" births. Almost 33 per cent of births occur at intervals of less than 24 months.

Any discussion on stabilizing India's population has to take place against the context of the country's achievements and shortcomings in human development. Several significant changes have taken place in India since Independence in 1947. Some of these changes are distinctly visible - especially in the economic sphere with adoption of new technologies, diversified production, and sophisticated management. Changes have occurred in the social sphere - with affirmative action for disadvantaged communities, with the weakening of untouchability and caste discrimination, and with women enjoying by and large more freedoms than ever before. On the political front, India has remained a vibrant democracy with increased participation particularly by women in political decision-making.

Few countries in the world can match India's economic growth record. In the 52 years between 1950-1 and 2001-02, with the exception of four years, the country has enjoyed a positive growth rate every year in its real Gross National Product. Economic growth accelerated in the 1990s following the initiation of economic reforms. Between 1990-92, the country's GNP grew by 3.3 per cent. The growth rate rose to 6.8 per cent between 1992-97 and fell marginally to 5.6 per cent between 1997-2002. It took 40 years - 1950-1 to 1990-91 - for India's real per capita income to double. However, in the ten years between 1990-91 and 2000-01, per capita income went up by 40 per cent. The accompanying decline in income poverty has also been impressive. In 1973-74, 55 per cent of India's population lived below the poverty line. By 1999-2000, this proportion had fallen to 26 per cent. At the same time, during 1951-2000, life

expectancy nearly doubled to 64 years and infant mortality was halved to 66 deaths per 1,000 live births. Overall literacy rates went up from 18 per cent in 1950-1 to 65 per cent in 2001 – and for women, from 9 per cent to 54 per cent. Between 1991-2001, India's literacy rate went up from 52 per cent to 65 per cent - the highest rate of increase in any decade since Independence.[7]

The Indian economy has also witnessed an impressive expansion in the production of goods and services. Between 1951 and 2001, foodgrain production increased fourfold, and the index of industrial production went up 20 times. India today has almost 40 million tonnes of foodgrains in safety stock. Investments in social infrastructure have been impressive. In 1951, the country had only 725 primary health care centres. This increased to more than 163,000 primary health centres and sub-centres by 2000. The number of primary schools increased almost threefold - from 210,000 in 1951 to over 641,000 in 2002. School attendance rates among children 6-14 years touched 79 per cent in 1999 – 74 per cent among girls and 83 per cent among boys. Close to 85% of the population is reported to have access to safe drinking water. In 2000, India was certified free of guineaworm disease. Polio vaccination coverage has increased dramatically. Rapid changes in the world of media and information technology have contributed to higher awareness and discussion on child rights.

Despite these achievements, human poverty in India remains entrenched. Globally, India accounts for[8]:

- 36 per cent of the world's poor living on less than $1 a day
- 20 per cent of the world's children out-of-school
- 20 per cent of the world's gender gap in elementary education (6-14 years)
- 25 per cent of the world's maternal deaths
- 23 per cent of the world's under-5 child deaths every year

7. Data used are from Census of India (2001), Government of India's Economic Survey (2002-2003) and UNICEF (2002). See also Shiva Kumar (1996).

8. The World Bank (2001)

- 30 per cent of the world's death from poor access to water and sanitation

Today, some 47 per cent of India's children below the age of 3 years are malnourished. This is twice the level of malnutrition reported by many countries of Sub-Saharan Africa. India's maternal mortality ratio of 540 deaths per 100,000 births is significantly higher than the ratio in Malaysia (39), Thailand (44), or Sri Lanka (60). It is almost a hundred times higher than what is reported by many developed countries. Between 25-30 percent of babies born in India are of low birth weight as against 7 percent in Thailand, 9 percent in Malaysia and 17 percent in Sri Lanka. Today, India reports an infant mortality rate of 66 deaths per 1,000 live births. It is 8 in Malaysia, 17 in Sri Lanka, 24 in Thailand and 29 in the Philippines. Around 47 million (74 per cent) pregnant women are anaemic. Only 50 per cent of all households are currently using adequately iodised salt. Sanitation coverage remains low. Only 37 per cent of households use toilets – 19 per cent in rural areas. There continues to be a high incidence of child labour and out-of-school children. Girls remain particularly disadvantaged. Millions of Indian children in India are still out of school. Barely two out of three Indian children reach Grade 5, and of those completing five years of schooling, many cannot even read and write. In most developed countries, primary schooling is universal, and learning outcomes are far better than in India. In 1998-99, only 42 per cent of children 12-23 months were fully immunized. India's maternal mortality ratio remains high reflecting, among other things, lack of timely access to health services, births without skilled attendants, maternal anaemia and gender inequality. Problems of rapidly declining water tables, deteriorating quality and increasing contamination threaten availability.

There has been a gap in addressing issues affecting adolescents relating, in particular, to teenage marriages and pregnancies, the health, nutrition, and skills development of girls, and imparting knowledge of HIV/AIDS prevention and good child care practices. Within a span of six years, India has seen a rapid increase in HIV/AIDS infections. An estimated 3.8 million people are living with HIV/AIDS, of whom 50 per cent are below the age of 29 years, 21 per cent are women of child bearing age, and 2 per cent are children. Many cities have become the destination for cross-border trafficking

of children, primarily for prostitution. Children and women in particular have been affected by situations of conflict and the multiple and diverse emergencies in parts of the country.

These failings translate into an enormous backlog of human deprivations. For instance, still some 260 million people live in poverty. Close to 296 million people were not literate in 2001, and almost 189 million of them were women. Around 1.8 million infants die each year, and most of these deaths are avoidable. Particularly affected by human poverty are communities belonging to the Scheduled Castes and Scheduled Tribes that continue to lag behind on most human development indicators.

Underlying the persistence of many of these problems is the fact that girls and women in most parts of the country do not enjoy equal opportunities. Men continue to outnumber women. In 2001, there were 933 females per 1000 males - a reflection of the historical discrimination against women and the anti-female bias that continues in society. Between 1991-2001, the sex ratio of the child population (0-6 years) fell sharply from 945 to 927 signalling the persistence of strong son preference and anti-female biases in certain segments of society.

Equally disturbing is the persistence of inequalities across India. For example, in 2001, Kerala reported an infant mortality rate of 11 deaths per 1,000 live births as against 90 in Orissa. Also worrisome is the slow pace of progress in recent years. For instance, between 1992-93 and 1998-99, malnutrition among children below 3 years fell marginally from 53 per cent to 47 per cent. At this rate of some one percentage point a year, it will take India another 50 years to end child malnutrition.

Ensuring a rapid and equitable expansion of social opportunities has to become a national priority not only for addressing population concerns but equally important, for accelerating and sustaining economic progress and improving the quality of people's lives.

**The nexus between human development and population policies**

The persistence of human poverty in the human development framework is seen as a violation of human rights and a denial of

basic entitlements – to education, health, nutrition, and other constituents of decent living.[9] According to Human Development Report 2000, human rights and human development "share a common vision and a common purpose – to secure the freedom, well-being and dignity of all people everywhere. To secure:

- Freedom from discrimination – by gender, race, ethnicity, national origin or religion.
- Freedom from want – to enjoy a decent standard of living.
- Freedom to develop and realize one's human potential.
- Freedom from fear – of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work – without exploitation."

From such a perspective, human poverty represents a systematic denial of many freedoms including the opportunity to participate in decision-making forums, political and social. Poverty is perpetuated by irresponsible public action as much as it is by public inaction. There is an emerging consensus that poverty is *created* by an uncaring society, by indifferent policies, and by insensitive policymakers. At the same time, it is also often the result of bad policies, especially when they are not based on the norms and procedures of human rights. Poverty gets perpetuated when the rights of a few are given precedence over the rights of some others. That is why typically people in rural areas are more deprived of basic necessities than their counterparts in urban areas.

Policies and practices of development must be based on the norms and procedures of human rights.[10] The Commonwealth Human Rights Initiative (2001) lists many advantages of adopting a human rights approach to poverty eradication. The human rights approach has the force of being based on both moral consensus

9. For a comprehensive discussion see, in particular, United Nations Development Programme (2000), and Commonwealth Human Rights Initiative (2001).

10. For a full discussion, see in particular Commonwealth Human Rights Initiative (2001)

and legal obligations. It is a practical means for policy setting, enabling policy makers to choose the most appropriate processes; create re-oriented public structures. It urges us to adopt democratic methods of implementation; it gives primacy to participation and empowerment of the poor; and it demands the setting of appropriate targets.

Adopting a human rights approach to development calls for impact evaluation in terms of what policies do to the dignity of human lives. The human rights perspective brings many important values and considerations into discussions on policies for poverty reduction – and for formulating population policies.

*First*, in every society, there are stakeholders and each one of them is a duty-bearer with a set of responsibilities. Establishing accountability becomes central to the human rights approach. It is not sufficient to find fault or pass the buck when some policy or programme fails. As the Human Development Report 2000 underscores, it becomes vital to understand why the intervention failed, who is responsible, and what action needs to be taken collectively to meet the commitments. Identifying and establishing accountability for failures within a social and political system becomes an extremely meaningful way of finding solutions. Seen in this light, it is not appropriate to point to 'poor' people and 'blame' them for having larger families with many children. It is important to examine the circumstances that prevent poor families from having fewer children – and then evolving appropriate interventions.

*Second*, a human rights perspective lays strong emphasis not just on outcomes but also on how the outcomes are brought about. In other words, there is an emphasis on the processes underlying the formulation of policy and implementation of programmes. The process ought to be such that it is not violative of the rights of others, especially the poor and the voiceless in society.

*Third*, human rights assessment has an important element of protection built into it. This is particularly important in today's context of globalization where the adverse effects are largely felt by the poor, the socially disadvantaged and the marginalized. The concern with protection makes it imperative for policymakers to

pay attention, first and foremost, to ensuring the security and safety of the poorest in society.

*Lastly*, and following from the concern for the poorest and the most disadvantaged, the human rights approach demands that policymakers think radically – not incrementally - about the way programmes for the poor are conceived and implemented. It is customary for governments to think incrementally. Suppose, for example, that only 60 per cent of children are fully immunized in a society. Who are likely to be the ones left out? Clearly, they would be the less fortunate children – whose parents do not have proper access to health services, information or incomes to afford the costs of immunization. Adopting an incremental approach to achieving universal immunization would typically involve expanding immunization coverage from 60 to 70 per cent and then to 80, 90 and 100 per cent. If an incremental approach is adopted, the ones who are going to be left out would be increasingly the more difficult to reach groups. A rights-based approach would call for adopting radical measures to reach the worst off in society. Plans must be drawn up to find effective ways of reaching those who are left out – even if it means finding more resources or supporting new and untested ways of reaching the poor.

**Addressing four deficits**

India's National Population Policy 2000 spells out measures to achieve population stabilization, incorporating in the process the principal approach emerging from the ICPD deliberations. It builds on a set of twelve themes: decentralized planning and programme implementation, convergence of service delivery at the village level, empowering women for improved health and nutrition, promoting child health and survival, meeting the unmet needs for family planning services, addressing as priority the needs of under-served groups such as those residing in urban slums, remote tribal and rural areas and adolescents. It also emphasizes the importance of collaboration between government and NGOs, research on contraceptive technologies, and strengthening legislation. The Action Plan accompanying the National Population Policy 2000 outlines in detail the many interventions that must be put in place. Some of the measures are listed below:

- Implement at village levels a one-stop integrated and coordinated service delivery package for basic health care, family planning, and maternal and child health related services, provided by the community for the community.
- A maternity hut in each village to be used as the village delivery room with storage space for supplies and medicines. It should be adequately equipped with kits for midwifery, antenatal care and delivery; basic medication for obstetric emergency aid; contraceptives, drugs and medicines for common ailments; and supplies for maternal and newborn care.
- Provide a wider basket of choices in contraception through innovative social marketing schemes to reach households
- Improve the accessibility and quality of maternal and child health services
- Develop a health package for adolescents
- Ensure adequate transportation at village level to assist pregnant women who may need emergency care

The challenge before India is to ensure proper implementation of the Action Plan. Getting anywhere close will require India address four deficits.

The first deficit is *financial*. All said and done, India needs to increase allocations to the social sectors. It is not possible to think of maternity huts in every village, offering appropriate reproductive health care and quality services unless more funds are allocated to health. Similarly, it is impossible to think of improving the quality of basic education unless more resources are allocated to elementary education. At the same time, however, it is equally important to worry about how the money is spent, where it goes, and on whom it is spent. No poor country can 'afford' waste, leakage and inefficiency. Additionally, there are serious inequities perpetuated by the existing patterns of public expenditures that need to be corrected.

Public investment in the social sectors, however, has not been easily forthcoming. Public expenditure in health, for instance, has been comparatively low at barely 1 per cent of GDP as against 6-7

per cent in industrialized countries and over 2 per cent in China. Moreover, it has fallen from 1.3 per cent of GDP in 1990 to 0.9 per cent in 1999. Similarly, India is far from reaching the target of spending 6 per cent of GDP on education. In fact, public expenditure on primary education fell from 1.25 per cent of GNP in 1990 to 1.08 per cent in 1997. Prospects of increasing levels of public spending on the social sectors look bleak. There are reasons for concern on the economic front as well. The fiscal deficit of the Central Government declined from 6.6 per cent in 1990-91 to 4.1 per cent in 1996-97 and then rose to 4.8 per cent in 1997-98 and to 5.9 per cent in 2001-02. The fiscal deficit of the State Governments has gone up from 3.3 per cent in 1990-91 to 4.6 per cent in 2001-02. Rising debt is a matter of serious concern. The liabilities to GDP ratio fell from 55.3 per cent in 1990-91 to 51.2 per cent in 1998-99 and then rose to 58.1 per cent in 2001-02. It is expected to rise further to 61.4 per cent of GDP in 2002-03. The increased recourse to market borrowings to finance the deficit has resulted in a sharp increase in interest obligations. Interest payments that accounted for 2.8 per cent of GDP in 1990-91 is expected to rise to 3.8 per cent in 2002-03.

The argument is often made that India is too poor to afford the many investments needed to stabilize population. Can India afford to expand contraception choices, ensure universal access to safe and appropriate reproductive services, and ensure health for all? Or for that matter, can India afford to universalize elementary education? It is well established that high incomes are not a prerequisite for social development. Several countries like China, Cuba, Costa Rica, Sri Lanka, and even Kerala in India have recorded remarkable gains in health and education at relatively low levels of income. Nations do not have to become rich in order to provide for people's health and education. On the contrary, the only way for them to become rich is to invest first in people's health and education.

Investing in social development is not entirely a matter of resources. It has much to do with priorities and the political will to address issues of population and human development. The issue is more than merely one of affordability. It is a matter of getting priorities right. The political and bureaucratic leadership has to recognize that social sector development is fundamental for stimulating economic growth and sustaining it.

The second deficit has to do with *leadership*. Even though India has the intellectual capacity, it seems to be lacking adequate leadership to channel these capacities constructively towards enhancing people's capabilities. It is true that post-liberalization, India has exhibited impressive intellectual leadership in the area of economic reforms and more recently, in the sphere of disinvestment. But the same kind of intellectual energy and thinking are sorely missing in other sectors including health, education, nutrition, and for promoting human rights. The deficiency in leadership is not just political. It is most striking when it comes to government, but the absence of effective leadership equally noticeable in the private corporate sector, and even the NGO community.

The third deficit has to do with *assessment* of progress and performance. There is little systematic assessment of 'success' and 'failure' in human development. Take the case of elementary education. Despite the huge investments and the new momentum to universalize elementary education, there are no systematic data available on how much children learn and what they learn. Without this vital information, it is difficult to comment on how the formal system of schooling is doing compared to the alternate learning centres that are being encouraged. Similarly, we hear of many successful interventions in reproductive health. But often the evidence base is thin, and the 'claims' have not been systematically evaluated. If human rights have to be assured, then the legal system too has to be responsive and accessible to the majority. But for the legal system to function effectively, evidence, based on careful assessment, is crucial. Without proper evidence and data, planning for social sector interventions becomes extremely difficult.

The last of the deficits has to do with the limited involvement and *participation of women* in accelerating human development.[11] There is no doubt that the 73rd and 74th Constitutional amendments have greatly enhanced the political opportunities for women to participate in local governance. Still, there is a long way to go. There are far too few women meaningfully involved in the formulation and implementation of social sector policies and programmes.

11. The important role of women's agency in enhancing human capabilities is well documented. See, for example, the discussion and extensive references in Dreze and Sen (2002) and Sen (1999).

Active engagement and participation of women in decision making has much to do with the way Indian society still views women's contribution – as being marginal and not quite as meaningful as men's contribution.

Addressing these four deficits is fundamental to empowering women, reducing poverty and accelerating human development – all of which are proven ways of slowing down population growth.

**Concluding remarks**

There has occurred a polarization of viewpoints on the most effective way to achieve population stabilization. On the one hand are advocates of population control – those who firmly believe that only direct interventions to 'control' fertility can slow down population growth. They believe that using coercion to force individuals to restrict family size is entirely justified. After all, no individual has the right to slow down society's progress that a large and growing population tends to do. Adding strength to their argument is also a worry about the limited 'carrying capacity' of the earth, and negative pressures that a growing population imposes on nature. On the other hand are those who respect the rights and freedoms of individuals to exercise individual choices and act responsibly while making family decisions. These advocates argue that assuring people access to decent health care, education and reproductive health choices will significantly reduce unwanted pregnancies and lower birth rates. It is the failure on the part of society to guarantee people access to even basic health care and a decent standard of living that underscores their inability to restrict family size. From this perspective, enhancing people's capabilities, and women's in particular, is the just way to stabilize a country's population. It is a route that enlists people's cooperation and has proven to not only slow down population growth but also enhance the quality of people's lives.

Caught in the complex web of moral, ethical and emotional discussions, policymakers and many concerned citizens often fail to recognize the many inter-connections between population growth and well-being of the individual, family and society. It is time to stop counting people and begin to count on people. Adopting a rights perspective draws attention to the many myths

that surround discussions on population policy. Blaming population for low incomes, poor economic performance and poverty is a convenient excuse for covering up serious policy failures and neglect of human development. It is becoming increasingly evident that reducing birth rates is not a technical problem with a technical solution. Urgent public action is required to achieve population stabilization. And the most effective route is to eliminate human poverty, reduce child deaths, enrich the quality of reproductive health care, enlarge contraception choices, and empower women.

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# *The Criminal (In)justice System*

Rajeev Dhavan

## I. Hegemonic influence and civil society.

The Criminal Justice and Injustice System (CJS) represents the cutting edge of governance. Towering over society, it parades an array of institutions, processes, people and penalties to reinforce its images. This array includes policeman in uniform, constables with batons or lathis, the (police) station, courts, jail, bail, sentence, prisons, imprisonment, death row, the gallows, hanging and death. Each of these institutions and processes is part of the CJS and yet partly autonomous within it. Together they represent a 'hegemonic' array of the power of the State to exact respect, support and compliance. At one extreme, the CJS may develop into an apparatus of State terrorism, while on the other it is represented as a public necessity to correct private and public wrongs firmly and fairly. In either case, we have been rightly reminded, that CJS institutions and processes are expressions of power which sustain an ideological image of governance imbedded in people's lives[1]. Not all CJS lead to the Gulag archipelago but virtually all of them congeal some potential element of it. The realities underlying a CJS are discernable to those who experience its uses and abuses. The policeman in khakhi enjoys power – often exercised without responsibility. The prison is a place that enervates the mind and soul. The legal system pathologically speaks in many voices to reveal both liberal concern and harsh inescapable realities.

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1. See generally Michael Foucault, *Discipline and Punish: The Birth of the Prison*, (London, Allen Lane, 1977) especially p. 178 on the huge array of institutions ranging from the school to the army (including workplaces) which represent: "... a whole micro-penalty of time (lateness, absences, interruption of tasks), of activity (inattention, negligence, lack of zeal), of behavior (impoliteness, disobedience), of speech (idle chatter, insolence), of the body (incorrect attitude, irregular gestures, lack of cleanliness), of sexuality (impunity, indecency)".

Beyond their crude instrumental capacity to compel compliance, CJSs wield an enormous influence over people's lives and imagination to seek to inspire 'consent' for its operations. An essential element of this consent is not just to project the CJS as a necessity but as one capable of fairness and justice. Criminal Justice Reform is not simply to iron out the working of the CJS, but to obtain an overall legitimacy for it. CJSs are simultaneously tough in their posture and soft in their quest for humane policies. The politics of criminal justice reform dictates its contours and is barometrically linked to varying demands for 'tough' and 'soft' governance. This, in turn, influences whether the CJS should bare its fangs and wear its heart on its sleeve. The tussle between 'hard liners' for tough governance and 'civil libertarians' over the appropriate due process is played out within and without the CJS.

India's CJS was implanted by the British and has gone through three heuristically identified phases: (i) the *imperial* phase (1837-1950) which was celebrated as both 'civilizing' in its effect as well as a utilitarian necessity; (ii) the *post independence* instrumental phase (1950-77) which, consistent with Nehru's ideas of planned development, saw 'law' (including criminal law) as an instrument for social change and (iii) the *post-Emergency* phase (from 1977) which saw the rise of 'liberal' due process alongside new and fresh intimidatory anti-terrorist and other laws. The British visualised 'criminal law and procedure' as the preserve of the legislature – to be interpreted but not re-written by the judiciary. India's Constituent Assembly (1947-50) did not disturb this vision greatly when it broadly laid down in Article 21 that the 'life and liberty' of a person could be infringed by 'any (as opposed to 'due') procedure established by law and laid down some protections against self incrimination, double jeopardy, arrest and detention (Article 22)[2]. Fearful that the judiciary might upset the social revolution, the wings of the judges were clipped – a position that the judiciary

2. Government of India, Constituent Assembly Debates Official Report, (New Delhi, Lok Sabha Secretariat, 1999), Volume VII [hereafter CAD] at pp. 999-1001 (13th December 1948) on controversies on due process. For a critique of the discussions on due process in the Constituent Assembly see G. Austin: *The Indian Constitution: Cornerstone of the Nation* (Oxford, Oxford University Press 1966) 84-115 and on criminal due process see B. Shiva: *The Framing of India's Constitution* (Bombay, N.M. Tripathi 1968) 231-249.

generally accepted in the 1950s and 1960s whilst not entirely giving up their 'liberal' role[3].

In the Nehru era, the Government was convinced that the stubborn cruelties and irresponsibilities extant in Indian society could only be reversed by a tough criminal law which would be applied through notions of strict liability so that those responsible could be punished on a lesser proof of their culpability. A huge number of laws were enacted relating to food adulteration, essential commodities, workers rights, industrial safety, dowry and untouchability to press compliance and achieve social change.[4] But, would these laws be implemented? If so to what measure? Would people change? Even the Supreme Court seemed somewhat divided in its approach over strict liability although the general spirit was to uphold the sanctity of their aims[5]. This led to the government to claim more and more power and more draconian laws to culminate in the Emergency (1975-77).

After 1977, the Supreme Court embarrassed by its performance during the Emergency and confronted with egregious atrocities committed by the police (such as the blindings in Bihar) and in jails, re-wrote the Constitution to include a new due process dispensation which tests executive action and legislative laws on the anvil of reasonableness and fairness[6]. Huge strides were – and are being made – along this judicial trajectory. But, the

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3. see *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27 – but note the dissent of Fazl Ali J; and the pick and cloose cases (*infra* n. 14) and the domiciliary visits case (infra n. 38). For a masterly account of the development of this jurisprudence by an Attorney General who participated in the cases see M.C. Setalvad: *The Indian Constitution 150-65* (Bombay, University of Bombay 1967) 47-84, 94-110.

4. See R.Dhavan, "Kill them for their Bad Verses: On Criminal Law and Punishment in India" in Rani D Shankardass (ed.), *Punishment and the Prison: Indian and International Perspectives* (New Delhi: Sage Publications, 1999) 264 at pages 280-288. See also R.Dhavan, "Law as Concern: Reflecting on Law and Development" in Yash Vyas et al. (ed.), *Law and Development in the Third World*, (Nairobi, University of Nairobi Press, 1994) 25-50 esp. at p. 32.

5. Note Justice Subba Rao in *State of Maharashtra v. Mayer Hans George*, AIR 1965 SC 722 at para 13 where he said: "the mere fact that the object of the statute is to promote welfare activities or to eradicate a great evil is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence."

6. See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. On the beneficial impact of *Maneka Gandhi* on criminal due process, see M.P.Jain, *Indian Constitutional Law*, (Bombay, N.M.Tripathi, 1987) pp. 589-595 and p. 589, footnotes 1-4.

'establishment' as a whole has been wary about these changes. Upheavals in the North East, Kashmir and Punjab have led to draconian laws like the Terrorist and Disruptive Activities Act (TADA) (1985-7) and the Prevention of Terrorism Act (POTA) (2002) and other laws. Although many of these laws have been decried for their abuse, they continue to form a special part of the legal armoury of the state in addition to the existing ordinary criminal law and procedures. While several law commissions have suggested tinkering around with the CJS and the Malimath Committee (2003) remonstrates the need for a complete overhaul, Indian intimations for CJS reform are skewed and incomplete[7].

But while we look at the inadequacies of the official CJS, we cannot turn a blind eye to the unjust realities of life in Indian society. Many years ago, the *Law Commission's 114th Report on Gram Nyayalayas* (1986)[8] considered giving a comprehensive criminal jurisdiction in certain classes of cases to *gram sabhas* (village assemblies) on the assumption that the latter would deal with criminals with fairness and justice. I often quarrelled with Justice D.A. Desai (the then Chairman of the Law Commission) over his 'wonder-that-was-village-India' naivety. Ambedkar's somber warning to the Constituent Assembly that a village (no less a town) – far from being a model of 'just' social relations may be a den of inequity is exemplified many times over by the gratuitous cruelties which India's civil society inflicts on itself[9]. Those who commandeer 'caste' and other forms of social power have inflicted devastating atrocities on others. What do we make of the continuous inhumanities on dalits which are as ghastly as they are legion. Ghastly stories infringe our imagination and sensitivities. Let me illustrate from reports of recent occurrence. Illicit inter-caste lovers have been thrashed and paraded naked in a village near Delhi in 1997. In 2000, a woman was beaten to death near Agra because she was seen as a 'bad omen'. Young lovers were hung because they crossed the caste taboo. Exemplary fines were imposed on every dalit because one of them loved a higher caste woman. In

7. See generally U. Baxi, *The Crisis of the Indian Legal System*, (Delhi, Vikas Publishimg House, 1982) pp. 244-295.

8. See Law Commission of India, *One Hundred and Fourteenth Report on Gram Nyayalaya* (New Delhi, Government of India, 1986), pr.3.12 and 6.3.

9. B. R. Ambedkar: Speech in the Constituent Assembly (1948) VII CAD 38-9 (4 Nov.)

Gorakhpur a 4 year old was sacrificed to exorcize spirits. A 16 year old was blinded by pouring acid into his eyes in Bihar. A 40 year old lover was caned to death because his affair was unapproved. A dalit was killed for killing a cow. Another dalit was forced to eat excreta by upper caste persons. These samples are taken from my scrap book on Indian atrocities[10]. Such atrocities are not limited to villages but large sections of society everywhere. They show the cruelties that Indian society can inflict on itself when left to its own devices. The assumption that there is a hidden *ram rajya* (blessed self rule) that would surface if the official CJS relaxes its hold is unfounded. While there is much that can be said for 'people power' conditioning the excesses of the official CJS, there is much to be wary and concerned about. Civil society not only devises its own 'atrocious' solutions but corrupts the CJS itself.

As India transits into its most difficult century generating expectations for over a billion people, it has serious dilemmas about its CJS and the alacrity with which powerful forces can manipulate or side step it. India cannot become a 'good' society overnight; but it can have a humane criminal due process which can protect the vulnerable, discipline the exercise of power and prevent total lawlessness with which the nation's 'million mutinees' threaten it everyday.

## II. Criminal Justice Law Reform in Perspective

The earlier reform of the CJS has to be viewed in the context of the broad policy of 'law and development' which animated the

10. For the various newspaper reports, see 'Couple Stripped, Paraded Naked', *Indian Express*, (13th August 1997); 'Agra Village Watched as Woman was Killed', *Indian Express*, (3rd April 2000); 'Teenage Lovers Hanged in Public', *The Times of India*, (8th August 2001); 'Boy Loves Girl, Community gets Penalised', *The Pioneer*, (28th November 2001); '4-year-old Sacrificed to Exorcise Spirits', *The Hindustan Times* (26th July 2003); 'Another Blinding in Bihar, This Time Acid is used', *The Hindustan Times*, (24th September 2003); '40 Year Old lover Caned to Death', *The Hindustan Times*, (29th September 2003); 'Thinniam Cases (forced consumption of excreta) not Commensurate with Heinous Crime', *The Hindu*, (11th June 2002); 'Cops Force Accused to Drink Urine' *The Times of India*, (16th October 2003); 'Rural Vigilantism takes Life: Three Women raped, hacked to Death for Prostitution', *The Statesman*, (22nd October 2003); "Childless couple sacrifices six year old in UP village – 25 such cases in Western UP in the last six months" *Hindustan* Times (31 October 2003); Panchayat's gang rape order compensated by Court *Hindustan Times* (31 October 2003); see also R.Dhavan, "Kill them for their Bad Verses! On Criminal Law and Punishment in India", (*supra* note 4) 264 and esp. at p. 330 footnote 18.

governance concerns of the Nehru administration. The broad 'law and development' approach extant from the 1950s visualised *'law'* as the instrument of social change. This was a then much praised approach which combined Soviet planning with America's post New Deal regulatory state. Although Nehru never spoke of a 'law and development' model, it has been discerned as a part of his thinking[11].

Two distinct trends are part of the advent of this, then, new 'law and development' thinking on criminal law. The *first* was 'strict liability' (not necessarily based on fault) in Indian criminal law. The second was to create special procedures and courts and preventive administrative detention for certain kinds of offences and wrongs. The first trend was manifest in many socio-economic legislations which used criminal penalties as part of their enforcement. Common law notions of ascribing responsibility on the basis of intentional wrong were modified by concepts of strict liability in relation to such offences – not always to the liking of some judges of the Supreme Court[12]. This broad approach was encapsulated by the Law Commission's 47th Report on *"(t)he trial and punishment of social and economic offences"* (1972) – then headed by former Chief Justice Gajendragadkar who was himself a prime proponent of social engineering through law[13]. This trend continues to dominate Indian thinking on criminal law. Alongside, concepts of 'strict liability' developed a *second trend* of establishing 'special courts' and 'special procedures' for special offences. At first the Supreme Court was wary of accepting too many 'special procedures

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11. On a construction of Nehru's model of law and development, see R.Dhavan, "If I contradict myself, well then I contradict myself... Nehru, Law and Social Change" in R.Dhavan (ed.) *Nehru and the Constitution*, (Bombay, N.M.Tripathi, 1992) pp. 45-62; see also generally R.Dhavan, 'Introduction' pp. i-xcii in the same volume.

12. See Justice Subba Rao in *State of Maharashtra v. Mayer Hans George*, AIR 1965 SC 722 at pr. 13; see also *State of Punjab v. Balbir Singh*, AIR 1994 SC 1872 and *Ali Mustafa v. State of Kerala*, AIR 1995 SC 744 on the reading down of such legislations. Cf. Bhagwati J in *Prem Ballabh v. State*, AIR 1977 SC 56 and Krishna Iyer J in *Pyar Ali v. Mahadeo*, AIR 1974 SC 228 for the effects of crude instrumentalism by the use of tough criminal law and heavy sentencing; see more generally R.Dhavan, "Kill them for their Bad Verses ...", (supra note 4).

13. For his general "sociological jurisprudence" approach, see P.B.Gajendragadkar, *Law Liberty and Justice*, (London, Asia Publishing House, 1965); ibid *Tradition and Social Change*, (Bombay, 1967); ibid *Jawaharlal Nehru – Glimpses of the man and his Teachings*, (Nagpur, Nagpur University, 1967).

and courts', which were likened to creating Star Chambers and inconsistent with a Diceyian concept of the rule of law which required all to be treated equally by the ordinary law[14].

But this resistance soon wilted – especially after the Emergency (1975-77). Anxious to prosecute the guilty persons responsible for the Emergency, the Special Courts Bill 1979, and its affirmation by the Supreme Court represents a point of no return for the creation of special courts and procedures for various classes of offences[15]. Special courts and processes have become the acceptable order of the day. Along with preventive detention (permitted by the Constitution itself), special courts and processes were consecrated by anti-terrorist legislation (such as in TADA and POTA) and for anti-corruption cases[16]. More recently, the Minister of law has created 'fast track' courts (presumably on the analogy of 'fast track trains')[17]. The best evidence of what can go wrong is the 'Best Bakery' case (2003) where a vastly over-written judgment by a 'fast track' judge acquitted all the accused implicated in mercilessly roasting people in the Bakery to death[18].

The advent of special procedures and courts has led to devising new rules of evidence not only in the case of crimes like rape or dowry deaths but more generally in anti-terrorist law to a point where the presumed innocence of an accused has been put in jeopardy[19]. With this, the CJS slides into an aggressive posture

14. See generally *Anwar Ali Sarkar v. State of West Bengal*, (1952) SCR 284; *Lachamandass v. State of Bombay*, (1952) SCR 710; *Dhirendra Kumar v. Superintendent and Remembrancer, State of West Bengal*, (1955) 1 SCR 224 protesting and striking down laws with special 'pick and choose' procedures; but contrast a more indulgent court in *Kathi Raning Rawat v. State of Saurashtra*, (1952) SCR 435; *Kedar Nath Bajoria v. State of West Bengal*, (1954) SCR 30.

15. *In Re Special Courts Bill*, (1979) 1 SCC 380; *V.C.Shukla v. State (Delhi Administration)*, 1980 (Supp.) SCC 249.

16. See Part III of the Terrorist and Disruptive Activities (Prevention) Act, 1987; Chapter II of the Prevention of Corruption Act, 1988; Chapter IV of the Prevention of Terrorism Act, 2002.

17. The idea of 'fast' track legislation stems from an initiative of Law Minister Arun Jaitley.

18. See Justice H.U. Mahida's judgment in the *Best Bakery* Case, dated 17 June 2003 (unreported).

19. For example see Sections 113-B and 114-A of the Indian Evidence Act, 1872; Section 53 of the Prevention of Terrorism Act, 2002.

poised against the individual accused. This imbalance in the Indian CJS is acquiring a creeping significance which finds more audacious expression in the Malimath Report which recommends more radical changes.

Although the Indian CJS exudes a commitment to accepting rules of strict liability, special courts and procedures and rules of evidence, this has not been systematically thought through but has emerged over the years as the legislature has transited from legislation to legislation. In fact, there have been few systematic attempts to view criminal justice as a whole. One of the prime sources of generating 'reform' ideas is the Law Commission. But its record on recommending changes in the criminal justice system has been sporadic. The Law Commission's famous 14th Report (1958) was general in its approach to criminal courts. The 32nd Report (1967) dealt with the discrete question of the appointment of additional sessions judges by the High Court. Close on its heels, the 33rd Report (1967) negatived the idea that public servants must mandatorily give evidence about bribery offences. The 36th Report (1967) dealt with issues concerning granting bail. The 37th Report (1967) considered the Criminal Procedure Code's (Cr.P.C.) provisions dealing with criminal courts and investigation whilst the 41st Report (1969) re-examined the recommendations of the 37th Report. The 29th Report (1966) and 47th Report on the socio-economic offences (1972) merely explicate what had already become the basis on India's instrumental approach in using criminal law for inducing social change and development. The pressures to streamline the system at the expense of civil liberties by, inter alia, permitting confessions to senior police officers was considered with ambiguous support in the Law Commission's 48th Report (1972). After the Emergency, the Law Commission's 74th Report (1978) considered the admissibility of certain statements by witnesses to Commissions of Inquiry. This was obviously in the context of the record of Mrs. Gandhi's regime during the Emergency being examined by Commission at the time. The inevitable questions of delays in criminal trial courts surfaced without conclusive meaningful recommendations in the 78th Report (1979). There were significant reports on contemporary controversies over rape and allied offences (84th Report (1980) and 172nd Report (2000)) and on dowry deaths (91st Report (1991)). Likewise piecemeal reforms were considered

in respect of sureties for keeping the peace (102nd Report (1984)), the power of criminal courts to restore cases dismissed for default (141st Report (1991)), concessional treatment for those who plead guilty without bargaining (142nd Report (1991)) and on weeding out redundant statutes –both civil and criminal (178th Report (2001)) and protection of informers generally (179th Report (2001)). The point behind recounting these efforts to consider law reform is to show that they have been either too general or issue specific, without necessarily following a systematic approach. They have been generally marginal in their significance and depth as they responded to the fashion or problem of the day[20].

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20. For a full list of Law Commission's Reports relevant to criminal justice reform. See Law Commission of India, *Fourteenth Report on the Reform of Judicial Administration*, (New Delhi, Government of India, 1958); Law Commission of India, *Twenty Ninth Report on Proposal to include Certain Social and Economic Offences in the Indian Penal Code*, (New Delhi, Government of India, 1966); Law Commission of India, *Thirty Second Report on Section 9 of the Code of Criminal Procedure, 1898-Appointment of Sessions Judges, Additional Session Judges and Assistant Sessions Judges*, (New Delhi, Government of India, 1967); Law Commission of India, *Thirty-Third Report on Section 44 of the Code of Criminal Procedure*, (New Delhi, Government of India, 1967); Law Commission of India, *Thirty-Sixth Report on Sections 497, 498 and 499 of the Code of Criminal Procedure, 1898*, (New Delhi, Government of India, 1967); Law Commission of India, *Thirty-Seventh Report on the Code of Criminal Procedure, 1898 (Sections 1 to 176)*, (New Delhi, Government of India, 1967); Law Commission of India, *Forty-First Report on the Code of Criminal Procedure, 1898*, (New Delhi, Government of India, 1969); Law Commission of India, *Forty-Seventh Report on the Trial and Punishment of Social and Economic Offences*, (New Delhi, Government of India, 1972); Law Commission of India, *Forty-Eighth Report on Some questions under the Code of Criminal Procedure Bill, 1970*, (New Delhi, Government of India, 1972); Law Commission of India, *Seventy-Fourth Report on Proposal to amend the Indian Evidence Act, 1872 so as to render Admissible certain statements made by witnesses before Commission of Inquiry and other statutory authorities*, (New Delhi, Government of India, 1978); Law Commission of India, *Seventy-Seventh Report on Delay and Arrears in Trial Courts*, (New Delhi, Government of India, 1979); Law Commission of India, *Seventy-Eighth Report on Congestion of Under Trial Prisoners in Jails*, (New Delhi, Government of India, 1979); Law Commission of India, *Eighty-Fourth Report on Rape and Allied Offences – Some Questions of Substantive Law, Procedure and Evidence*, (New Delhi, Government of India, 1980); Law Commission of India, *Ninety-First Report on Dowry Deaths and Law Reform: Amending the Hindu Marriage Act, 1955, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872*, (New Delhi, Government of India, 1983); Law Commission of India, *One Hundred and Second Report on Section 122(1) of the Code of Criminal Procedure, 1973: Imprisonment for Breach of Bond for keeping the Peace with Sureties*, (New Delhi, Government of India, 1984); Law Commission of India, *One Hundred and Forty First report on Need for Amending the Law as regards Power of Courts to restore Criminal Revisional Applications and Criminal Cases Dismissed for Default in Appearance*, (New Delhi, Government of India, 1991); Law Commission of India, *One Hundred and Forty Second Report on Concessional Treatment for Offenders who on their own Initiative choose to Plead Guilty without any Bargaining*, (New Delhi, Government of India, 1991);

The Law Commission did attempt reviews of aspects of the Criminal Procedure Code (154th Report (1996)), Penal code (156th Report (1997)) and Evidence Act (185th Report (2003)) but without providing comprehensive fresh insights. Discrete journeys have also taken place into the right to silence (180th Report (2002)) which need careful examination since any tampering with this valuable right must be subject to strict scrutiny. While its report on the law relating to arrests (177th Report (2001)) has a lot of useful suggestions on not arresting people in respect of a large number of offences, this Report has generally been ignored as presenting a liberal face which the Government does not wish to countenance at a time when the latter is preaching harsh criminal laws and strict procedures. More acceptable to the government has been the sustenance of the laws against Narcotics (155th Report (1997)); and, more significantly, the report on the Prevention of Terrorism Bill 2002 (173rd Report 2000)) which lead to a sea change in the anti-terrorist laws[21]. This last report was not above criticism. The National Human Rights Commission (NHRC) immediately published its own recommendations against the Law Commission's approach to caution for laws more protective of civil liberties. This had no effect on the BJP led government which pushed POTA 2002 through a special joint session of parliament[22].

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Law Commission of India, *One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973*, (New Delhi, Government of India, 1996); Law Commission of India, *One Hundred and Fifty Fifth Report on the Narcotics Drugs and Psychotropic Substances Act, 1985*, (New Delhi, Government of India, 1997); Law Commission of India, *One Hundred and Fifty Sixth Report on the Indian Penal Code*, (New Delhi, Government of India, 1997); Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws*, (New Delhi, Government of India, 2000); Law Commission of India, *One Hundred and Seventy Third Report on Prevention of Terrorism Bill, 2000*, (New Delhi, Government of India, 2000); Law Commission of India, *One Hundred and Seventy Seventh Report on the Law Relating to Arrest*, (New Delhi, Government of India, 2001); Law Commission of India, *One Hundred and Seventy Eighth Report on Recommendations for amending various enactments, both civil and criminal*, (New Delhi, Government of India, 2001); *One Hundred Seventy Nine Report on Public Interest Disclosure and Protection of Informers*, (New Delhi, Government of India, 2001); *One Hundred and Eighty report on Article 20 (3) of the Constitution of India and Right to Silence*, (New Delhi, Government of India, 2002); *One Hundred and Eighty Five Report on Review of the Indian Evidence Act, 1872*, (New Delhi, Government of India, 2003).

21. See The Prevention of Terrorism Act, 2002.

22. In July 2000, the NHRC took the view that legislations like TADA and POTA were inimical to civil liberties – thus, taking a view different from that of the Law Commission in the latter's 173rd – Report (supra).

While the Law Commission's tough advice on certain harsh enactments has been appropriated by the government, the Law Commission itself has failed to impress as a prime body on criminal justice reform. It has not really opposed the general drift to stronger anti-libertarian laws and often applied itself to trivia rather than more meaningful questions in an incisive way. Perhaps, that is the reason the Government relied on the Malimath Committee for suggesting a new framework for criminal justice in India.

In March 2003 the Malimath Committee on Reforms of Criminal Justice System[23] submitted a Report detailing 158 recommendations addressing all aspects of the criminal justice system. The Committee headed by Justice Malimath has the broad mandate, "to examine the fundamental principles of criminal jurisprudence, including the constitutional provisions relating to criminal jurisprudence and see if any modifications and amendments are required." The three broad areas of concern to the Malimath Committee Report appear to be : (i) the need to tune the philosophical underpinning of the criminal justice system which according to the Committee is weighed too far in favour of the accused and the notion that the judges should be guided by the 'quest for truth', thereby signaling a shift to the 'continental' inquisitorial process; (ii) the need for a quicker investigative and trial process for dispensing justice; and (iii) the need to strengthen the police force and reform the administrative apparatus, especially to prevent the police force from being politicized[24].

The central motive of the Malimath Committee is to re-examine the philosophical underpinnings of Indian criminal law which is based on the adversarial system traceable to a colonial legacy; and, which according to the Malimath Committee, is loaded heavily in favour of the accused. However the gravitational pull of the Committee's recommendations would nullify the spirit of the Constitution's due process provisions. The Report seems to suggest that the presumption of innocence of the accused, his right to silence

23. See Government of India, *Report of the V.S.Malimath Committee on the Reforms of Criminal Justice System*, (New Delhi, Government of India, 2003 mimeo) Volume I [hereafter Malimath Committee Report].

24. *Malimath Committee Report*, (supra n. 23), Recommendations 1 – 7 pp. 265-267 (on the inquisitorial system). pr. 7.12 p. 96 (on the politicization of the police).

and the privilege against self-incrimination have been principally responsible for the increase in the crime rate in India[25]. This appears to be an unduly exaggerated picture of the failure of the criminal legal and justice system. In fact, these rights draw from a concept of fairness, which has come to occupy an important position in India's justice system and administrative jurisprudence. While the first of these principles deals with the method of reviewing the entire evidence before arriving at a finding of guilt or otherwise, the latter two principles protect suspects from every possible means of unfairness that may be inflicted on them in the course of investigation and trial to require their indictment to be independently proved without putting pressure on the accused to incriminate themselves.

The Malimath Committee proceeds with a bias in favour of the inquisitorial system. In the 'Explanation' to Recommendation 1 of the Report comes the mistaken belief of the Committee that "the inquisitorial system is certainly efficient in the sense that the investigation is supervised by the judicial magistrate that results in a higher rate of conviction"[26]. It is doubtful whether the conviction rate has any link, direct or indirect, with the inquisitorial process. More importantly it is not the rationale of the inquisitorial system to convict the greatest number of accused. If so, such a rationale would be invidious.

The International Commission of Jurists' (ICJ) Position Paper[27] in its critique of the Malimath Committee Report notes that the assumption that the shift from adversarial to inquisitorial would render criminal justice more efficient is flawed as it not only misconstrues the working of the 'continental' system and the principles underlying it but also fails to address the intrinsic deep-rooted problems in the criminal justice system in India. Thus, instead of experimenting with ostensibly new approaches to the law of evidence and designing a new 'inquisitorial' criminal justice system, it would be more salutary to attempt to solve the problems

25. See *Malimath Committee Report*, (*supra* note 23) pr. 2.2 and 2.3 p. 24.

26. See *Malimath Committee Report*, (*supra* note 23) p. 265.

27. International Commission of Jurists, *Criminal Justice Reform in India: ICJ Position Paper Review of the Recommendations made by the Justice Malimath Committee from an International Human Rights Perspective*. (Geneva, International Commission of Jurists, 2003) [hereafter ICJ Position Paper], p. 11.

of the existing criminal justice system in the light of the spirit and intent of nationally and internationally evolved due process norms (both procedural and substantive) so as to increase its viability, fairness and efficiency on a more exacting and rigorous basis rather than grasping half baked solutions based on incompletely understood ready made alternatives drawn from disparate legal systems found elsewhere in the world.

While dealing with the right of an accused not to testify against oneself, the Committee begins by laying stress on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 20(3) of the Constitution but proceeds to do a balancing act by recommending an adverse inference to be drawn when the accused remains silent. Thus, according to the Committee, the accused is to present a statement of defence at the beginning of the trial and should answer when the court puts questions to him, failing which an adverse inference may be drawn against him. The Committee's rationale for a Defence Statement is that the present system *"is not fair and hampers dispensation of justice"* as it allows *"the accused to spring a surprise at any stage"*[28]. This does not take into account the fact that the prosecution has the advantage of being in a position to dictate the proceedings and has access to investigative resources that are superior to those available to the defendant in most criminal cases. In fact the presumption of innocence also tips the balance to ensure fairness. What the Committee fails to accept is that the right to silence is mainly concerned about involuntary confessional self-incrimination. The accused may choose to break his silence before a magistrate but only if he does so voluntarily and without duress or inducement. Article 20(3) notes that no person accused of an offence shall be compelled to be a witness against himself. By drawing an adverse inference, when a person seeks to exercise his constitutional right

28. See *Malimath Committee Report*, (*supra* note 23) pr. 3.32 p. 49 where the Committee quotes Bentham as saying that the Rule is "one of the most pernicious and most irrational notions that ever found its way into the human mind"; note also pr. 3.40 p. 52 and Recommendation 8 p. 267 (suggesting the amendment of Section 313 of the Indian Evidence Act).

not to answer questions, the Committee short-circuits constitutional guarantees[29].

While conceding that the presumption of innocence is a hallowed right that needs to be preserved, the Committee reads down the content of the right to be presumed innocent until proven guilty. While quoting from English and Indian judgments and Article 14(2) of the ICCPR, the Committee makes the observation that it is left for each law making authority to prescribe the procedure for proof to suggest a shifting from the 'beyond reasonable doubt' test to a standard of proof which would be higher than the "balance of probabilities" but lower than "proof beyond reasonable doubt". This introduces a new and nebulous standard to evaluate the evidence to convict if "the court is convinced that it is true"[30]. Although purportedly suggested to ensure a balance between the rights of the accused and the rights of the victim, such an approach leaves too much to the subjectivity of the judge without guidelines or reserve. In an interesting interpretation to Article 14(2) of the ICCPR, the Malimath Committee notes that it is left to each nation to determine the burden of proof. This goes against the views of the ICCPR Human Rights Committee which notes that the presumption of innocence remains until the charge has been proved beyond all reasonable doubt[31].

The Malimath Committee has recommended that evidence

29. See *Malimath Committee Report*, (*supra* note 23) pr. 3.42 p. 53 for the adverse inference to be drawn when an accused refuses to answer questions and pr. 3.50 and 3.51 pp. 56-57 where the Report notes that the accused should present a statement of defence at the beginning of the trial.

30. See *Malimath Committee Report*, (*supra* note 23) Recommendation 13 (iii) p. 270 Accordingly the Committee recommends that a clause be added in Section 3 on the following lines: "In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced it is true."(emphasis added). For a recent article on presumption of innocence being part of Article 21, see P.Venkatesh and B.Subramanian, "Presumption of Innocence in Criminal Law", 2000 *Criminal Law Journal* (Jour.) 129.

31. Article 14 (2) of the ICCPR provides "Every one charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law"; see also the *ICJ Position Paper*, (supra note 27) p. 21 where from the Human Rights Committee of the ICCPR is quoted to have stated that "by reason of the presumption of innocence, the burden of proof is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt" (emphasis added).

recorded in video and audiotapes before a police officer of the rank of a superintendent should be admitted as evidence. It notes that, at present, confessions recorded by police are not admissible as evidence on the belief that the police often resort to torture to extract a confessional statement but suggested that with the strides in technology, videotapes could be used so that a magistrate can determine whether the person making the confession is under duress[32]. While tapes can be re-recorded, the problem of coercive duress and torture will remain. While it is known that many jurisdictions allow the use of video recorded evidence to safeguard against torture, this alone is not a sufficient safeguard. Nor is it enough to ordain recording under the oversight of a superior police officer if there is no safeguard on the independence of such supervision. Those who record investigation on video are unlikely to film their misdemeanours – whether before or after the interrogation.

Giving the police force a free hand while allowing confessions to be made admissible would only hamper the judicial process as they would be retracted on grounds of coercion at later stages. There are no safeguards in the present statutory framework that would ensure the fair use of this recommendation and the Committee does not make any concrete suggestions in this regard beyond its misplaced faith in technology[33]. As the International Commission of Jurists notes, as long as police brutality and torture are not completely eradicated, the bar to the admissibility of confession in the Evidence Act and Criminal Procedure Code should continue to operate[34].

For the purposes of this discussion, only certain recommendations have been highlighted. There have been a number of Recommendations by the Committee that would make things better for witnesses and victims. A number of recommendations seek to provide a right for the victim within the criminal justice system. Other recommendations seek to separate

32. See *Malimath Committee Report*, (*supra* note 23) Recommendation 37 p. 276.

33. See *Malimath Committee Report*, (*supra* note 23) pr. 7.35.3 p. 123 where it is noted that "if the confession is audio/video recorded, it would lend further assurance that the accused was not subjected to any form of compulsion."

34. *ICJ Position Paper*, (*supra* note 27) p. 16.

the public order responsibilities of the police from crime detection and investigation. Similarly, the report re-opens the 'qualifications' debate as far as the judges are concerned by suggesting a review process to ensure that highly competent judges alone are appointed. The report also seeks to reform rape laws by broadening the notion of penetration under Section 375 of the IPC and providing for the speedy completion of investigation and trial. Trying to tackle the problems faced by witnesses by making common-sense recommendations to protect witnesses and ensuring that the witnesses are treated with dignity and respect, assigning an official to take care of witnesses, providing separate facilities like toilets, drinking water, seating, resting and so on for witnesses; permitting a seat for the witness when s/he gives evidence in court and creating a 'witness protection program'[35], the report, at least in this regard, makes humane suggestions to enlarge the scope of criminal due process. Some of these suggestions can be ordained by the Supreme Court through constitutional interpretation.

The Malimath Committee has been sprung on public discourse at a time when there is a considerable and renewed emphasis on tough policing, wider investigation powers for the police, fast track trials and severe sentencing. By suggesting overhauling the system by increasing police powers, moving to an inquisitorial system and changing the standard of proof, there is much in the Report that we have to be wary about. It exults support for and exalts the so called European criminal justice systems without adequate knowledge of how they work and what makes them workable. The Committee's research is episodic and intuitive. It makes suggestions without carefully examining the Indian conditions into which these suggestions are sought to be transplanted. No doubt, the Malimath Report should be the subject of rigorous public discussion. But its prescriptions need careful evaluation. They ask for too much whilst giving too little.

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35. *Malimath Committee Report*, (*supra* note 23) Recommendation 14, pp. 270-272 (rights of the victim); Recommendation 15 p. 272 (separation of the investigation and the law and order wings); Recommendation 63 p. 280 (Review of qualifications prescribed for appointments of judges at different levels); Recommendations 79-89 pp. 284-85 (rights of witnesses); Recommendation 119 p. 291 (broadening the definition of 'penetration' in Section 375 of the Indian Penal Code)

## III. Criminal Due Process

We have already noted how the Indian Constitution started with a 'any process' – as opposed to a due process – clause to defend the life and liberty of a person (Article 21). This was due to sombre warnings by Sir Alladi Krishnaswami Ayyar and others that a due process clause would be mal-interpreted by the judiciary to stem social programmes and prevent the effective control of law and order[36]. This meant that as long as the legislature enacted a procedure, courts must take that procedure as they find it. The protection of due process lay with the legislature rather than the judiciary. Over the dissent of one judge, the Supreme Court accepted this dispensation in 1950[37]. Over the pre-emergency years, the Court expressed some discomfiture over special procedures being arbitrary and took exception to the police invading peoples' privacy by late night visits without authority of law[38]. In 1970, the Bank Nationalization case paved the way for a more integrated reading of the Constitution so that all governmental actions and laws would be tested against the broad concept of 'reasonableness'[39]. But all concepts of reasonable due process collapsed during the Emergency (1975-77) in which thinly veiled legal provisions were used to arbitrarily silence opposition by incarceration[40].

It was only after the Emergency that a broader constitutional concept of due process (founded on an indigenous concept of 'reasonableness) was evolved. An embarrassed Supreme Court, that had not done its bit to protect civil liberties during the Emergency, began to notice the inequities of Indian governance and life. Nowhere was the impact of new due process felt more deeply than in the area of criminal justice. Startling revelations about the police blinding accused in custody in 1978 triggered off the case for a new due process. One revelation followed another. Pre-trial accused –

36. See VII *CAD* 853-54 (6th December 1948) for Alladi Krishnaswami Ayyar's speech but cf. pp. 846-53 for the contra view; and generally *supra* n. 2.

37. See generally *A.K.Gopalan v. State of Madras*, (*supra* n. 3) AIR 1950 SC 27 but note the dissent of Justice Fazl Ali.

38. *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 (on domiciliary visits); on special procedures and courts note the cases cited supra n. 14.

39. *Rustam Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248.

40. The most notorious example of the failure of due process was *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521; note Justice Khanna's dissent.

including children – had been incarcerated in prison for years beyond even the maximum punishment prescribed for the offence for which they were accused. The law of 'release' emphasized jail rather than bail. Those incarcerated were subjected to inhuman conditions, kept in solitary confinement and handcuffed when there was no need to do so. Accused who had been incarcerated for a long period of time were ordered to be released. Women prisoners were not treated with dignity and respect[41]. In all these cases, the Supreme Court laid the foundations for a new due process to infect the investigative, pre-trial and trial stages of a criminal case – not systematically in each case but with a new approach and a breath of fresh air. The old theory that prisoners could be deprived of their fundamental rights was laid to rest to give way to a new reformist approach in which the goal of imprisonment was potrayed as restorative and not just punitive[42]. New prescriptions were made for legal aid and support[43]. The new criminal due process had arrived.

From this foundation, many criminal due process norms flowered. A new law emerged on granting compensation in cases of unexplained disappearance of persons from custody[44]. The *D.K.*

41. *Charles Sobhraj v. Supdt. Tihar Jail*, AIR 1978 SC 1514 (conditions of imprisonment of undertrials); *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (undertrials); *Kadra Pahadiya v. State of M.P.*, WP No. 8322 of 1981 (torture of young prisoners); *Munna v. State of U.P.*, AIR 1982 SC 806 (sexual exploitation of young children in jails); *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 (custodial violence towards women prisoners)

42. On the new jurisprudence on the rights of prisoners see *D.B.M.Patnaik v. State of Andhra Pradesh*, (1975) 3 SCC 135 (pr. 6); *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488 (pr. 28); *Mohd. Ghiasuddin v. State of A.P.*, (1977) 3 SCC 287; *Rama Murthy v. State of Karnataka*, (1997) 2 SCC 642 (pr. 2-3).

43. There are a number of cases on legal aid that trace the courts' expanding concern including *Tara Singh v. State*, AIR 1951 SC 217; *Ranchod Mathur v. State of Gujarat*, AIR 1974 SC 1143; *M.H.Hoskote v. State of Maharshtra*, AIR 1978 SC 1548; *Khatri v. State of Bihar*, AIR 1981 SC 928; *Ranjan Dwivedi v. Union of India*, AIR 1983 SC 624; *Centre for Legal Research v. Union of India*, (1986) 2 SCC 706; *Kishore Chand v. State of Himachal Pradesh*, (1991) 2 SCC 286. A scheme was submitted by Rajeev Dhavan to the court at the request of Justice Kuldip Singh which was circulated to the states but it could not be finalized because Justice Kuldip Singh retired from the court.

44. On compensation for fatal and other injuries by the State, see *Rudul Shah v. State*, AIR 1983 SC 1086; *Sebastian Hongray v. Union of India*, AIR 1984 SC 571; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746; *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465; and by private persons (see *Lata Wadhwa v. State of Bihar*, (2001) 8 SCC 197; *M.S. Grewal v. Deep Chand Sood* (2001) 8 SCC 151; *United India Insurance Company v. Patricia Mahajan*, (2002) 6 SCC 281.

*Basu case* (1997) laid down new criteria for arrest and detention[45]. Prisoners' rights included not just the right to humane treatment but also wages for work done in prison[46]. In *Antulay's* case (1992)[47], relying on previous precedent, the Supreme Court included the right to speedy trial as part of the criminal due process while denying the logical consequence that a trial would be vitiated for the infringement of this right. Later on, when time limits were sought to be laid down for a speedy trial in 1998, the Supreme Court reversed itself in 2002 to assert that no fixed time limits can be imposed[48]. Despite legal services legislation, a legal aid and support system for the accused in criminal cases has never flowered[49]. When faced with a strong legislation like TADA, the Supreme Court accepted its invasive features while attempting to soften its rigour. Equally, 'shoot to kill' powers for North East India were approved with safeguards. In this case, the NHRC opposed the Government to have some of its submissions accepted even if the Commission's wholesale condemnation of these provisions was not accepted[50]. It is possible to argue that in difficult cases, the Supreme Court has tried to strike a balance in favour of the government – lest the Court be accused of putting the nation's security in peril. Apart from cases like *D.K. Basu* case (1997) which was systematic in its approach to create a code on arrest and detention, the *PUCL* case (1995) on telephone tapping and a continued monitoring of investigation in the *Hawala* case (1998) which prescribed a due process code in this regard, there have been no comprehensive attempts to lay down a systematic criminal due process. Nor are criminal due process

45. *D.K.Basu v. State of West Bengal*, (1997) 1 SCC 416; see the earlier *Joginder Kumar Singh v. UP* (1994) 4 SCC 260 where detailed directions were also given; and *Dilip K Basu v. State of West Bengal*, (1997) 6 SCC 642; *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172.

46. See *State of Gujarat v. Hon'ble High Court of Gujarat*, (1998) 7 SCC 392 and the cases cited therein.

47. *Abdul Rehman Antulay v. R.S.Nayak*, (1992) 1 SCC 225.

48. See *P.Ramchandra Rao v. State of Karnataka*, (2002) 4 SCC 578 which overruled several cases, that imposed a time limit of two or three years for the completion of the trial including *Raj Deo Sharma (I) v. State of Bihar*, (1998) 7 SCC 507; *Raj Deo Sharma (II) v. State of Bihar*, (1999) 7 SCC 604; *Common Cause, A Registered Society v. Union of India*, (1996) 4 SCC 33; *Common Cause, A Registered Society v. Union of India*, (1996) 6 SCC 77. However, delays will influence the granting of bail.

49. See generally The Legal Services Authorities Act, 1987.

50. *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.

violations subject to 'strict scrutiny' which in the context of India is necessary[51]. To some extent, this is inevitable in a common law system, where judicial doctrine is built from precedent to precedent as conditioned by the facts of the case. Broadly speaking, the emphasis has been on criminal procedures and not on striking down substantive offences or prescribed sentencing provisions. In the *Capital Punishment* cases, the Court refused to accept that the death penalty itself was against the law, but decreed that it was one to be imposed in the 'rarest of rare' cases. What, then, are the 'rarest of rare' cases of exceptional depravity that shock the conscience? On this, there is insufficient judicial consistency in later cases[52]. Heed needs to be paid to the report of a distinguished Indian jurist who wrote a report on American capital punishment to show that the death penalty is imposed on the poor and black people[53]. In India, too, capital punishment visits the poor with more frequency than the well off. The other striking of a substantive offence being struck down as unconstitutional was a judgment de-criminalising suicide. But no sooner was this judgment passed, it was reversed by a larger bench for reasons that are not wholly convincing[54]. Whatever their shortcomings, the expanse of India's new criminal due process has potentially traversed from procedural matters to substantive offences – but in an incomplete sort of way.

51. *D.K.Basu v. State of West Bengal*, (1997) 1 SCC 416; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *Vineet Narain v. Union of India*, (1998) 1 SCC 226. Note also the decisions on handcuffing (*Citizens for Democracy v. State of Assam* (1995) 3 SCC 743 and the cases cited there).

52. See *Machhi Singh v. State of Punjab*, AIR 1983 SC 947 which prescribed the formula of the 'rarest of rare' However to see the arbitrariness with which this formula has been applied, see also *Triveniben v. State of Gujarat*, (1989) 1 SCC 678; *Ishaque v. State of Bihar*, (1995) 3 SCC 392; *Surja Ram v. State of Rajasthan*, (1996) 6 SCC 271; *Kishori v. State of Delhi*, (1999) 1 SCC 148; *State of Maharashtra v. Bharat Chaganlal*, (2001) 9 SCC 1; *Bacchitar Singh v. State of Punjab*, (2002) 8 SCC 125; see further S. Murlidhar: "Hang them now, hang them not: India's travails with the death penalty" (1998) 40 *Journal of the Indian Law Institute* 143-173.

53. International Commission of Jurists, *Administration of the Death Penalty in the United States: Report of a Mission*, (Geneva, International Commission of Jurists, 1996). The report was by a committee headed by Fali S. Nariman, a distinguished jurist from India.

54. *P.Rathinam v. Union of India*, (1994) 3 SCC 394 decriminalising suicide; *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648 restoring the constitutionality of the provision and making suicide a crime; see further a detailed remonstrance on the recriminialisation of suicide by R.Dhavan, "To Die To Sleep and then Perchance to Dream...: The Supreme Court on Suicide" (2003-4, forthcoming, presently in two parts as a mimcographed working paper).

One question that looms large around the judicial enforcement of the criminal due process laid down by the Court is its efficacy and enforceability. What happens if the due process is violated? Will the trial be vitiated? Does the new due process have any teeth to enforce its prescriptions? In the *Speedy Trial* case of 1992, the Indian Supreme Court refused to follow American law which suggested that once it is shown after manouvering many exceptions that the right to speedy trial is violated, the trial itself would be vitiated. The Indian Supreme Court initially took the view that such a result need not follow in all cases. This robbed this otherwise interesting judgment of much of its rigour. Later – as we have shown – when the Supreme Court prescribed time periods beyond which the prosecution would have to wind up its case, these later decisions were reversed by a powerful Constitution Bench[55]. So, what is the point of a constitutional norm on speedy trial, if it is generally unlikely to have a decisive bearing on the trial itself to become a mere will-o'-the wisp? How else would the regime of criminal due process be enforced? In a remarkable series of cases, the Supreme Court has awarded compensation where people have disappeared whilst in custody or for custodial atrocities. Inherent in these decisions is the idea of a constitutional tort – the transgression of which would lead to compensation by way of money damages. This has been placed on a more articulate footing in *Nilabati's* case[56]. But, there has been no follow through. What happens if the arrest and detention code laid down in *D.K. Basu's* case is not followed? Clearly, the trial itself would not necessarily be vitiated. Nor does it necessarily follow that money compensation would invariably be paid for the transgression. The chances are that a possible case can be made out for compensation for a constitutional tort. But, how and where would a remedy for such a tort lie? No doubt, the categories of civil action are never closed and a civil suit could be filed. But such a remedy would be a chimera in a legal system which is notorious for incessant delays and where years pass by before a remedy for damages comes to fruition. The alternative would be to file a writ in the High Courts or Supreme Court for the violation of the constitutional tort. So far, compensation through writs has been successful in cases of atrocity, death and disappearance – even

55. *supra* note 48.

56. *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

against private persons. But there is little to suggest that Indian courts have developed a more expansive jurisprudence on constitutional torts[57] which should extend generally to at least violation of norms of criminal due process and other rights which have been read into India's bill of rights as part and parcel of guaranteed fundamental rights.

I am not suggesting that even the most minor transgression of a criminal due process norm should necessarily result in the trial being called off or that compensation would necessarily follow for each trivial violation of arrest and detention norms. But the posture of the law must be not to tolerate any transgressions, even if it tailors the remedy in respect of the consequences that should follow if such infringing transgressions take place. *De minimus* violations may invite only censure. Due process rights cannot be left without remedy. The criminal due process declared by the Supreme Court leaves too much in the air. Remedies exist for only very exceptional cases. There is a vast gap between the 'trivial' cases which should invite stricture and disciplinary action but may otherwise be ignored and the 'exceptional' cases which would attract compensation and other reliefs. In between, lies a shadow for which no serious and convincing criteria have been devised or made out to attract damages by way of compensation. This means that investigators, the police and others do not fear any reprisal for the violation of constitutional norms. No doubt, not every case would go to the courts which are expensive and unpredictable. The fact that police reforms have not been effected aggravates the issue. There is no proper independent complaints system for accused or prisoners. Thus, even administrative responses to due process failures are weak, vacillating and defensive – further accenting the lack of due process firmament in the system of governance as a whole. In recent years, the NHRC has been trying to enforce the criminal due process

57. Even though compensation has been ordered in several cases (*supra* n.44), the Supreme Court has failed to evolve concept of constitutional tort for violations of due process and other rights which would result in either remedial suits or prerogative remedies in the High Courts and higher judiciary. Unfortunately, in *A.K. Singh v. Uttaranchal Jan Morcha* (1999) 4 SCC 476 while dealing with Justice Ravi Dhavan's elaborate judgment in the Uttaranchal 'atrocity' cases, the Supreme Court chastized the judge without comprehending or dealing with this important concept which was perceptively and widely discussed in the judgment appealed from.

codes. The NHRC has evolved a report back procedure for custodial deaths; and awarded compensation in cases of clear violations. It has added substance to many undefined criminal due process rights. In a remarkable case, it has laid down practice directions on invasive lie detector tests[58]. But, its own position is hampered because it can only make recommendations even if it has had cooperation from many State governments (sometimes reluctantly and contentiously) in its endeavours.

All this is not to wash the impressive achievements of the judicial enlargement of due process with cynical acid. But the judicially devised new criminal due process has been more impressive in its declarations than its enforcement. That does not detract from its importance. These new norms cast some kind of shadow on the actual working of the system as a whole even if not on every case. But, there is a great deal more that needs to be worked through before the new criminal jurisprudence can be declared to be both effective and efficacious.

## IV. The Criminal Justice System (CJS) Revisited

To say that the Indian CJS has imperial origins and is British in style is to assert an untidy fact. Whatever its source, India's legal system has been effectively appropriated by Indian society to work as an Indian system by and for Indians. The imperial design remains. Unlike the Common Law, the Indian Criminal Procedure Codes (Cr.P.C.) has a different design. The Common law's solicitude not to arrest without a charge was specifically overlooked. In India, arrest is possible for 60 days or more without a charge – a span of time that abjures civil liberties[59]. Even if England has altered its law somewhat, Indian law has overreached itself in this regard in

58. Note the decision of the NHRC in the matter of *Inder P. Choudhrie* (1999-2000) where relief was denied to the petitioner but the Commission laid down "practice directions" on invasive lie detector tests — based on an opinion by Rajeev Dhavan. Later the NHRC's guidelines were questioned in inconclusive proceedings in the Delhi High Court.

59. See proviso to Section 167 of the Code of Criminal Procedure, 1978. In fact, inter alia, if the investigation were to relate to an offence punishable with death, imprisonment for life or a term of not less than ten years, then the accused may be detained for ninety days.

new statutes like POTA[60]. Wary that the police may extract confessions, Indian law renders confessions to the police inadmissible. But, the overall effect of the Cr.P.C. was to powerfully empower police at pre-trial stage - whilst following the broad approach of Magistrate's committing serious cases to trial while using various varieties of lesser procedures to deal with lesser cases. When a new Cr.P.C. was cast in 1973, the dominant imperial model was retained – partly because it was familiar and partly because it was consistent with versions of the police state which India's rulers generally favoured. An accused caught in the web of the Cr.P.C. will pave away his fortunes to deal with issues of arrest and bail – on which Indian criminal lawyers are veritable experts and Indian judges often forebearingly harsh. The Cr.P.C. of 1973 did not attempt too many changes even if it abolished the notion of an executive-judicial magistrate (which was clearly contrary to the doctrine of separation of powers although such an arrangement made British governance of India easier), introduced new notions of anticipatory bail and spruced up the public prosecutor system to a limited extent[61]. But the overall design was retained; and the system continued as before alongside the Indian Penal Code of 1860 which

60. See Section 49 (5) read with Section 62 of the Prevention of Terrorism Act, 2002. The fact that TADA and its successor were susceptible to abuse is evident from the Supreme Court's own suggestion to establish 'review committees' whilst upholding the validity of TADA in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 pr. 265 p. 683. The review/screening committees were themselves not always reliable *Asifali v. State of Gujarat* (1994) *Supp.* 2 SCC 93). Review committees became necessary because of complaints to the court (see *Shaheen Welfare Association v. Union of India*, (1996) 2 SCC 616. But there too many lapses in these cases where prosecution is often done due to community association rather than criminality (*Bonkya v. State of Maharashtra*, (1995) 6 SCC 447). More recently, POTA has been sought to be used by Chief Minister Jayalalitha against political opponents like Mr. Vaiko and Kannappan. The Union has responded with proposals for the existing 'review committees' (see Ss. 60 read with s. 19 and 46 of POTA) examining each case – making their review binding on the authorities where in favour of the accused (see *Hindustan Times*, (27 October 2003)) But such a 'review' cannot discharge a person undergoing the criminal process without judicial sanction (see R.M Tewari v. State (NCT of Delhi) (1996) 2 SCC 610). It is one thing for review committee to review declarations of terrorist organization or phone tapping, but yet another to interfere in the judicial process. These reforms are paper reforms. It is better to reconsider whether POTA should be scrapped – on the Prevention of Terrorism (Amendment) Ordinance 2003 see R. Dhavan "Sugarcoating POTA" *The Hindu* (31 October 2003).

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has now been supplemented by new laws of strict liability and tough and stern laws to deal with narcotics and terrorism. The system is underpinned by the police whose working has been heavily criticized by various commissions and whose reform eludes tangible progress[62] and a prison system which is antiquated and needs overhaul[63].

62. On police reform see *Report of the National Police Commission Volumes I-VIII* (New Delhi, Government of India 1979 – hereafter NPC Committee). Following the Supreme Court's directions in *Prakash Singh's* case WP(Civil) No. 310 of 1996, the Union Government appointed the J.F. Ribeiro Committee which submitted reports in October 1998 and March 1999 (available for limited circulation in mimeo). This was followed by the Padmanabhaih Committee (2001-2001 (available for limited circulation in mimeo). Both these committees were with a view to implementing the Report of the NPC but which seem to have shortchanged the NPC's recommendations by suggesting more informal non-statutory responses with diluted proposals for complaints and generally retaining police control and oversight over itself. The NHRC's concern in many reports (but see especially see NHRC: Annual Report 1995-6 (Government of India, New Delhi 1997) pr. 2.4 (vi) p. 3)) caught the attention of Home Minister Inderjit Gupta who wrote an authoritative note to seek to implement the NPC entitled "Union Home Minister Note on Police Reforms and Restructuring" (3 April 1997) and pointing out that little had been done since the NPC reports were submitted to the Union government on 31 March 1983). After the demise of the Prime Minister Gujral led government, no meaningful further step was taken except for the relatively dilutionary and regressive report of the inhouse Riberio and Padmanabhan recommendations. For a general bibliographic essay on the police in British and post independent India see generally R.K. Raghavan: "The Indian Police: Expectations of a democratic polity" in Francine Frankal et. Al (ed) *Transforming India: Social and Political Dynamics of Democracy* (Delhi, Oxford University Press, 2000) 288-313 and P. Upadhyaya: "Human Rights and Governance: Police and Prison Reforms in India" (2003) 1 *Indian Journal of Federal Studies* 89-102 generally. A recent example of custodial death by police beatings of a thirty two year old, Sushil Kumar, in Delhi shows the continued prevalence of such brutality: see *Hindustan Times* (22 October 2003); *Times of India* (22 October 2003).

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From the point of view of civil liberties, a system has to be looked at so as to examine its design as well as working even if our rulers preach that we should not look a gift horse in the mouth. India's criminal law was designed to over-empower the police at the arrest and investigative stages. The general power and temperament of the police has led to these empowerments to be viewed with apprehension and fear. Atrocity after atrocity is committed at these arrest and investigative stages. People picked up by the police live in fear unless they have someone influential to watch over their interest. The custodial crimes of assault, humiliation, injury and death are prevalent. Indeed, the Supreme Court's criminal due process was a response to the shocking incidents of custodial blindings, rape and continued detention which were paraded before the court. If the Court triumphed with the new jurisprudence, it was precisely because it responded to practices that were widely known but crying out for redressal. In a huge country of over a billion people in which caste, community and communal rivalries infect the working of any system, the poor, disadvantaged, dalits and disempowered suffer ignominious tribulations in ways that defy correction. From the point of view of human rights and inhuman wrongs, it is this experiential aspect of what people actually suffer which is the core of the problem. Beyond that are incessant delays, temperamental decision making, the absence of legal aid and support (which makes an expensive system unattainable to all but a few) and a prison system that leaves a lot to be desired.

There is a converse point of view largely based on India's ungovernability whereby more and more powers are demanded for the police while seeking changes in the law relating to the right to silence, pre-trial confessions, changes in the burden of proof and a relaxation of the principle that the guilt of an accused must be proved beyond reasonable doubt. The Malimath Committee represents this trajectory of establishment thinking.Within this framework, a countervailing emphasis has also been written into

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India's criminal justice needs review – but not along the lines suggested by the Malimath Committee and its supporters. Wayward policing needs to be controlled by due process norms and corrective institutional oversight. The police system needs to have rigorous complaint and disciplinary systems. There is a need for an independent Director of Public Prosecution to replace the half way house that exists at present. Effective legal aid and support eludes the accused. Trial related due process (including those relating to speedy trial) need to be re-worked following the Supreme Court's turning its back on its own suggestions. No well developed system of constitutional tort exists. The Supreme Court's own due process is not underpinned by effective remedies which would provide compensation for civil liberties and due process violations or result in trials being set aside for transgressions of due process norms.

In the past few years, the Indian criminal justice system has been more concerned to seek better and further empowerment for officials against the citizen rather than addressing the pathological violations that plague the citizenry. In all this, it has taken many

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# *Rights of Victims in the Indian Criminal Justice System*

S.Muralidhar*

## Introduction

The adoption by the General Assembly of the United Nations, at its 96th plenary on November 29, 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter 'U.N. Declaration') constituted an important recognition of the need to set norms and minimum standards in international law for the protection of victims of crime. The U.N. Declaration recognized four major components of the rights of victims of crime – access to justice and fair treatment; restitution;[2] compensation[3]

* Part-time Member, Law Commission of India. The views expressed here are the author's own.

1. Clauses 4 and 5 of the U.N. Declaration read thus:

   "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

   5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."

2. This contemplates deprivations both by State and non-State actors. Under Clause 8 of the U.N. Declaration, restitution includes "the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights." Clause 11 provides that "where the government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."

3. Under Clause 12 of the U.N. Declaration the onus is on the state to "endeavour to provide financial compensation to both victims who have suffered bodily injury or impairment of physical or mental health as a result of serious crimes as well as the family of those who have died as a result of victimization."

and assistance.[4] In the first part of this piece it is proposed to examine how far the prevailing legal framework in India conforms to the norms and standards that were sought to be set by the U.N. Declaration nearly two decades ago.[5] It also notices relevant judicial dicta that have sought to address the needs of the victims of crime. In the second part the prevailing international trends and recent local developments are briefly noticed. The concluding part offers certain suggestions as regards the nature of the changes that are required in order to make the system respond effectively to the needs of victims of crime.

## I

## Access to Justice and Fair Treatment

The victim of a crime sets the criminal justice mechanism in motion by giving information to the police which is expected to reduce it to writing.[6] The victim as an informant is entitled to a copy of the FIR "forthwith, free of cost".[7] Where the officer in charge of a police station refuses to act upon such information, the victim can write to the Superintendent of the Police who is then expected to direct investigation into the complaint.[8] Failing these mechanisms, the victim can give a complaint to a Magistrate,[9] who will in turn examine the complainant on oath and enquire into the case or direct investigation by the police before taking cognizance.[10] The victim thereafter does not participate in the investigation except

4. This includes "the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means" (Clause 14) Part B of the U.N. Declaration concerns victims of abuse of power "that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights."
5. Though the U.N. Declaration may not have the binding effect of a Covenant, its clauses serve as useful benchmarks.
6. S.154 (1) of the Code of Criminal Procedure, 1973 (Cr. PC). This is registered as the *(the first information report (FIR).*
7. s.154 (2) Cr. PC.
8. S.154 (3) Cr. PC.
9. S.190 Cr. PC.
10. S.200, 202 Cr. PC. The failure by a public servant to willfully neglect to act upon the complaint of member of the Scheduled Caste (SC) or cheduled Tribe (ST) is itself a punishable offence under s. 4 of the SC and ST (Prevention of Atrocities) Act, 1989('SC/ST Act').

by being called to confirm the identity of the accused[11] or the material objects, if any, recovered during the course of investigation.

The position of victims who happen to be women or children has not merited the attention it deserves in the procedural statute. The protection under s.160 Cr. PC that "no male person under the age of 15 years or women shall be required to attend any place other than the place in which such male person or woman resides" does not apply to a woman or a child who is picked up as a suspect.[12] The plight of rape victims is compounded by their being held in `protective custody' in jails or in the nari niketans (women's shelters), on the pretext that they are required for giving evidence although such detention has no legal basis.[13]

The law's response to the needs of victims of rape and other violent crimes against women has been both predictable and inadequate. In imposing severe and minimum punishments[14] for the offence and in shifting the burden of proof,[15] the law fails to address the needs of the victim to be treated with dignity, to sustained protection from intimidation, to readily access the justice mechanisms, to legal aid and to rehabilitation. There is yet no provision in the law mandating 'in-camera' trials particularly when

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11. The evidence gathered by means of a test identification parade is relevant and admissible: S.9 Evidence Act 1872.

12. The Supreme Court emphasised the mandatory nature of this requirement in *Nandini Satpathy v. P.L.Dani* (1978) 2 SCC 424. The Rule that an arrest of woman should not be detained beyond sunset was evolved judicially: *Christian Community Welfare Council of India v. Government of Maharashtra* (1996) 1 Bom CR 70 but even this has been held not to be mandatory by the Supreme Court in Government of Maharashtra v. Christian Community Welfare Council of India, (2003) 8 SCC 546-A

13. The practice of keeping victim women in jails for giving evidence was strongly deprecated in *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 93 (at 96) as "nothing short of a blatant violation of personal liberty guaranteed under Article 21 of the Constitution."

14. S.376 (2) prescribes a minimum sentence of ten years and a maximum sentence of life imprisonment for certain severe forms of rape.

15. For e.g., S. 114 A, Evidence Act 1872 raises a presumption as to the absence of consent where the woman raped says in her evidence before the court that she did not consent. Recently some token amendments have been made recognising the need for preserving the dignity of the victim: S.155 (4) Evidence Act 1872 which permitted the impeachment of the credibility of a prosecutrix by reference to her general "immoral character" now stands repealed. S. 228 A prohibits the disclosure of the identity of the victim in any publication concerning the offence.

the victim is a child.[16] There is also no statutory scheme recognising the rehabilitative needs of the victims of rape.[17] The legislative and executive apathy to the problem stands in contrast with the response of the Supreme Court in *Delhi Domestic Working Women's' Forum v. Union of India.*[18] The case arose out of an incident in which six women, working as domestic servants in Delhi, were raped by eight army personnel in a moving train between Ranchi and Delhi. The members of the petitioner forum, when prevented by the employers from meeting the victims, sought the court's directions for expeditious and impartial investigation of the offences. The court indicated the following "broad parameters for assisting the victims of rape":[19]

- The complainants in sexual assault cases had to be provided with legal representation. It was important to have someone well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It was important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represented her till the end of the case.
- Legal assistance would have to be provided at the police station since the victim of sexual assault might be in a distressed state upon arrival at the police station; the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

16. An attempt is being made through a PIL in the Supreme Court (*Sakshi v. Union of India* (2001) 10 SCC 732) to get the legislature to remedy this lacuna.

17. Societal support to victims of sexual crimes is seldom available. From a victimological perspective, studies show that in sexual crimes against females and children of both sexes, the greater damage is often done by the reactions of others. This is termed as secondary victimization: Gerd Ferdinand Kirchhoff, "Victimology – History and Basic Concepts" in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 1at 51

18. (1995) 1 SCC 14.

19. *Supra* note 47 at 19-20.

- The police was under a duty to inform the victim of her right to representation before any questions were asked of her and the police report should state that the victim was so informed.
- A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. An advocate would be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the court was sought or obtained.[20]

The victim has a say in the grant of bail to an accused. S. 439 (2) Cr.PC, as interpreted by the courts, recognizes the right of the complainant or any "aggrieved party" to move the High Court or the Court of Sessions for cancellation of a bail granted to the accused.[21] A closure report by the prosecution cannot be accepted by the court without hearing the informant.[22] Also, compounding of an offence cannot possibly happen without the participation of the complainant.[23] In *S.A. Karim v. State of Karnataka*[24] the Supreme Court acted on the plea of the father of a policeman who was killed by a dreaded forest brigand and set aside the order of the trial judge that had allowed the prayer of the State for withdrawal of prosecution.[25]

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20. The other parameters included the payment of compensation to victims of crime by the constitution of a Criminal Injuries Compensation Board. The National Commission for Women was asked to evolve a scheme for victims of rape. However, that is yet to come about. Meanwhile the incidents of crimes against women has shown a steady increase. From 1,21,265 in 1997 it had risen to 1,35,771 in 1999. Of these, torture constituted 32.4%, molestation 23.8%, kidnapping and abduction 11.7% and rape 11.4%:*Crime in India 1999*, National Crime Records Bureau (2001), 203.
21. *Puran v. Rambilas* (2001) 6 SCC 338 and *R.Rathinam v. State* (2000) 2 SCC 391.
22. *Union Public Service Commission v. S.Papiah* (1997) 7 SCC 614.
23. S.320 Cr.PC.
24. (2000) 8 SCC 710.
25. In *P.Ramachandra Rao v. State of Karnataka* (2002) 4 SCC 578, the Supreme Court reversed its earlier orders in *Common Cause v. Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775 permitting closure of petty criminal cases the trial in which had not commenced even after the lapse of two to three years after institution. The Court noted the concern expressed for the plight of the victims of crime who, if left without a remedy might "resort to taking revenge by unlawful means resulting in further increase in the crimes and criminals." (*ibid.* at 596)

While the victim of a crime may move the government to appoint a special prosecutor for a given case,[26] there is no scope under the Cr.PC for the victim or informant or her lawyer to directly participate in the trial. S. 301 (2) Cr.PC mandates that such lawyer of the private party "shall act under the directions of the Public Prosecutor...and may, with the permission of the court, submit written arguments after the evidence is closed in the case." Further, though there is no provision in the Cr.PC for providing legal aid to the victim of a crime,[27] S.12 (1) of the Legal Services Authorities Act, 1987 (LSAA) entitles every person "who has to file or defend a case" to legal services. A victim of crime has a right to legal assistance at every stage of the case subject to the fulfillment of the means test and the `prima facie case' criteria.[28]

The Cr. PC also does not effectively address the growing menace of intimidation of victims or witnesses during the pendency of trial at the instance of the accused and other vested interests.[29] Even the few provisions that exist are not creatively used for meeting the challenge.[30] Recently the Supreme Court took judicial notice of the fact that "the conviction rate has gone down to 39.6%

26. S.24 (8) Cr.PC. The trial of offences under the SC/ST Act is to take place in Special Courts (s.14) and for each such court a Special Prosecutor is required to be appointed (s.15). Nevertheless the effective conviction rate for offences under this Act has been around 5%: See, Crime in India 2000, National Crime Records Bureau (2002), 184.

27. S.304 Cr.PC provides for legal aid only to the accused.

28. S. 12 (1) (h) and s. 13 (1) of the LSAA respectively. Under s. 12 (1)(b) every victim of trafficking in human beings or *begar*; under s. 12 (1) (e) every person under circumstances of undeserved want such as a "victim of a mass disaster, ethnic violence, caste atrocity.." is entitled to free legal services irrespective of the means test but subject to the prima facie case test.

29. The provisions that exist offer protection against intimidation by the police. S.162 Cr. PC makes the statement made by a witness to the police during the course of investigation in admissible in evidence consistent with the statutory bar under s.25 Evidence Act, 1872. S.163 Cr. PC seeks to protect a witness against inducement threat or promise offered or made by "police officer or other person in authority". S.171 Cr. PC mandates that "no complainant or witness on his way to any Court shall be required to accompany a police officer, or shall be subject to unnecessary restrained or inconvenience."

30. S.284 Cr. PC provides that a witness can be directed by the court to be examined on commission thus dispensing with the need for such witness to attend the trial. In addition, where the court finds that the key prosecution witnesses have turned hostile it can under s.309 Cr. PC and for reasons to be recorded, postpone the trial. Also, under s.311 Cr. PC it can recall and re-examine a witness if "his evidence appears it to be essential to the just decision of the case". However, these provisions are seldom used even when the court finds that the witness is under obvious threat and intimidation.

and the trials in most of the sensational cases do not start till the witnesses are won over."[31] One response is to get the court trying the case to hold sittings in camera or shift the venue of the trial to a safer place in the interests of ensuring a fair trial.[32] The other, and a less frequently invoked option, is to seek a transfer of the trial to another state by petitioning the Supreme Court under s.406 Cr.PC. In *G.X. Francis v. Banke Bihari Singh*,[33] the Supreme Court transferred the trial of a criminal defamation case filed against Christians by a non-Christian from a court in Madhya Pradesh, where the atmosphere was palpably hostile, to one in the neighbouring state of Orissa. The judgment of Vivien Bose J. explained the grounds for transfer thus:[34] "In a case of defamation against Christians by a non-Christian, bitterness of local communal feeling and the tenseness of the atmosphere afford good grounds for transfer under this section. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India, not because the judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions".

The victim's right of participation in the post-trial stage of the proceedings stands on a better footing. An appeal against an order of acquittal can be preferred, with the prior leave of the High Court, by both the State Government[35] and the complainant.[36] The right of a victim's near relative, who was not a party to the

31. Order dated August 8, 2003 in W.P.(Crl.) No. 109/2003 (*National Human Rights Commission v. State of Gujarat*). The court also took note of the fact that "No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses." In a 1984 case from Calcutta, the entire trial was held vitiated because all the key witnesses had been won over. A re-trial was ordered by the Supreme Court: *Sunil Kumar Pal v. Phota Sheikh* (1984) 4 SCC 533.

32. S. 9(6) Cr.PC states: "The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Sessions is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the Sessions Division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein".

33. AIR 1958 SC 309.

34. *Id.* at 310.

35. S.378(1) read with s. 378 (3) Cr.PC.

36. S.378(4) Cr.PC.

proceedings, to file a Special Leave Petition under Article 136 of the Constitution in the Supreme Court challenging an order of acquittal by the High Court was expressly recognised by a Constitution Bench in *P.S.R. Sadhanantham v. Arunachalam*.[37] Telescoping the requirement of fair procedure implicit in Article 21 into Article 136, the court declared:[38] "When a motion is made for leave to appeal against an acquittal, this court appreciates the gravity of the peril to personal liberty involved in that proceeding. It is fair to assume that while considering the petition under Article 136 the court will pay attention to the question of liberty, the person who seeks such leave from the court, his motive and his locus standi and the weighty factors which persuade the court to grant special leave."[39]

**Restitution**

The right of a victim of crime to restitution has not yet merited statutory recognition. In this area, the constitutional courts have been inclined to examine the plea of victims for redressal of the losses suffered during violent incidents including riots and caste clashes. The principle that is evoked is that of 'culpable inaction' under which the state and its agencies are expected to anticipate the losses or damage to public and private property in certain situations over which the potential victims have no control. The courts have gone as far as to find the state liable only where a definite failure on its part to act has resulted in the loss.[40] The outbreak of riots in the wake of the assassination of the Prime Minister in October 1984, resulted in large-scale damage to the properties of members of the Sikh community in several places of the country. In *R. Gandhi v. Union of India*,[41] the Madras High Court,

37. (1980) 3 SCC 141.

38. *Id.* at 146

39. The judgment of Krishna Iyer, J., for the court was concurred with by Pathak,J. (as he then was) in a separate opinion who sought to restrict the right of a private party other than a complainant to file a special leave petition "in those case only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petition for special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations."

40. For a detailed elucidation of this principle see Usha Ramanathan, *A Criminal Appraisal of the Laws Relating to Compensation for Personal Injury*, Thesis submitted to the Delhi University for degree of Doctor of Philosophy, September 2001, 246.

41. AIR 1989 Mad 205.

acting on the report of a commissioner appointed by it to assess the losses, directed payment of varying amounts of compensation for the losses to property of the Sikh community in Coimbatore. However, in *Sri Lakshmi Agencies v. Government of Andhra Pradesh*[42]the Andhra Pradesh High Court declined to accept the prayer for compensation to the loss of life, injury, destruction and loss of property as a result of the violence that followed the murder of a sitting member of the legislative assembly. The court explained that:[43] "it is only when the officers of the state do any act positively or fail to act as contemplated under law leading to culpable inaction, that the state is liable to pay the damages. There should be a direct nexus for the damage suffered on account of state action and if that is absent, Article 21 of the Indian Constitution is totally inapplicable".[44] This is an evolving area in which the courts are seen to be treading cautiously.[45]

**Compensation and Assistance**

The right of a victim of crime to receive compensation was recognised even under the Code of Criminal Procedure, 1898[46] but was available only where a substantive sentence of fine was imposed and was limited to the amount of fine actually realised. S.357 (3), Cr. PC 1973 permits the grant of compensation even where the accused is not sentenced to fine.[47] However, this provision is invoked sparingly and inconsistently by the courts.[48]

42. (1994) 1 Andh LT 341.

43. *Id.* at 351.

44. See also *Inder Puri General Store v. Union of India* AIR 1992 J&K 11; *Smt. Bhajan Kaur v. Delhi Administration*, 1996 AIHC 5644 and *Noor Mohammad Usmanbhai Mansuri v. State of Gujarat* (1997) 1 Guj LJ 49.

45. For cases where compensation for loss of property in riot like situations has been declined see *State of J&K v. Jeet General Store* AIR 1996 J&K 51; *Smt. Charan Kaur v Chief Secretary, Orissa* (1998) 85 Cutt LT 581 and *Nathulal Jain v. State of Rajasthan*, (1997) 2 ACJ 1271

46. S.545 (1 & 2) and s.546 Cr. PC 1898.

47. S.357 (3) "When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

48. In *Hari Singh v. Sukhvir Singh* (1988) 4 SCC 551, the Supreme Court had to exhort the criminal courts to use this provision since "this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system". Recently, in *Pamula Saraswathi v. State of A.P.*, (2003) 3 SCC 317, the Supreme Court, while affirming the conviction of the four assailants of the appellant's husband, directed them to pay a fine of Rs.10,000/- each which was then directed to be paid to the appellant.

The 152nd Report of the Law Commission had recommended the introduction of s.357-A prescribing inter alia that compensation be awarded at the time of sentencing to the victims of the crime – Rs.25,000/- in the case of bodily injury, not resulting in death; Rs.1,00,000/- in the case of death.[49] The 154th Report of the Law Commission of India noticed that its earlier recommendation had still not been given effect to by the government. It went one step further and recommended that it was necessary to incorporate "a new s.357-A in the Code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. Heads of compensation are for (i) injury, ii) any loss or damage to the property of the claimant which occurred in the course of his/ her sustaining the injury and (iii) in case of death from injury resulting in loss of support to dependants".[50] This recommendation also has not been acted upon by the government.

In the absence of a viable, effective statutory regime for compensation, the courts in their constitutional law jurisdiction have had to forge new tools to give effect to the right of victims of crime to be compensated.[51] In the *Delhi Domestic Working Women Forum Case*, the court directed payment of Rs.10,000 as ex gratia to each of the victims.[52] In *Gudalur M.J. Cherian v. Union of India*[53] the State of U.P. was directed to pay a sum of Rs.2,50,000/- as compensation to two Sisters on whom rape had been committed by unidentified assailants. The question of payment of compensation to victims of crime from the wages of prison labour came up for consideration in *State of Gujarat v. Hon'ble High Court of*

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49. Law Commission of India, *152nd Report on Custodial Crimes* (1994).

50. Law Commission of India, *154th Report on the Code of Criminal Procedure, 1973* 1996, 63. The Law Commission took note of the existence of a Victim Assistance Fund that had been created in the State of Tamil Nadu.

51. The earliest of these cases was *Rudul Sah v. State of Bihar* (1983) 4 SCC 141. The inadequacy of the provisions in criminal law to deal with custodial torture is reflected in the judgment in *State of M.P. v. Shyamsunder Trivedi* (1995) 4 SCC 262.

52. *Delhi Domestic Working Women's Forum v. National Commission for Women* (1994) 3 SCALE 11.

53. (1995) Supp 3 SCC 387. This was notwithstanding the fact that the persons who had been arraigned as accused were found by the CBI not to be involvedin the offence. The report pointed out grave lapses on the part of the investigating officers. See also *Chairman Railway Board v. Chandrima Das* (2000) 2 SCC 465.

*Gujarat*.[54] The court recommended that the State should make a law "for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in another feasible mode".[55]

**Victims of custodial crimes**

The constitutional right of a victim of custodial crime to receive compensation was reiterated by the Supreme Court in *Nilabati Behera v. State of Orissa*.[56] The court pointed out that it was not enough to relegate the heirs of a victim of custodial violence to the ordinary remedy of a civil suit. The right to get relief of compensation in public law from courts exercising their writ jurisdiction was explicitly recognised. This was further developed in *D.K. Basu v. State of West Bengal*,[57] where it was explained that "the award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the state... the relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them."[58]

**II**

In order to develop a comprehensive statutory scheme redressing the needs of victims of crime, it may be useful to examine some of the current practices elsewhere. The European Convention on Compensation of Victims of Violent Crime, 1983 provides for many of the rights recognised in the U.N. Declaration. The statutes

54. (1998) 7 SCC 392.

55. The concurring judgment of Wadhwa J., however, opined that "any amount of compensation deducted from the wages of the prisoner and paid directly to the victim or his family may not be acceptable considering the psyche of the people in our country".(at 435)

56. (1993) 2 SCC 746.

57. (1997) 1 SCC 416.

58. *Id* at 443. (emphasis in original) For a later decision of the Supreme Court reiterating the same principles, see *State of A.P. v. Challa Ramakrishna Reddy* (2000) 5 SCC 712.

on the topic in certain other countries include the Criminal Injuries Compensation Act, 1995 in the United Kingdom,[59] the Victims of Crime Assistance Act, 1996 of Victoria in Australia,[60] and the Victims and Witnesses Protection Act, 1982 of the USA[61]. Courts in some of these countries make use of "victim impact statements" to take on board the victim's feelings regarding the offence.[62] Outside of the formal legal system, there are associations formed in some of the countries, which are central to the provision of all forms of assistance to victims of crime.[63]

South Africa has enacted a Witness Protection Act, 1998 (WPA) which provides, inter alia, for the establishment of a central office for witness protection, which will function under the control of the Minister of Justice and Constitutional Department. This office will be responsible for the protection of witnesses in terms of the WPA and regulations made in terms thereof, and will perform all duties relating to protection of witnesses.[64] It may be recalled that simultaneously with the making of the Constitution of South Africa, a Truth and Reconciliation Commission (TRC) was also established.[65] One of the key functions of the TRC was to examine

59. The working of the Criminal Injuries Compensation Board in the United Kingdom has not been found to be satisfactory. A recent report titled "Criminal Justice: the Way Ahead" makes a key recommendation that "we will put the needs of victims and witnesses at the heart of the criminal justice system and ensure they see justice done more often and more quickly."

60. Under s.3 of this Act, the family of the witness could also seek protection or other assistance.

61. Despite many states creating programmes responding the needs of victims of crime which include restitution by the offender, compensation by the state, assistance by government and private organisations and the promulgation of "bills of rights", the actual implementation of these schemes appears to have not been adequate: See LeRoy L Lamborn "The Constitutionalisation of Victims' Rights in the United States: The Rationale" in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 280

62. Matti Joutsen, "Changing Victim Policy: International Dimensions" in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 211 at 219

63. Among the prominent ones are the Weisser Ring established in Germany in 1977, the Scottish Association of Victim Support Schemes and the National Organisation for Victim Assistance in the USA.

64. Ss. 2 to 6.

65. The TRC was constituted under the Promotion of National Unity and Reconciliation Act, 1995.

the claims of victims of the apartheid regime to compensation.[66] An important aspect of the functioning of the TRC, as explained by one of its members, Justice Albie Sachs, was to give the victim a voice and encourage a dialogue between the victim and the perpetrator. He explains that "if you are dealing with large episodes, the main concern is not punishment or due compensation after due process of law, but to have an understanding and acknowledgment by society of what happened so that the healing process can really start. Dialogue is the foundation of repair."[67]

The need for setting up separate victim and witness protection units in the trial of mass crimes has been acknowledged in the setting up of international tribunals to deal with them. The International Criminal Tribunal for Rwanda has formulated rules for protection of victims and witnesses.[68] Similar provisions exist in the Statute for the creation of an International Criminal Court (ICC).[69]

Recent local developments require to be noticed. The notification of the Government of India constituting the Committee on Reforms of Criminal Justice System, chaired by Justice V.S. Malimath (hereafter 'Malimath Committee') was uncharacteristically candid in its lamentation that "People by and large have lost confidence in the Criminal Justice System... Victims feel ignored and are crying for attention and justice..."[70] In its turn

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66. S.23 of the 1995 Act constitutes a Committee on Reparation and Rehabilitation. The TRC has since submitted its final recommendations.

67. Albie Sachs. The Fourth D.T. Lakdawala Memorial lecture. "Post-Apartheid Africa: Truth, Reconciliation and Justice". Institute of Social Sciences 37 – 38 (mimeo)

68. Article 21 of the Statute of ICTR provides for rules to be made for protection of victims and witnesses and further states that such rules shall not be limited to conducting an in-camera trial.

69. Article 68 of the Statute provides for 'protection of the victims and witnesses and their participation in the proceedings'. Article 43(6) of the same Statute requires the Registrar of the ICC to set up a 'victims and witnesses unit' within the Registry which shall provide "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."

70. Report of the Committee on Reforms of Criminal Justice System, Government of India Ministry of Home Affairs – Vol.I, March 2003 (hereinafter referred to as 'the Malimath Committee Report'), 75.

the Malimath Committee, after making extensive recommendations to ensure that "the system must focus on justice to victims"[71], has concluded that "criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognised by law and restitution for loss of life, limb and property are provided for in the system."[72] While largely concurring with the recommendations of the Law Commission of India in relation to witness protection the Malimath Committee concludes that "Time has come for a comprehensive law being enacted for protection of the witness and members of his family".[73]

The government of the day, on August 14 2003, tabled in the Parliament the Criminal Law (Amendment) Bill, 2003 proposing a series of changes including the insertion of new Ss.164-A and 344-A in the Cr. PC to deal with the problem of witnesses turning hostile.[74] Further, s.195-A is proposed to be introduced in the Indian Penal Code making the threatening or inducing of any person to give false evidence a cognizable and non-bailable offence punishable with imprisonment for seven years or fine or both. This response of the government is not only ad hoc but also inadequate as it fails to address the whole range of issues raised by victims of crime.

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71. *Ibid* at 270.

72. *Ibid* at 271.

73. Para 11.3, *ibid* at 152. The principal criticism of the Malimath Committee is that in its single-minded focus on shifting the system from being accused-centric, an assumption not borne out by any systematic empirical analysis, and in its over eagerness to make it address the needs of victims, it adopts the 'either/or' approach. It jettisons the principle of presumption of innocence which it views as a barrier to discovering the truth. Prof. Upendra Baxi criticism is that "Instead of doing any sustained empirical work bearing on so crucial a matter, the Report relies merely on 'commonsense' expressed *ad nauseum* in judicial reiteration of the maxim: 'it is better that ten guilty persons may escape rather than one innocent person may suffer": Prof. Upendra Baxi, Introductory Critique to *The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights*, Amnesty International India (September 2003), 19

74. The new s.164-A, as suggested by the Law Commission of India, provides for production by a police officer of "all persons whose statement appears to him to be material and essential for proper investigation of the case, to the nearest Metropolitan Magistrate or Judicial Magistrate, as the case may be, for recording their statements". This will apply to cases involving an offence "punishable with death or imprisonment for seven years or more". S.344-A provides for a summary procedure for trial of witnesses deposing contrary to the statements recorded under s.164-A.

## III

## Conclusion

A brief review of the existing legal framework in relation to rights of victims of crime reveals that except in the area of providing compensation, very little has been done either statutorily or through schemes to address the entire range of problems faced by victims of crime. There is need to take a fresh look at the position in which the victim of a crime is placed in our criminal justice system.

The role of the victim of a crime in our criminal justice system, which follows the common law colonial tradition, is restricted to that of a witness in the prosecution of an offence. This stems from a negative perception of the victim of a crime as a person who has "suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."[75] Resultantly, the criminal justice system acquires a "vertical dimension" and becomes "a means of formal social control" by the state which takes over the prosecution of the offender to the exclusion of the victim.[76] From a criminological and victimological perspective, these are "value laden judgmental labels that serve no useful research function and thus can be easily replaced by more neutral designations, such as 'participants to the conflict', 'parties to the dispute', 'protagonists' and so forth."[77] This view advocates replacement of the vertical criminal justice system by a "horizontal line of justice" where the punishment system is sought to be substituted by a mediation system which gives a central

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75. Clause 1 of the U.N. Declaration.

76. Gerd Ferdinand Kirchhoff, "Victimology – History and Basic Concepts" in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 1 at 63

77. Ezzat A. Fattah, "Some Problematic Concepts, Unjustified Criticism and Popular Misconception", in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 82 at 84. Fattah argues that this neutral terminology represents a much needed return to the notion of crime as a conflict and the notion of conflict as an interaction. He points out that "normative designations of "criminal" and "victim" imply such a judgment and therefore preempt a thorough and objective investigation into the real and actual roles each party played in the genesis of the crime."

role for the victim.[78] Our system however has persisted with the vertical dimension model.

The reorienting of the criminal justice system to address the needs of a victim of crime need not and perhaps should not be exclusive of the need to enforce and protect the rights of suspects as well as the rights of the accused. It should be possible to accommodate both requirements as has been done in countries like United Kingdom and the United States of America. To begin with it is essential to acknowledge that our legal system is not equipped at present to effectively deal with mass crimes, including the crimes of genocide and crimes against humanity.[79] The setting up of a witness and victim protection unit under the control of an independent and accountable agency by suitably modifying the available models, e.g., the one provided by the Statute for the creation of the ICC, becomes imperative. This ought to be built into the statutory legal framework itself.

Although the Malimath Committee has recommended that "the victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the state if the victim is not in a position to afford a lawyer",[80] this fails to acknowledge that the present state of implementation of the statutory provisions concerning free legal aid in the criminal justice system leaves much to be desired.[81] The reform of the criminal justice system as a whole will have to be simultaneous with the reform of the legal aid system before a victim of crime can be guaranteed an effective right of representation in a criminal trial.

78. Gunther Kaiser, "Comparative Prospective Concerning Victim Orientation in Criminology, And Criminal Justice" in Kirchhoff *et al* (eds.) International Debates of Victimology, WSV Publishing (1994), 104 at 137. The author while emphasising the advantages of the victim - offender mediation points out that this "requires as its foundation a form of organisation which is not directly integrated into the judiciary." Clause 7 of the U.N. Declaration encourages the utilization of informal mechanisms for resolution of disputes "where appropriate to facilitate conciliation and redress for victims."

79. For a detailed analysis of the failure of the legal system to deal with the mass killings of 2733 Sikhs in Delhi in November 1984 in the wake of the riots following the assassination of the Prime Minister. Vrinda Grover, *"Quest for Justice 1984 Massacre of Sikh Citizens in Delhi"* (2002) (mimeo).

80. Report of the Malimath Committee, 270.

81. See generally S. Muralidhar, *"Legal Aid and the Criminal Justice System in India"*, thesis submitted to the degree of Doctor of Philosophy (April 2002).

The limitation of the resources of the State in making adequate provision in the form of a victim assistance fund ought not to be countenanced any longer.[82] The attempt at devising a statutory scheme of witness protection will have to be preceded by a wide range of consultations by the law making body with not only victims of crime but other statutory bodies like the National Human Rights Commission which are plagued with a rising number of complaints.[83] The approach would also have to be multi-disciplinary involving, inter alia, sociologists, law persons and professionals from the field of medicine. Given the endemic delays faced by litigants in the present legal system, it would be appropriate to develop alternative forms of dispute resolution without diluting the need for providing fair and equal justice to victims of crime. The U.N. Declaration continues to serve as a useful benchmark in reordering the criminal justice system to address the needs of victims of crime.

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82. The Supreme Court has time and again negatived such a plea: See *State of Maharashtra v. M. P. Vashi* (1995) 5 SCC 730

83. The Annual Report of the NHRC for the year 1998-99 reveals that the number of deaths in police custody and judicial custody were 183 and 1,114 respectively. There were 436 cases of illegal detentions and 2,252 cases of other police excesses. The official statistics of the National Crime Records Bureau also acknowledges that there were as many as 78 deaths in policy custody and over a 100 deaths during "production/ process imports/ journey connected with investigation": Crime in India, 2000, 355-356.

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# *Towards A Rights Based Approach in Combating HIV*

Anand Grover[1]

HIV/AIDS is the largest and most serious health crisis to hit human kind in the last 500 years. As of 2002, 42 million persons are living with HIV/AIDS worldwide[2]. 21.8 million persons have died of AIDS-related causes since HIV was first discovered in 1981[3]. There are about 15 thousand infections everyday in the world[4]. A large majority of people living with HIV/AIDS (PLHAs) are in the productive years of their lives, 15 to 49 years[5]. Over 800,000 of the new infections are amongst children[6].

HIV was first detected in India in Chennai in 1986[7]. Today India has the dubious distinction of having the second largest population of PLHAs, with 4.58[8] million HIV positive persons, second only to South Africa with a total population of 5.3 million PLHAs[9]. Of the new infections more than quarter are in women[10]. HIV is no longer restricted to the "high risk populations". It has

1. This article has been prepared with assitance of my colleague Ms Shehzad Mansuri
2. Epidemiology, UNAIDS, Available at http://www.unaids.org/en/resources/epidemiology.asp
3. Statistics-the World, United Nations Development Programme, Available at http://www.undp.org.pl/hiv-aids_en/index.php?opt=s world .
4. *ibid.*
5. *ibid.*
6. Epidemiology, UNAIDS Available at http://www.unaids.org/html/pub/Topics/Epidemiology/RegionalEstimates2002_en_pdf
7. National AIDS Prevention and Control Policy, NACO, Ministry of Health and Family Welfare, Government of India, p.1.
8. *HIV Estimates in India* (based on HIV Sentinel Surveillance), Available at http://www.naco.nic.in/indianscene/esthiv.htm .
9. *AIDS Epidemic Update*, Available at http://www.naco.nic.in/globalscene/globe2.pdf.
10. According to the results of a 2002 study released by NACO 61.5% of PLHAs in India are males. 'HIV/AIDS on the rise in India', *ABC Radio Australia News*, 25 July 2003, Available at http://www.abc.net.au/asiapacific/news/GoAsiaPacificBNA_910626.htm.

entered the mainstream populations. It has no geographical barriers either. The rural hinterland is as much affected as the urban centres. It is however estimated to be concentrated in six states, Maharashtra, Tamil Nadu, Karnataka, Andhra Pradesh, Manipur and Nagaland where the seroprevalence is estimated to be over 1% in the adult population[11].

Fortunately the rate of HIV sero-prevalence in India is low at 0.8 % of the adult population[12], when compared to, say South Africa, where the sero-prevalence is nearly 20% of the adult population[13]. The fear is that if emergent steps are not taken now India will go the Sub-Saharan African way. There is still a window of opportunity for India. If proper interventions are made now it is possible to avert the path of Sub-Saharan Africa.

**HIV and AIDS, it's peculiarities**

The difficulty with combating the spread of HIV has to do with the peculiarities of the virus itself. Apart from a few Doubting Thomas', it is well accepted in the scientific world that the causative agent of AIDS is HIV, a retrovirus.

HIV can be contracted only by four modes and no other. These are unprotected sex, transfusion of HIV infected blood, sharing of infected needles or syringe, from an HIV positive mother to her child during birth or by breast-feeding. The chances of contracting HIV from unprotected sex is 0.1 percent, from HIV infected blood 95-99 percent and from mother to child from 15 to 35 percent.

The human body has an immune system that combats infections. One of the primary elements of the immune system is the CD4 (T helper) cell (part of the white blood cells) that detects a foreign agent like a virus and then destroys it. The problem is that HIV enters the CD4 cell itself and destroys it. Initially when HIV enters the human body, it sero-converts. This may result in minor symptoms like flu, associated with the HIV viral load introduced. The human body responds to the induction of the virus by

11. Supra n. 7.

12. Global AIDS program: India Available at http://www.cdc.gov/nchstp/od/gap/countries/india.htm.

13. *Africa : HIV/AIDS figures Stabilise* Available at http://www.aegis.com/news/irin/2000/IR001104.html .

producing increased CD4 cells in an attempt to destroy the virus. The initial symptoms therefore disappear. The body then enters the long asymptomatic period, peculiar to HIV. A PLHA would be healthy for all purposes and can carry on all activities like any other person. Thus a PLHA will not know that s/he is HIV positive, because s/he is, for all intents and purposes, perfectly healthy. This is the first peculiarity of HIV. In public health terms this implies that the vast majority of PLHAs do not even know that they are HIV positive.

In the meantime the battle between HIV and the CD4 cells goes on in the human body. Except in very rare cases, ultimately HIV overpowers the immune system, manifested by lowering of the CD4 cell count and a proliferation of HIV, measured by the viral load. As the CD4 count goes down and the viral load increases, opportuntistic infections (OIs) set in, like flu, diarrhea etc. The PLHA is then unable to combat the OIs and ultimately succumbs to them. That is why the condition is termed as the Acquired Immune Deficiency Syndrome (AIDS). It is the crucial balance between HIV and the viral load that is indicative of the health status of a PLHA. Unfortunately there is no cure for HIV/AIDS at the moment. That is the second peculiarity of HIV. Vaccines are at an early stage of development, and if successful, it will take at least a decade for them to be available at a mass level. There is treatment available by way of the administration of anti-retro virals (ARVs) or anti-retroviral therapy (ART). Unfortunately ART in India is expensive, and out of the reach of the vast majority of PLHAs.

The third and the most crucial factor that is peculiar to HIV is it's association with sex and sexuality issues which most individuals and societies find very uncomfortable to deal with. Despite the fact that there are different modes of HIV transmission, it is mostly associated with sex. This has given rise to extreme stigma and discrimination associated with HIV. All over the world and particularly in the countries most affected like South Africa and India, HIV is a heavily stigmatised disease.

**Vulnerabilities and Empowerment**

However the issue of sexuality in the context of HIV transmission raises the question of vulnerability of individuals and communities to contract HIV. This in turn raises the issue of

inequalities and disempowerment, factors crucially responsible for contracting HIV. Vulnerabilities are multi-layered and operate at diverse levels in societies and within communities. They can be economic, social, political, cultural and even personal. To a large extent it is these vulnerabilities that determine the individuals or communities who fall prey to HIV and the course of the epidemic.

HIV is not a simple problem that can be countered by the twentieth century public health responses of isolating those who are infected in the hope that others will not contract HIV. Among other things, there is a need to examine vulnerabilities of individuals and populations. The rights based response examines these issues and protects and promotes the rights of those most vulnerable. In the HIV scenario this means empowering sex workers, homosexuals, women, injecting drug users and other marginalized and vulnerable populations and removing the causes of their vulnerabilities. This fashions a response that can alter the course of the epidemic. Justice Michael Kirby has put it most eloquently. He argues that, "paradoxically enough, the only way in which we will deal effectively with the problem of the rapid spread of this epidemic is by respecting and protecting the human rights of those already exposed to the virus and those most at risk".

There is no gainsaying that countries that have had success in combating HIV have dealt with this factor head on. Thus, Thailand and Uganda have brought sex out of the closet and developed programmes dealing with intimate sexuality issues[14]. Ultimately they have been able to bring the epidemic under control.

Fortunately there are examples in India, which bear this out. The sex workers intervention project in Sonagachi, Kolkata clearly shows that empowering sex workers at diverse levels can promote condom usage and thereby reduce the transmission of HIV. In Sonagachi, because of the intervention based on empowerment of sex workers, the rate of HIV sero prevalence increased from 1992 to 1998 only marginally from 5% to 7% and then remained steady, while STD rates actually went down from 25% to 6% in that period[15].

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14. *Reproductive health: key to human development and poverty reduction'* Available at http://www2.tribute.nl/wpf/uk/content/projekten.html .

15. Dugger, Celia. W. , "Going Brothel to Brothel, Prostitutes preach about using condoms" , *New York Times*, 4 January 1999 Available at www.nytimes.com/library/world/asia/010499India-AIDS.html.

This is in contrast to other places like Mumbai, where the seroprevalence amongst sex workers had reached the staggering level of 70%[16].

How have countries responded to the HIV epidemic? In the context of rights one can conveniently divide the responses into two. One that we have termed the isolationist response and the other the integrationist response. These are set out in the table below.

| | RESPONSE | |
|---|---|---|
| ISSUE | ISOLATIONIST | INTEGRATIONIST |
| Testing | Mandatory without consent | Voluntary with consent |
| Confidentiality | Breached | Not breached |
| Discrimination | Person isolated | Person integrated |

In India the original response was in the isolationist mould. In Goa, the State Legislature amended the Goa Public Health (Amendment) Act and made the testing of a person suspected of being of HIV mandatory. If the person was found HIV positive on a single ELISA test s/he would be isolated. The amendment was challenged in the *Lucy D'Souza* case[17]. While holding that the person sought to be isolated had a right to a hearing to show that s/he indeed was not HIV positive, the Goa Bench of the Bombay High Court upheld the amendment. Thereupon the Central Government sought to introduce a Bill on similar lines in Parliament. Fortunately activists and pressure from multilateral organisations persuaded the Central Government of the futility of the isolationist response.

## Discrimination

A defining moment in the history of law in HIV in India came when the Bombay High Court in *MX v ZY*[18], through Tipnis J., decided that a PLHA had the right not to be discriminated in recruitment to a public sector company provided s/he had the necessary qualifications for the job, was fit to perform the functions of the job and that s/he did not pose a significant risk to co-workers, customers etc. This standard developed in the *Arline* case[19] by the

16. *'Aids in a New Millenium: a grim picture with glimmers of hope'*, Report on the global HIV/AIDS Epidemic, UNAIDS, June 2002, Available at http://cira.med.yale.edu/international/india.html .

17. *Lucy D'souza vs. State of Goa*, (1990) Mh.L.J.713.

18. *MX vs. ZY*, AIR 1997 Bombay 406.

19. *School Board of Nassau County, Florida et al v. Arline*, (1987) 480 U.S. 273.

US Supreme Court, has now become universally accepted the world over. It was followed by the South African Constitutional Court in the *Hoffman* case[20]. *MX* is also significant for the reason that it permitted a PLHA to sue by suppressing her/his identity. *MX* held that the court may allow the PLHA to sue by suppressing her/his identity if s/he were to able to show that s/he would be prevented from suing if her/his identity is made public. In the context of the heavy stigma against HIV this strategy allows the PLHA to sue without fear of disclosure of her/his identity in public. Fortunately this is being followed in other courts in India now. Though varied success has been achieved in the employment sector against discrimination, there have been virtually no favourable judgments in the area of discrimination in the health sector.

A concept in the employment sector that is increasingly accepted abroad, but still in the nascent stages in India and has to be developed is that of *reasonable accommodation*. In the event of a PLHA being found unfit to continue work, the employer has no right to simply terminate her/his services. The employer has to give her/him an alternative job commensurate with her/his skill and experience. The only caveat being that the employer should not be burdened with undue hardship either administratively or financially on that account. The rudiments of this approach already exist in the case of *Anand Bihari*[21] and need to be developed in the context of HIV in the Indian legal setting.

## Consent to testing for HIV

Consent to testing is based on the fundamental principle that "every human being of adult years and sound mind has a right to determine what should be done with his own body.[22]" Effective and valid consent is predicated on it being without force, coercion, fraud, undue influence or misrepresentation[23]. There is no doubt

20. *Jacques Charl Hoffman vs. South African Airways*, CCt 17/00 decided on 28 Sept 2000.

21. *Anand Bihari vs. Rajasthan S.R.T.C*, (1991) 1 SCC 731.

22. *Schloendorff vs. Society of New York Hospital*, (1914) 103 NE 92.

23. "The voluntary consent of a human subject is absolutely essential. This means that a person involved should have the legal capacity to give consent; should be so situated as to be able to exercise free power of choice; without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior from of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision". Principle 1 of the *Nuremberg Code*.

and it is universally accepted that consent is necessary for testing for HIV. However, the kind of consent is an issue. Protagonists of the existing system contend that HIV testing should be treated like any other diagnostic test. An oral and even implied consent is sufficient to test for HIV. However advocates of the rights approach argue that given that HIV has no cure and given further that there is severe stigma attached to HIV, the test must be accompanied by pre-test and post-test counselling. This would prepare a person who reports HIV positive to cope with the new situation. For the person who reports negative, information can be imparted about means to prevent the contracting and transmitting of HIV. This would a serve a public health goal.

**Informed Consent**

There is however a more fundamental reason that consent in the HIV context needs to be informed. Consent is based on two persons thinking about the same thing in the same sense. They are said to be at *ad idem* (have the same idea) on that particular thing. This can only happen if both persons have the same knowledge and understanding about that particular thing. Now in the doctor or health care worker (HCW) and a patient setting, the HCW invariably has more knowledge and skill about that particular thing. Moreover the patient reposes complete trust on the HCW. In that context consent can only be real and valid if the patient has the same understanding of that particular thing. The law attempts to do that by the doctrine of informed consent. This requires the HCW to impart information to enable the patient to make an "informed decision". This would mean informing the patient the risks that s/he would be exposed to, the benefits of the proposed treatment and alternatives if any. However the standards of informed consent are different in different countries. The English standard is what is "accepted by a body of skilled and experienced medical men[24]". However the onus is on the patient to show that s/he would have not consented had s/he been informed of the risks. In the US the HCW has to disclose material risks that the prudent patient would want to know[25]. In Canada the objective risks that HCW would disclose in all situations as well the subjective concerns of the patient

24. *Hills vs. Potter*, (1983) 3 All ER 716.

25. *Canterbury vs. Spence*, (1972) 464 D 2d 772.

have to be disclosed[26]. In India matters are now in courts where the issues of informed consent would hopefully take a more rigorous informed consent approach.

In the HIV scenario, increasingly there has been a felt need for the HCW to be able to advise minors about sexuality and even treatment issues. This will become important with parents dying leaving only children to fend for themselves. Earlier, in the context of pregnancy advice to minors, the English courts upheld the contention that minors are allowed to access health services independently of, and sometimes against the wishes of their parents[27]. This was later incorporated into Medical Council guidelines.

**Confidentiality**

At common law confidentiality arises when information having the quality of confidence is imparted in a relationship involving factors of mutual trust, knowledge and skill. Such relationships include HCW-patient and lawyer-client relationships. Confidentiality in the lawyer-client relationship is given statutory recognition in India, whereas the HCW-patient relationship remains within the realm of common law. The maintenance of confidentiality in the health care setting is necessary not only for the individual patient but also for the general public. For if a HCW were not to maintain confidentiality of an individual patient other patients would not go to that HCW. This would defeat the very objective of providing medical services. Thus maintaining confidentiality is in public interest.

The important question that has arisen in the HIV scenario is whether the HCW is obliged to disclose her/his patient's HIV positive status to others including his/her spouse or partner. Traditionally common law has dealt with this resorting to the balancing of interests approach[28]. Given that confidentiality is maintained in public interest, disclosure would arise only if the competing interest is also a public interest and it overrides the interest to maintain confidentiality.

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26. *Kenny vs. Lockwood,* (1932) 1 DLR 507.

27. *Gillick vs. West Norfolk and Wisbech Area Health Authority and Anr.,* (1984) 1 Q.B. 581.

28. *X vs. Y,* (1988) 2 All ER 648, QBD; *W vs. Edgell,* (1990) 1 All ER 835.

Disclosure has been ordered in cases where it is necessary for the treatment of the patient, where it is necessary for the proper administration of justice, required by statutory law or necessary to protect another person[29].

In India the National AIDS Prevention and Control Policy requires that the status of an HIV positive person must be kept confidential. However in the case of *Mr. X v. Hospital Z*[30], the Supreme Court of India has held that the hospital disclosing HIV status of a person to his prospective spouse would not be committing any wrong. Even *Mr. X v. Hospital Z* does not lay down that the HCW is bound to disclose the HIV status of her/his patient to his partner or spouse mechanically without assessing whether s/he is at risk. Several scenarios can be contemplated in this context. One that the HIV positive patient is separated from his spouse/partner. The other that he is not separated but there is no sexual relationship at all. In these cases there is no question of any risk, therefore there is no reason for disclosure. Another case could be that there is continuing sexual relationship but there is consistent and correct use of condom. In this case there may be a risk. In another case, the patient may be continuing to have sex but without condoms. Here there is obviously a risk. What does the HCW do in such a case? It is good practice for the HCW to counsel the HIV positive patient for him to tell the wife/partner. One has to remember the HCW always has the discretion to disclose or not to disclose the status of her/his partner and that s/he should seek the least risky alternative, one that balances both the interests. The first duty is always for the HCW to counsel the HIV patient about the safe practices that s/he should adopt for her/his own sake and for others. The discretion becomes a duty only in case the risk is significant to the spouse/partner. However even then only the person at risk needs to be told. There is no duty to inform the world at large. Fortunately the law in some jurisdictions has followed the good practice approach outlined above[31].

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29. *Royal Melbourne New Hospital vs. Mathews and Ors.*, (1993) 1 VR 665; *Tarasoff vs. Regents of the University of California,* 17 Cal 3d 358.

30. *Mr. X vs. Hospital Z,* (1998) 8 SCC 296.

31. *BT vs. Oei,* (1999) NSW Supreme Court 1082; *PD vs. Dr. Nicholas Harvey and One other,* (2003) NSWSC 487.

**Access to treatment**

There is a silent epidemic of death spreading amongst the poor in India without any action from the government to stop it. It is now impacting children too. It is youth between the ages of 20 and 30 years who are succumbing to AIDS. First it is the husband. The wife is next. Then it is the children. Young children orphaned by HIV are becoming an increasing reality. A large number of them are also HIV positive.

HIV is not a curable disease. Till 1995 it was not even treatable. One of the main reasons is that HIV is able to mutate very fast. As a result, HIV is able to resist the single drug Anti-Retroviral therapy fairly quickly. Therefore a PLHA on a single ART very soon finds that the single drug that s/he is on becomes ineffective. In 1995 it was found that HIV could be treated with a triple combination. ARV therapy and resistant virus that would develop on a single drug therapy could be tackled by adding two more drugs. Combination ART is able to bring the viral load down and boost the CD4 count to a significant extent. ART is normally initiated when the CD4 count goes down to about 350 in the west. However in India it is initiated even at lower levels at a CD4 count of 150. As a result of ART in the west and developed countries morbidity on account of HIV has lessened significantly. Even in middle income countries like Brazil, where ART is available free of charge to all PLHAs, morbidity on account of HIV has decreased by fifty percent in the last six years[32].

For ART to be effective the viral load must go down by one log and the CD4 count go up one log. However there are several problems with ART. First ARVs are extremely toxic drugs. It is estimated that only two-thirds of the all PLHAs can tolerate ART. More importantly HIV is able to mutate very fast. As a result sooner or later resistance sets in. In that event the PLHA has to resort to the much more expensive second or third line regimens involving protease inhibitors. This implies that ART has to be constantly monitored for CD4, viral load, resistance etc. Second, the ARVs are very expensive. Even now, in India the first line regimen cost about Rs. 1200 per month. However the tests for monitoring toxicity,

32. *National AIDS Drug Policy* (Ministry of Health of Brazil, May 2001) Available at http://www.aids.gov.br/final/biblioteca/drug/drug1.htm .

resistance cost an extra Rs. 2500 per month. This means that even the first line regime can cost about Rs. 4,000 per month. If resistance sets in and a protease inhibitor has to be added, the cost can shoot upto Rs. 15,000 per month. However they are not available in the developing world including in India. The situation the world over is so serious that the World Health Organization (WHO) has declared the lack of access to ARVs an emergency[33]. There is thus a demand from PLHAs that ARVs be made available free of cost to them when medically indicated.

The National AIDS Control Organization (NACO) policy provides for free drugs for Opportunistic Infections (Ols) to PLHAs through the public health system[34]. However in practice PLHAs are not able to access the OI drugs that are required. Under NACO policy ARVs are not available free for treatment. They are however made available in some areas. One is for the Prevention of Mother to Child Transmission (PMTCT)[35]. Administration of ART prophylaxis to the mother and the child can reduce the MTCT considerably. Second in case of accidental exposure amongst HCWs, on account of say, needle stick injury, where administration of Post Exposure Prophylaxis [PEP] can ensure that the HCW is not infected[36]. Both Prophylaxis are fairly cheap. NACO had plans to make available ART prophylaxis to pregnant mothers in 180 sites around the country by 2002[37]. However that is not in place even now. Even if that were in place a large number of mothers would be not able to access ART prophylaxis for PMTCT. This has been specifically deprecated by the South African Supreme Court where a small number of HIV positive pregnant mothers had access to government run programmes of PMTCT[38]. Surprisingly there is no plan for HIV positive mothers to be given any ART after delivery.

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33. Global AIDS treatment emergency Available at http://www.who.int/mediacentre/factsheets/2003/fs274/en/index.html .

34. *National Guidelines for Cllinical Management of HIV/AIDS*, NACO, India Available at http://www.NACO.nic.in/nacp/clinical.pdf.

35. *'Care and Support for People Living with HIV/AIDS'*, NACO Programmes. Available at http://www.NACO.nic.in/nacp/program/prog5.htm .

36. *ibid.*

37. 'Care and Support for People Living with HIV/AIDS', NACO Programmes, Available at http://www.NACO.nic.in/nacp/program/pmtct.htm.

38. *Minister of Health and Ors. vs. Treatment Action Campaign and Ors.*, 2002 (10) BCLR 1033 (CC): 2002 (5) SA 721 (CC).

Secondly for HCWs the NACO policy proposes reimbursement of expenses incurred for administering ARV prophylaxis. In practice *in our system this means that HCWs are not able to access ARVs* because there is no nodal treatment facility in hospitals. Also, they have to run from pillar to post for the reimbursement. This policy is as good as being non-effective.

The Government of India has also put in motion the availability of ARVs either free of charge or at a subsidised rate through NGOs at four sites in three cities, Bangalore, Chennai and Mumbai[39]. By this process about 15,000 PLHAs will be covered out of the 100,000 who need ARVs. The entire programme is being funded through the Global Health Fund for AIDS, TB and Malaria. About 100 million USD will be used for AIDS. Apart from the Government there are other state entities which provide free ARVs. These are the Employees State Insurance Corporation, the Railways, Central Government Health Scheme as also some para military forces.

Recently the Minister for Health, Ms. Swaraj announced that ART would be available to HIV positive children[40]. However no details are available for this as yet.

We have a piquant situation in India today. Despite the fact that Indian pharmas are manufacturing and marketing ARVs at the lowest prices in the world they are not available to the vast majority of the PLHAs in India. Indian pharmas are now concentrating their energies on exporting their generic products in the lucrative markets of the US, Europe and Japan.

The Government of India justifies in not providing free ARVs to all PLHAs who need them by contending that it does not make economic sense to spend disproportionate amounts to provide ARVs free of cost to PLHAs. However that assumption has been completely destroyed by the Brazilian experience that has shown that it makes economic sense to provide free ARVs[41]. Brazil has

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39. Narrain, S. *"A Health Care Emergency"*, Frontline (India), September 13-26, 2003 Available at http://www.globalpolicy.org/socecon/develop/aids/2003/0913indiaarv.htm .

40. *'HIV-positive children to get free drugs'* Indian Express (Mumbai), 5 October 2003.

41. *National AIDS Drug Policy* (Ministry of Health of Brazil, May 2001) Available at http://www.AIDS.gov.br/final/biblioteca/drug/drug1.htm .

shown that taking into account monies that would be otherwise be spent on treatment of OIs, hospitalisation etc., if ARVs are not provided, the expenses incurred on providing ARVs constitute a net saving.

It is to be noted that economics was not the primary reason that the Brazilian government started it's programme of providing free ARVs. It was the Brazilian government's decision that it's citizens were entitled to live with dignity that prompted it to embark on the programme of free ARVs to all PLHAs. The positive economic fall out is fortuitous. In the same vein the Government of India must provide free ARVs to make sure that our PLHAs do not die.

**Other Barriers**

HIV disproportionately affects already marginalised and stigmatised communities, such as sex workers, homosexuals, drug users etc. It is necessary that they be empowered so that they can access services and also use safe practices. The National AIDS Prevention and Control Policy recognises this and has been promoting condom usage and distributing millions of condoms through NGOs to sex workers and Men having Sex with Men (MSM)[42]. Similarly the clean needle exchange programme, which bases itself on the understanding that sharing of needles amongst Injecting Drug Users (IDUs) enhances the risk of contracting HIV, gives the IDU a clean needle for a used one, is being actively pursued by the government through NGOs in Manipur, Delhi and Maharashtra.

However in India there are barriers to these strategies. Thus the Immoral Traffic Prevention Act while not making prostitution itself illegal, makes all the practices necessary to carry it out sex work illegal, thus making the act of prostitution effectively illegal. Similarly section 377 Indian Penal Code, 1980 makes "unnatural sex" an offence. Promoting condoms amongst the population of sex workers or MSM without the support of the police authorities is fraught with danger. The police view these activities as abetting crime. Police authorities have taken stern action where they do not

42. *National AIDS Prevention and Control Policy*, NACO, Ministry of Health and Family Welfare, Government of India, p.42.

support such activity. Similarly promoting clean needle exchange is seen by some as promoting drug abuse. The authorities may see these activities as abetting or preparation to commit a crime under the Narcotic Drugs and Psychotropic Substances Act. There is thus a need to reform the law. In some cases it may be to protect the strategies that are instituted to promote harm reduction and have legal safe havens, such as insulating needle exchange programmes from criminal action. In other cases, like section 377 IPC, there is a need to repeal it altogether. Enacted by the colonising British on the eighteenth century Judeo-Christian moral world-view in India, it has been repealed in England. In other cases, such as ITPA, there is a need to have law reform which balances the need to check trafficking on the one hand and allow adults to practice sex work if they do so of their own free will without harassment from the police authorities. This can only be done by enacting a comprehensive law on HIV.

**Drafting a law on HIV**

Realizing the need to have a law on HIV, the Parliamentary Advisory Group has requested the Lawyers Collective HIV/AIDS Unit to draft a law. In preparation for that extensive papers have been published and are available in book form from the Lawyers Collective. The draft law will be put on the website and on web lists followed up by consultations with the key stake holders, PLHAs, Vulnerable Communities, Health Care Workers, Industry (Management and Trade Unions), Women, Children, NGOs, Government Agencies etc. On that basis the draft will be submitted to the Government for consideration.

come from one section of society and the perpetrators from another. Needless to say these two sections are popularly referred to as the 'haves' (who would be most insecure if law and order was not properly administered) and the 'have-nots' (who supposedly have less to lose by disturbing the peace and therefore make trouble, and need to be adequately punished if they offend). Cliched as this argument might appear, the stark reality on the ground is that, exceptions aside, the deprived *are* seen as the depraved and the well-off as the compliant members of society. The logic may be convoluted but its effect on society's attitude to offenders is devastating.

There is little likelihood of any radical rethink in some areas of penal justice by the official agencies set up for reform or research. Reasons? Too many 'agendas', too much complacency, too much of 'we know best', too little knowledge, too little research, and very little desire to work 'together' with such others amongst whom knowledge *does* exist, research *is* developing, experiments *are* being tried

Some non-governmental groups in the South Asian region have taken the pains

(a) to research and analyze the experiences of vulnerable groups at considerable length through developed strategies of investigation and intervention

(b) to probe prison management and look at the picture from the 'other side', and

(c) to study minutely, the real life experiences of women and other specific groups in the criminal justice system (case studies, questionnaires, schedules and other methods).

The prison and prisoner profiles that have resulted are in-depth pictures of the state of the art, and of the 'gap', and while the picture is far from complete some directions and methodologies have been worked out that could be gainfully developed for further work.

Some hard facts that relate to prisons and prisoners are mentioned here to suggest how adequate probing is required to arrive at the real picture:

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# *Common concerns about Human Rights and Penal Reform: And our inability to work together*

Rani Dhavan Shankardass

As a region with many common problems and possibly common solutions to human rights issues particularly in the area of penal justice, South Asia (at governmental and non-governmental level) has not really done enough in either developing or sharing (i) in-depth research and exploration (ii) better understandings of concepts and issues (iii) development of expertise, and (iv) concrete solution-seeking processes, in the area of human rights violations or non-observances of standards and norms. Nowhere is this more apparent than the area of prison reform. Some reasons for this failure to research and disinclination to share need to be probed and remedied.

Better access to justice (institutional and other) for vulnerable groups (women, juveniles, the aged, those in custody, and those too deprived to avail themselves of the promise of equal and fair justice for all) should be a cause of concern for all the countries of the South Asian region. Marked steps and efforts towards shared knowledge and collective thinking and action however have been conspicuously lacking in the region. Even within each country of the region there is an unhealthy attitude towards the sharing of knowledge and expertise on human rights. The goal (of easier access to justice for 'lesser mortals') seems elusive at the best of times. When social inequities, a lack of awareness of the issues involved and to a degree vested interests are at play to the extent that they are, the *small steps* that can be or have been taken to ensure the delivery of justice seem to get us nowhere. This problem needs to be analyzed collectively (for identifying the obstacles and snags)

and remedial measures need to be worked out with cooperation and put in place with sustainability in view.

Some non-government organizations have made particular areas, subjects and locations their fields of expertise for better understandings of human rights, and have sought to share their knowledge and experiences with other non-governmental bodies and with governmental agencies. One of the *small steps* referred to above might be mentioned here. It is an endeavour towards better understandings of human rights issues in the area of criminal and penal justice in the South Asian region initiated by *Penal Reform International* through its regional partners and specific governmental agencies: it began country wise in the early 1990s and took on a regional (South Asia) shape and form in 1999 in Kathmandu with the specific move towards open and detailed discussions about problems and practices in all the countries of South Asia in the area of access to justice and penal reform. Through the sharing of views and ideas, and skills and expertise (made possible by arranging conferences and study tours, and through the sharing of vital information and documents about standards and best practices) it soon became clear that each country in the region could gain from intensive researching, followed by change-oriented programmes and evaluation processes that had not been embarked upon in these countries, and that could *(if shared and exchanged)* result in considerable saving of time and resources. Some of the areas that this has been attempted are justice for women and juveniles, human rights training for practitioners, better prison management (through better standards in prisons etc), reducing the now known damage caused by imprisonment, and exploring alternatives to imprisonment.

Barring such small steps efforts in this direction particularly in penal and specifically prison reform, movement (effort and impact) has been *slow* and is generally surrounded by suspicion and misgivings amongst the 'players'. Why this is so is a matter of concern and affects the overall progress of human rights particularly in fields where less is known and still less desired to be changed. This paper would wish to give a brief overview of some of the practical hitches and glitches that human rights players face, particularly in the area of justice for the most vulnerable and *more*

*specifically in opaque institutions (such as prisons)* which are low priority ('step children') for governments and of little concern for society (all rhetoric to the contrary notwithstanding). What is being suggested here is (i) that better understandings about human rights (violations) at the 'deep end' are giving a clearer idea about just how deficient we really are in our research and knowledge about those areas and locations where human rights violations are of a 'special' and specific kind, and (ii) how unable and unwilling most organizations (governmental and non governmental) are to accept the reality that shared knowledge, understandings and experiences may get them further in the quest for improving human rights standards, than their proclivity to reinvent the wheel at each juncture, often without adequate tools.

While international *minimum standards* are being widely circulated amongst prisons and places of custody, and it is widely recognized and emphasized that custody of any kind should not deprive a person of her/his *human* rights, and while the damaging effects of imprisonment are being meticulously researched and widely demonstrated, the institutions that are responsible for translating these findings into reality, use the new human rights rhetoric without acknowledging or accepting the new findings in practice.

There are two major reasons why reform and change in the area of human rights in criminal justice institutions (and particularly the prison) is not taking the shape and form it needs to:

- Existing Agendas of the present players
- Relationship between social Justice and Criminal Justice

**Existing Agendas of the present players**

There is always a 'cogent' argument put forward by the existing practitioners of a society for allowing only that much reform and change in a penal system. The argument usually plays on society's fears and insecurities and suggests that any laxity in the area of punishing offenders will put all of society at risk and make for more instability in an already unstable world. This argument is used the world over, but it has particular significance in developing societies where the sufferers (of the feared insecurity) supposedly

come from one section of society and the perpetrators from another. Needless to say these two sections are popularly referred to as the 'haves' (who would be most insecure if law and order was not properly administered) and the 'have-nots' (who supposedly have less to lose by disturbing the peace and therefore make trouble, and need to be adequately punished if they offend). Cliched as this argument might appear, the stark reality on the ground is that, exceptions aside, the deprived *are* seen as the depraved and the well-off as the compliant members of society. The logic may be convoluted but its effect on society's attitude to offenders is devastating.

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The prison and prisoner profiles that have resulted are in-depth pictures of the state of the art, and of the 'gap', and while the picture is far from complete some directions and methodologies have been worked out that could be gainfully developed for further work.

Some hard facts that relate to prisons and prisoners are mentioned here to suggest how adequate probing is required to arrive at the real picture:

- There are approximately 3.5 lakh persons in jail (judicial custody) in India
- Each prison has between 65% to as much as 90% prisoners who are awaiting trial
- There are approximately 10,000 women prisoners in India; and an average size State Jail for Women in any State has approximately 160 prisoners
- A State like Andhra Pradesh has 775 women in prison in all its jails (June 2003 figure); but it also has approximately 20,000 women (many with children) go through the prison doors each year for varying lengths of time
- Between 70 to 80 per cent of the prisoners have some form of mental/emotional/psychological problem that is the direct consequence of their imprisonment (the figure is higher for women prisoners)
- At least 60% of women in prison (convicts) cease to have visits from family and relatives after being in prison for over three months
- Some women prisoners have not seen families for five to six years as a result of their imprisonment and consequent abandonment
- Approximately 50% of women in prison are unable to resume normal (family) life after they have been through a jail experience
- Whereas it is clear that prisons exacerbate the chances and incidents of diseases (physical and mental) not enough health and medical care is provided in prisons to alleviate this problem (the commonest diseases are TB, skin ailments of many types (and specifically of sexual organs), abdominal disorders, eye and ear diseases
- Of every ten prisoners interviewed at least five are unaware of their human rights outside the prison and in the case of women this figure is often as high as eight out of ten
- Women prisoners often do not know what is bail, remission, or parole

- Three out of ten women in some jails do not know the purpose of a lawyer
- Children born while women are imprisoned and who may have reached the age of four have never seen a car, a bus, a train, an aeroplane, an elephant
- In cases of dowry deaths as many as eleven members of a family have been imprisoned for the alleged offence of violation of the (Dowry) Act
- Women in prison recount horrendous experiences of their arrests, and detention at police stations that make human dignity and its preservation a mockery (including having had policemen urinate in their mouths, and stub out cigarettes on the private parts of women's bodies! These stub marks were seen by this writer while they were still 'raw'!)
- In a men's jail in Bihar on most days approximately 150 prisoners need to be taken to court for the extension of their remand; only about 50 get transported in the police escort vehicle; the process of 'choosing' these fifty is only one example of the many corrupt practices of the prison
- It would be impossible to uphold standards of decency and dignity in the prison when the conditions in which prison staff live and work are themselves not human rights oriented.

These and many more vital features of prison life get revealed with each in-depth research of prisons and prisoners. None of these would ever get revealed with what are called prison 'inspections' or 'rounds of the prisons' by human rights agencies deputed by the State to investigate human rights violations.

There is no detailed research-based information-gathering about the prisoners and prisons at any level in the formal machinery that deals with prisons and prisoners: and no effort is made to seek or solicit this kind of research from those who have produced such research to address human rights issues relating to the prison. Little is known among prison managers and other institutional agents about the socio-economic backgrounds of prisoners or staff, and even less about their physical and mental health and health history.

The addressing of 'human rights' within this all too opaque institution thus becomes an exercise in futility and attempts at addressing prisoners' rights are thus a sham and an eye wash. 'Prisoners' problems' are more often than not viewed all too broadly (like reading a newspaper in headlines), rather than minutely. The meagre information thus derived is considered adequate for promoting human rights in this all too complex and intricate institutions. Without the information coming out of *detailed* work behind the high walls there is nothing that really addresses the human aspect of running this questionable institution!

What gets lost in settling for limited or peripheral knowledge (as opposed to research and analysis) is the fact that the necessary connections between humans, the realities of their lives and the running of institutions is not made consciously: Details coming out of research (done by those who believe in it and have acquired the skills to do it) <u>are</u> available and sharable. They <u>do</u> reveal that the backgrounds and circumstances surrounding the lives of all those 'inside' are not unrelated to the fact of their offending; and that the treatment they are likely to get in prison is also directly related to their socio-economic status. But as *sharing is not our strong point* these details are not likely to result in policy changes.

Research done (by some groups) on the (specific) effects of imprisonment on those who spend different lengths of time 'inside', and steps taken towards preparing elaborate blue prints for working out suitable alternatives for certain categories of potential prisoners and offences remain 'unshared'. The damage to health (including mental health) and the family lives of prisoners meticulously catalogued and analyzed remain unsolicited by responsible functionaries.

'Old hands' both within the (penal) system and outside it (including prominent human rights bodies and, more often than not, even judges charged with the responsibility of prisons' inspections), who believe they have been in the business of dealing with criminal and penal issues long enough, prefer to work with old theories and rationale, and obsolete images and sketches about prisons and prisoners, and consider newer portrayals drawn with newer concepts and methods neither desirable nor useful. 'We know enough and we know what works'. Further information, conceptual

knowledge, new initiatives taken in other countries, rethinks about what prison really does and does not do, all these are scoffed at and adequate reasons provided for not moving from existing positions.

And now we have a fresh reason for not being too innovative in the area of punishing offenders by locking them up: The whole world is threatened with terror and insecurity, and caution is the need of the hour in handling offenders. Tighter security, tighter control and tighter punitive measures are only some of the responses to the new scenario of global terror.

Unfortunately the words 'global' and 'globalisation' can be made to sound more melodious and magical than they really are: The rhetoric is about one world; the reality is about two worlds. The developed world had one *way of life*, the developing or undeveloped had *quite another way of living*. South Asia becomes vital and superfluous alternately in the global scheme of power. There are features in the world of the 21st century that are disturbing and frightening. There is more hate, more intolerance, more agendas that are exploitative, more walls around, more myopic visions, and above all more fear; and all this within the realm of the global.

There is talk of a 'safe world'; but safe for whom? The more we desire safety, security, justice, and harmony the further we get from it because of our inability to understand difference as a fact of life. If something (someone) is too unlike us we ostracise them, we warehouse them, and we eliminate them. We don't give difference as a reason: we give criminality, deviance, terrorism, anti-social behaviour as reasons for removing/eliminating people. That is the context in which we are pretending to promote human rights. The immediate effect of 11 September was that many countries, and this applies to our region as well, started altering their laws, rules, and statutes to combat this terror specifically. It was stated that this terror could spread everywhere without differentiating, and so the laws we put in place should also operate universally without differentiating.

The fact is of course that the laws do differentiate between people and people. And nowhere does this show up more starkly than in the ways we choose to punish offenders and to deprive

them of their basic rights as humans. We continue to live in two worlds: rich and poor, prosperous and impoverished, healthy and unhealthy, clinically sterile and filthily squalid, and the dichotomies could go on. The new ('global') interest in South Asia is piece meal and disjointed and not enough to reverse the socio-economic trends that have been perpetuated for so long. And these trends affect the agenda of penal reform as much as the actual event (11 September) that triggered some new political thinking and some new agendas in the way we would punish 'offenders'.

**Relationship between social Justice and Criminal Justice**

This brings us to the question of *justice*-that cornerstone of a healthy democracy that is so intimately related to the ensuring of human rights for *all*. Nowhere is the actual performance of justice delivery revealed as well as it is at 'the deep end' of society - in the working of some of our uglier institutions – like the prison. Without wishing to provide reasons for people's criminal behaviour and seeking to suggest *'soft options'* for those who need to be punished for violating the rules and laws set out for social order, there is a need to ask one question: 'What reform and access to justice are we talking about if our children feed on garbage dumps, our battered women suffer violence day in and day out without reprieve, the uneducated and impoverished do back breaking jobs for a pittance (47% of this region's population lives on less than Rs. 45 or a-dollar-a-day) and most of our youth has no work to do.

The hard realities of the region cannot be ignored when the delivery of justice through its institutions is being discussed (and its relationship with social justice overlooked):

- In 1995, of the *world's poor population of 1.3 billion* people, *515 million came from South Asia.*
- In 1999, of the one and a half billion population in the South Asia region, 35% were not expected to survive to the age of forty
- In 1999, half our total population in the region was illiterate.
- In 1995, over one fifth did not have access to health.

- In the year 2000, 63% of the people in the region did not have access to sanitation.
- In 1999, life expectancy at birth was 62.9 years.
- In 1999, again the infant mortality rate (per 1000 live births) was 69.6.
- Under-five mortality rate per 1000 live births was 97.6 in 1999.
- Between 1990—97, the proportion of low birth weight babies was 32 per cent in the region with Bangladesh having the highest rate at 50 percent.
- The maternal mortality rate per 100,000 live births between 1990-98 was estimated to be around 480 with the highest rate in Nepal at 540 per 100,000 live births.
- In 1997, 39 million children were not in primary schools.

These are NOT irrelevant figures and they particularly affect the area of punishment! This trend particularly affects the justice we are seeking for our women and youth.

How these grim realities work themselves into the attitudes and policies of policy makers and practitioners is not hard to comprehend and they assume importance because they affect the kind of reform we settle for when 'human dignity in prisons' is advocated as a basic component of human rights. For example:

- *Sanitation facilities* in South Asia: The deprivation referred to above that *63 per cent of the total population in the region did not have access to sanitation facilities* was as high as 73 per cent in Nepal and 69 per cent in India

  [This 'reality' assumes importance when activists insist on proper sanitation in prisons and are told by the management that most of those who come to prison have never seen toilets in their lives!]

- *Malnutrition in the region:* In 1990-98, 51 per cent of the children under five years were malnourished. This number remained stagnant in Bangladesh, India and Pakistan, and

fluctuated in Sri Lanka and Nepal around 38-56 per cent. The survival and development of children continues to be a daunting problem in this 'era of globalization'.

[This reality has an uncanny effect on prison administrations: The demand that children in prisons, accompanying mothers who have been sent there, must be given the basic minimum requirements in terms of calorific and other value in their diet, is met with the argument that they get better food in a jail than they would were they in their poverty stricken homes !]

- *Literacy in South Asia*: In 1999 the Adult Literacy rate was 53.9 per cent – male literacy being 65 per cent and female literacy 42 per cent. While boys came closer to completing primary education girls failed to complete even two years of schooling.

  [This impacts acutely on the total ignorance of legal and other awareness including health and basic human rights in places of custody and while a few detailed intervention strategies to remedy this have been prepared by some non-government agencies, no institutional support is forthcoming either to examine or to adopt the strategies ]

Features of social degradation ('outside') as they affect human dignity are used as reasons for compromising with minimum standards ('inside'). That the logic of criminality could also be reversed needs to be considered: If the squalor and deprivation was not as bad 'outside' as it is, *perhaps* there would be less reason to have to 'nab' such women and children who commit the smallest of offences, and 'warehouse' them in our all too depressing prisons!

Each major city of our region has approximately a hundred thousand children on the streets either in the form of beggars, 'street-children', or as abandoned, abused or neglected children. There are too many with no work and most of them are young. In Bombay, Calcutta, Dhaka, Karachi or other major cities of the region at night fall homeless people swarm on pavements to rest their skimpily clad bodies for the night. Women sleeping scantily clad are subjected to molestation and their 'indecent exposure' only gets them into

social, moral and legal trouble all the time. This is not a melodramatic portrayal Bollywood style: It is a sordid reality that has begun to anger many in all of our countries. And most of the angry are also the young.

Our ignorance about our young is phenomenal: children on the streets are looked at as 'potential criminals'. They *could* become criminal, and again, *they may not*. We have little knowledge about who these children are: *Most Juvenile Departments in most States have little knowledge about the children in their streets*. They have not even evolved a definition of what is a street child! Are all the children on the streets 'street children'? Clearly not! So how do we determine what street children are? Researchers have begun some work on the problem but where do they take their research to make it effective and consequential? And what is the difference between a 'girl street child' and a 'boy street child'? And does this difference matter? Will they face and lead to similar problems and need similar solutions? No Juvenile department seems to have researched this, and they are not willing to take kindly to advice or assistance from non-governmental 'experts'.

One of India's larger, more populous (population 65 million) of India's States has only *ONE* 'Juvenile Home' for girls in the entire State! The Home is more like a warehouse and reveals just what this article is trying to say: there is no appraisal of the problem, no thinking about human rights issues, no research into needs and issues, and no imagination. A five year old raped on the streets and brought to the home by the Police for protection, sits amidst girls aged ten and twelve and fifteen, in a common classroom and visitors to the home are informed about her 'personal case' within hearing of all her 'class' mates and indeed the child herself! Is this attention to the Human Rights of that child or is it 'Inhuman Degradation' that might scar the child for life?

The declarations and statements made above come out of research and investigation done over a period of years in the specific areas referred to and can be corroborated through the documented material available in the Reports and literature mentioned in the references. While an attempt has been made to be discreet towards non-performers, the oversights and neglect existing particularly in opaque institutions and among vulnerable groups is regrettable

and therefore may not be slurred over. Civil society interventions need no justification and the lament voiced in this article while not peculiar to this region does have consequences of a somewhat grave nature in our part of the world.

It needs to be emphasized that in the paucity of research in the particular areas of engagement suggested above, and the inability to share and acknowledge what is researched, governmental and non governmental bodies are equally guilty. While governmental agencies fail to draw on non-governmental endeavours, non-governmental organisations between them are as guilty of non-cooperation and guarded engagement. The consequences of this 'attitude' can be serious and misleading for the public and for 'the cause'. One example of this (and there are others) is a document available in Bangladesh on women prisoners (and almost the only one on the subject) that has been produced without any of the writers and 'researchers' actually visiting any of Bangladesh's women's jails and talking to prisoners inside!

We may all be guilty of similar frauds if we do not get our act together *in togetherness.*

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# *The Human Right to Adequate Housing- India's Commitment and the Struggle Towards Realization*

Miloon Kothari

The current dire state of housing and living conditions across India is a result of planning and housing policy formulation since Independence that has not been based on respecting and building upon human rights of the residents of India. Across the country we see numerous forms of distressed housing – people and communities living in slums, on pavements, alongside railway tracks, under railway platforms and bridges, on streets and roadside embankments, in shelters made from plastic sheets, cardboard, aluminium and tin, in water pipes, on degraded lands, in areas prone to earthquakes and floods, on denuded hillsides. Aggravating this already dire situation is the phenomenon of ghettoisation and discrimination across the country where people belonging to marginalized communities, including the poor, are forced to live in segregated areas with little or no access to civic services, including water, sanitation and electricity. The overwhelming dynamic of displacement and forced evictions, in both urban and rural areas, is another destructive phenomenon that forces people and communities to live in inadequate and insecure housing and living conditions.

A particularly useful paradigm to change the failed nature of policy and legislative formulation is the human rights framework that guides, and flows from, our Constitution and from the international human rights instruments that India has ratified. The recognition and implementation of overarching principles that underpin human rights instruments, such as *non-discrimination* and *indivisibility* offer powerful means to tackle the growing phenomenon of segregation and insecurity that millions across India face. The Indivisibility approach to adequate housing, for

example, would require equal attention to the human right to adequate housing, the right to security of the home and security of the person. The Indivisibility approach would mean equal attention to the right to housing, health, food, water and livelihood. Any legislative or policy formulation or choices that create a conflict between these rights would be inconsistent with human rights obligations.

In the late 1980's the Indian National Campaign on Housing Rights (NCHR), diligently pursuing the human rights path, defined the right to housing as 'the right for every woman, man and child to a secure place to live in peace and dignity'. The intention was to project the right to housing as much more comprehensive and holistic concept than just the 'four walls and a roof' and 'housing as a commodity' conception that policy makers were utilizing.

This article is, therefore, based on the recognition of the right to adequate housing contained in international human rights instruments and in the interpretation of the Indian Constitution since Independence. The article also relies upon the guidance provided by interpretative jurisprudence of UN treaty bodies such as general comments and general recommendations. The article also relies upon the extensive investigative and policy advocacy work done by civil society groups in India, such as the NCHR, the National Forum for Housing Rights and the Housing and Land Rights Network.

**Domestic Obligations**

Although India's Constitution does not explicitly refer to the right to adequate housing, it is recognized and guaranteed as a subset of other fundamental rights.[1] Article 21 provides that no person be deprived of his or her life and personal liberty. The Supreme Court affirms that the right to life necessarily implies access to basic amenities. To that end, the right to adequate shelter

1. Originally, the right to property was included in the list of fundamental rights. The *44th Amendment Act* 1978, strikes off the right to property from the list of constitutionally protected rights. Because the right is not constitutionally guaranteed, any person deprived of property in contravention of the law has limited means of redress against the government, including restricted access to judicial contestation in the Supreme Court and limited right to compensation.

is a constitutional guarantee.[2] Because the practice of forced eviction results in the loss of livelihood, it is a *prima facie* transgression of Article 21.

In addition, Article 14 and 15 guarantee of substantive equality, obliging the State to take affirmative action in facilitating opportunities for the disadvantaged and prohibiting discrimination on the grounds of religion, race, caste, sex or place of birth.[3] Read together, these provisions not only prohibit the exclusion of those marginalized from basic housing needs and land rights, but also implicate State action in redressing these deprivations.

India's commitment to justice and equality on an international level is enshrined in Article 51 of the Constitution.[4] The Supreme Court has declared that the provision enjoins the State to respect and promote the standards of international law. In particular, the court holds that legislative and executive actions must conform to the principles established in international covenants.[5]

**International Commitments**

Since the adoption of the Universal Declaration of Human Rights, the right to adequate housing has featured prominently in human rights instruments adopted at the UN during the past fifty years. The strong legal recognition in instruments protecting the human rights of Women, Children, those facing racial discrimination lends weight to the moral and ethical claims that affected communities already possess, based on the inherent dignity of the individual and the collective identity of communities.

India has ratified all the international human rights instruments that recognize adequate housing as a fundamental human right. Acts of ratification legally bind the State to implement its obligations. Timely implementation and progressive realization of rights emanating from international instruments is imperative.[6]

2. *Francis Coralie* v. *The Union Territory of Delhi*, 1981 SCC 608.
3. *Panchayat Varga Shramaji Samudaik Sahakari Khedut Cooperative Society* v. *Haribhai Mevabhai* A.I.R 1996 S.C. 2578.
4. Article 51, Constitution of India states: "The State shall endeavor to foster respect for international law and treaty obligations in the dealing of organized people with one another."
5. *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 125.
6. *Limburg Principles*, UN Doc. E/CN.4/1987/17, 1987, specifically used for interpretation of the *International Covenant on Economic, Social and Cultural Rights.*

This duty obliges State parties to move expediently towards the realization of economic, social and cultural rights, notwithstanding the nation's level of economic health.

The list of international instruments ratified by India that protect the right to housing include: *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *International Covenant on Civil and Political Rights* (ICCPR); *The Convention on the Elimination of all Forms of Racial Discrimination* (CERD); *Convention for Elimination of All forms of Discrimination against Women* (CEDAW); and the *Convention on the Rights of Child* (CRC).[7]

The right to adequate housing is most comprehensively elaborated in the Article 11(1) of the ICESCR:

The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing, and to the continuous improvement of living conditions...

India's commitment to adequate housing under the ICESCR explicitly precludes the practice of forced evictions. General Comment 7 of the Committee on Economic, Social and Cultural Rights' recognizes this abrogation of liberty, justice, security and privacy as a violation of international human rights law.[8] The UN Commission on Human Rights has also recognized forced evictions as a gross violation of human rights, particularly the right to adequate housing.[9]

Given the critical importance of realizing the human right to housing for Women and Children in India, it is relevant to look at the instruments that protect these rights.

**Women**

Women's complex role within the family and the household has brought about the need to articulate "adequate housing" from a gendered perspective. Despite the formal protections conferred upon women through national instruments, local customs continue

7. For the complete text of the provision protecting the right to housing in these instruments see: www.unhchr.ch/housing

8. For the full text see: www.unhchr.ch/housing

9. UN Commission on Human Rights resolution 'Forced Evictions', E/CN.4/1993/77.

is a constitutional guarantee.[2] Because the practice of forced eviction results in the loss of livelihood, it is a *prima facie* transgression of Article 21.

In addition, Article 14 and 15 guarantee of substantive equality, obliging the State to take affirmative action in facilitating opportunities for the disadvantaged and prohibiting discrimination on the grounds of religion, race, caste, sex or place of birth.[3] Read together, these provisions not only prohibit the exclusion of those marginalized from basic housing needs and land rights, but also implicate State action in redressing these deprivations.

India's commitment to justice and equality on an international level is enshrined in Article 51 of the Constitution.[4] The Supreme Court has declared that the provision enjoins the State to respect and promote the standards of international law. In particular, the court holds that legislative and executive actions must conform to the principles established in international covenants.[5]

**International Commitments**

Since the adoption of the Universal Declaration of Human Rights, the right to adequate housing has featured prominently in human rights instruments adopted at the UN during the past fifty years. The strong legal recognition in instruments protecting the human rights of Women, Children, those facing racial discrimination lends weight to the moral and ethical claims that affected communities already possess, based on the inherent dignity of the individual and the collective identity of communities.

India has ratified all the international human rights instruments that recognize adequate housing as a fundamental human right. Acts of ratification legally bind the State to implement its obligations. Timely implementation and progressive realization of rights emanating from international instruments is imperative.[6]

2. *Francis Coralie* v. *The Union Territory of Delhi*, 1981 SCC 608.

3. *Panchayat Varga Shramaji Samudaik Sahakari Khedut Cooperative Society* v. *Haribhai Mevabhai* A.I.R 1996 S.C. 2578.

4. Article 51, Constitution of India states: "The State shall endeavor to foster respect for international law and treaty obligations in the dealing of organized people with one another."

5. *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 125.

6. *Limburg Principles*, UN Doc. E/CN.4/1987/17, 1987, specifically used for interpretation of the *International Covenant on Economic, Social and Cultural Rights*.

This duty obliges State parties to move expediently towards the realization of economic, social and cultural rights, notwithstanding the nation's level of economic health.

The list of international instruments ratified by India that protect the right to housing include: *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *International Covenant on Civil and Political Rights* (ICCPR); *The Convention on the Elimination of all Forms of Racial Discrimination* (CERD); *Convention for Elimination of All forms of Discrimination against Women* (CEDAW); and the *Convention on the Rights of Child* (CRC).[7]

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to exist that deny women rights of ownership and inheritance. In addition to the broad recognition of women's rights to housing it is critical to recognize that "special attention is required for groups of women who are more vulnerable than others, at higher risk of becoming homeless or suffering from the consequences of inadequate housing."[10] The severe impact on women arising from housing violations has been highlighted by the UN *Commission on Human Rights*.[11]

Article 14(2)(h) of *the Convention on the Elimination of Discrimination Against Women* prescribes that State parties eliminate discrimination against women in rural areas, to ensure such women "enjoy adequate living conditions, particularly in relation to *housing*, electricity and water supply, transport and sanitation." This is strengthened by Article 16, which lays down the State's obligation to ensure equality of access for both men and women, to property, rights of ownership and administration. Emerging from these international instruments is recognition that full realization of the right to adequate housing and land is central to a woman's right to self-determination. In review of India's progress in fulfilling its CEDAW obligations, the *Committee on the Elimination of Discrimination Against Women* stated that denial of inheritance rights in land result in gross exploitation of women's labour and their impoverishment. The Committee has called upon the government to urgently review inheritance laws to ensure that rural women obtain access to land and credit.[12]

## Children

The unique vulnerability of children is most comprehensively addressed in the *Convention on the Rights of the Child*. The right to a safe and secure environment is integral to the realization of other basic rights as the home is the frame of reference for the child's

10. Miloon Kothari, *"Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, in accordance with Commission Resolution 2002/49,"* 59th Session, E/CN.4/2003/55 26th March, 2003.

11. See the resolutions entitled "Women's equal ownership of, access to and control over land and equal rights to own property and to adequate housing". UNCHR Resolutions E/2003/22, 56th Meeting, 22nd April 2003, and E/2002/49, 51st Meeting, 23rd April, 2002.

12. *Committee on the Elimination of Discrimination Against Women*, Concluding Observations: India, 22nd Session, A/55/38, 4th February, 2000.

formative period of development. Article 27(3) calls on State parties to assist parents and guardians in providing the child with proper food, clothing and housing. Article 16(1) protects the child from unlawful or arbitrary interference with his or her privacy, family, home or correspondence. The *Concluding Observations of the Committee on the Rights of the Child* notes that India's efforts to implement legislation with respect to child rights have been inadequate, considering the high percentage of children living in inadequate housing, including slums, and the continued occurrence of forced evictions.[13]

**Implementation- The Reality of Housing Rights in India Today**

*De jure* ratification of international legal instruments has not substantively translated into improved housing and living conditions nor quelled the pattern of forced evictions. The vast schism between existing legal entitlements and the social reality of housing conditions in India today is symptomatic of State apathy in implementing its national and international obligations. The following are examples of some of the phenomenon that have contributed to the dire state of housing and living conditions in India today:

**Slum Evictions**

Slum dwellers in India's largest urban centers have been threatened by forcible evictions since the process of urbanization began after Independence. In the last five years, however, slum dwellers have been facing intensive eviction drives and are being relocated in city outskirts under the pretext of urban renewal, development and beautification. The National Forum for Housing Rights has documented eviction patterns in metropolises such as Delhi, Chennai and Kolkata and reports that eviction and demolition drives are a part of planned exercise in different cities in India of the central and the state government.[14] In contravention of the *Slum Areas (Improvement and Clearance) Act* (1956), evictions are carried out without looking at alternatives such as upgradation on site, proper notification and relocation areas are allocated without prior consultation with the affected communities. The

13. *Committee on the Rights of the Child:* Concluding Observations: India, 23rd Session, CRC/C/15/ADD.15, 23rd February, 2000.

14. Sushil and Rajeev John George, *Eviction Watch India: A Report on Evictions in India's Major Cities* (Combat Law Publications 2003).

relocation sites are invariably situated in the urban periphery where evictees have to commute at great cost, forcing the urban poor to turn increasingly towards informal occupations. Insufficient space is allocated to the families, colonies are densely populated and the living environments of these sites are often not habitable, devoid of basic facilities such as electricity, potable drinking water, and sanitation systems.[15]

## Repercussions of Development

One of the consistent patterns of India's development policy since Independence has been the implementation of major development projects that have led to mass displacement and dispossession of sustainable communities, causing widespread impoverishment through eradication of traditional livelihoods and homes. The Planning Commission of India reports that in the period of 1990-1995, 21.3 million people were displaced as a direct consequence of development projects. Disproportionately, 80% of the displacement has occurred in tribal communities, from which a small minority have been provided with rehabilitation options. The Construction of the Sardar Sarovar Dam exemplifies the extensive repercussions on the housing rights of affected communities, as a total of over 100,000 families from 245 villages in Madhya Pradesh, Gujarat and Maharashtra are expected be affected by the project. Guidelines set out by the Narmada Water Dispute Tribunals on rehabilitation only makes provision for reservoir affected families. Thus oustees displaced by the creation of canals and sanctuaries attached to dam construction are not entitled to aid. The Supreme Court has issued directions stating that construction efforts can only be undertaken if rehabilitation and compensatory measures have taken place. In contravention of the judicial directions, dam construction authorities continue to raise the dam before resettlement has been carried out.[16]

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15. Habitat International Coalition- Housing and Land Rights Network, *Fact Finding Mission Report: Restructuring New Delhi's Urban Habitat, Building an Apartheid City?*, (Habitat International Coalition-Housing and Land Rights Network, 2002).

16. Habitat International Coalition, Housing and Land Rights Network, *Fact Finding Report on the Impact of the 2002 Submergence on the Housing and Land Rights in the Narmada Valley* Habitat International Coalition, Housing and Land Rights Network, 2002). For directions of the Supreme Court, please refer to *Narmada Bachao Andolan* v. *Union of India and Ors*, Writ Petition (C) No. 319 of 1994.

## The Riots in Gujarat

An enduring consequence of the 2002 riots in Gujarat, has been the dispossession of more than 110,000 people, predominantly of the Muslim religious minority, due to destruction of houses and property. The internally displaced were forced to relocate to relief camps, a vast majority established and operated by community-based organizations. Shelter is rudimentary, consisting of make shift tents constructed of tarpaulin. Potable water and space are scarce commodities. More alarmingly, indemnity for loss of life and damage to homes and livelihoods are disbursed in a scheme of ex-gratia payments rather than through a system of compensation that formally acknowledges the moral and psycho-social implications of dispossession. In violation of the constitutionally guaranteed right to information, families in the camps are not informed of the indemnity schemes and assessment processes are neither transparent nor participatory.[17]

These processes of ethnic conflict, destructive development and slum evictions has affected particular communities and amongst these Women and Children.

## Adivasis

Over 10 million *adivasis* or tribal people and forest dwellers have been displaced from their homes as a result of State development projects, the creation of protected areas and the privatization of land for resource exploitation.[18] Many marginalized tribes that have traditionally engaged in agriculture, before State notification processes declared forest lands as state owned, are legally defined as "encroachers" because they were not included in the surveying process. Denied legal tenure, displaced tribes do not qualify for access to governmental rehabilitation and resettlement policies. Ad-hoc evictions are carried out without timely notification, depriving *bona fide* right holders of time to file

17. Habitat International Coalition-Housing and Land Rights Network, *Rebuilding from the Ruins: Listening to the voices from Gujarat and restoring people's right to housing, livelihood and life.*, (Habitat International Coalition, Housing and Land Rights Network, 2002)

18. *See* findings and surveys compiled by National Forum of Forest People and Forest Workers, Habitat International Coalition, Housing and Land Rights Network, *Inaccessible livelihoods: A Report on the Economic, Social and Cultural Rights of Forest Dwellers in India*, 2003.

their objection claims.[19] Eco-diversity legislation that demarcate land as wildlife sanctuaries and parks effectively restrict customary rights of access to land and forest produce, severely diminishing livelihoods. The consequence is displacement, either directly or indirectly, of the people who were previously dependent on the area and its resources for their survival.

**Dalit Communities-Insecure tenure**

Despite the legal abolition of the practice of untouchability in the Constitution,[20] Dalit communities today continue to be marginalized and are confronted with the on-going deprivation of their political, social, cultural and economic rights. Many of these deprivations stem from the denial of their rights to ownership and control of land, particularly in communities where landholding regulates social status. State governments have initiated land reform policies in conformity with constitutional schedules, but implementation of these policies has been blocked by resistance from landholders and the lack of government commitment. At least one comprehensive survey indicates that land reform laws implemented in the 1960s have not positively translated into increased economic and social security for the Dalits in rural Gujarat.[21] Dalit communities continue to face segregationist practices targeting the sanctity of their homes, including denial of their usufructuary rights to land and the deliberate destruction of their homes. The *UN Committee on the Elimination of All Forms of Racial Discrimination* has articulated its concern over the effects of caste-based discrimination and directed State action in this area by "Undertaking to prevent, prohibit and eliminate practices of segregation directed against members of descent-based communities including in housing, education and employment".[22]

19. *Ibid.* Reports, for example, have indicated that the 1999 state government resettlement process in Himachal Pradesh denied 10,000 people from filing objection claims.

20. Article 17 *Constitution of India. See also,* Art. 16 that prohibits discrimination on the grounds of caste and descent, among others.

21. Navsarjan Trust, *The Story of Land Reforms in Gujarat* 1997 (Navsarjan Trust).

22. *UN Committee on the Elimination of All Forms of Racial Discrimination,* Gen Rec. XXIX, stating that descent-based discrimination on the basis of caste is a violation of CERD obligations, CERD/C/61/MISC.29/REV.1, 61st Session., August 23, 2002. See articles 1, 15 and 39 for other provisions protecting housing and land rights.

## Nomadic Communities

Nomadic communities in India are confronted with extreme barriers of discrimination and exclusion. Various legislative enactments aimed at ecological preservation have eroded tribal customary rights of hunting, foraging and trapping that in turn have affected traditional livelihoods. The movement to settle and to acquire land as a new livelihood option has been hindered by resistance from settled communities, many of whom view the disbursement of land to nomadic communities as an incursion on their territories. Regional land allotment authorities continue to neglect applications for title, further reflecting the existence of discriminatory attitude of officials towards the nomadic communities, caste bias of settled communities. Without legal title, tenure is precarious and many tribes have no means of redress when forced evictions or planned demolitions of their homes are carried out.[23]

## Women and the right to adequate housing

The unjust development policies, that have marked the interventions of governments at all levels, have led to an increase in poverty for particular groups of people in India. The effect of increasing poverty has had a devastating impact on women and their right to adequate housing. Poverty particularly affects women as they face greater risk of homelessness.[24] In India today, customary rules continue to impinge women's ability to claim and control property, thereby increasing the threat of poverty.[25] Overcrowding and precarious housing threaten women's right to security of the home and person and the right to privacy and leave them vulnerable to ill-health and violence.

Violence within the home is one manifestation of women's particular vulnerability in relation to housing rights. It is estimated that spousal violence occurs in 50% of marriages in India; in most

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23. Habitat International Coalition-Housing and Land Rights Network, *"Land Rights for the Nomadic Communities of Rajasthan: Emerging from the Shadows of "Criminality""* [Forthcoming in 2004].

24. *Supra* note 11

25. Bina Argawal, "Who sows? Who reaps? Women and Land Rights in India." *The Journal of Peasant Studies*, Vol5, No.4, July 1988.

cases perpetrated by the male.[26] In regions where customary law precludes women from managing, owning or renting property independently of the man, the woman's security options are foreclosed. The threat of homelessness hinders escape from abusive situations.[27] Indeed, violence in the home is a gross violation of the right to adequate housing, the right to security of person and security of home are denied. In sum, breach of the right to housing causes and is a consequence of violence against women in the form of:

a) Discriminatory laws or customary practices that hinder women's access to property ownership, thereby limiting sources of security of women.

b) Inadequate living and housing conditions that are conducive to violence and that deny women the right to privacy and dignity.[28]

**Children and the right to adequate housing**

The practice of forced evictions erodes family security, destroying communities and cultural identities. In the city of Mumbai, 40% of the 980,000 pavement dwellers are children. The unhealthy, insecure life on the streets without sufficient access to basic services is exacerbated by the threat of forced evictions carried out by the Maharashtra Housing and Area Development Authority. At periodic intervals, demolitions of whole communities occur without prior notice to evictees and families are often not provided with resettlement options. Children struggle to come to terms with a community dispersed and bonds severed. After demolitions, livelihoods are lost and the child's means to security and access to food, water and clothing are severed. Reports indicate that drop out rates increase due to family financial insecurity.[29]

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26. Bina Agarwal and Pradeep Panda, "Home and the World: Revisiting Violence," *Indian Express, August 7, 2003.*

27. *UN Committee on Elimination of Discrimination Against Women,* Gen Rec. 21, 13th Session, 1994.

28. Findings from the Asia-Pacific Civil Society Regional Consultation on the "Interlinkages between Violence against Women and the Right to Adequate Housing, in Collaboration with the UN Special Rapporteur on the Right to Adequate Housing," [forthcoming report at www.unhchr.ch/housing , 2004].

29. Human Rights Foundation, LAYA, YUVA, "The Child in Search of the State: Alternate Report to the India Country Report on the Implementation on the Right to Housing," (HRF, LAYA, YUVA, 1998).

## Violations

The above cases illustrate some of the violations of the right to adequate housing that persist in India today, in contravention of international laws. In addition to the provisions of the international instruments outlined earlier in this article it is important to refer to the interpretative instruments that the relevant treaty bodies have developed. The *Committee on Economic, Social and Cultural Rights* has reiterated in General Comment 4 that the right to housing is not restricted to shelter but encompasses the right to live in security, peace and dignity, irrespective of the right holder's income and access to economic resources. The set of core obligations that comprises of the right to adequate housing include legal security of tenure, availability of essential services, affordability, habitability, reasonable location and cultural sensitivity in housing development policies. Since the adoption of this General Comment more work at national and international levels have deepened the understanding of the essential elements of the right to adequate housing to include elements such as the right to privacy, participation and freedom from dispossession.[30]

On the issue of forced evictions, a recurring phenomenon across the country, another General Comment of the Committee provides guidance for policy and legislative formulation. While recognizing that forced evictions are a violation of human rights, the, General Comment 7 states, in the event relocation is unavoidable, the procedural methodology should be aimed at alleviating the impact of such measures, including timely and appropriate notice, public participation in rehabilitation schemes and the obligation to provide reasonable compensation.[31]

## Recommendations

The human rights approach to adequate housing relies on domestic and international legal mechanisms to create accountability for deprivations of adequate housing. In India, the State's response to obligations created by these mechanisms has

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30. See work done on housing rights indicators by Habitat International's Housing and Land Rights Network at www.hlrn.org. Also see Miloon Kothari, 'Study by the Special Rapporteur" Supra note11, Paras 51 to 62.

31. For full text see www.unhchr.ch/housing

been inadequate. There is scope for much improvement. Poor implementation of domestic legal obligations, failures to incorporate international obligations, and a dearth of reflection and analysis of violations have lead to a clear erosion of the right to housing in India. It is opportune, therefore, that the following steps be taken by governments at various levels and civil society to recognize the enormity of the housing and land crisis, to seek redress and to design alternatives to the violations that are taking place almost on a daily basis.

1. The government must implement domestic law in accordance with international human rights standards

   The State must use all available means to facilitate the necessary conditions for the exercise of the right to adequate housing. This is particularly important with respect to forced evictions, a practice that must immediately be halted *and prohibited by law*. When displacement is unavoidable, the government must establish appropriate procedural safeguards. These safeguards must be in accordance with all applicable international human rights principles and instruments.

2. The central and state governments must maintain dialogue with civil society to ensure transparency and accountability.

   Policy must be implemented in an environment that is inclusive, cooperative, and participatory. It must also consider the cultural norms of all affected communities. Obstacles such as caste-based or racial discrimination must be acknowledged and addressed as causes of dislocation and dispossession. In short, policy makers must consider possible solutions to housing issues from within the context of historical and social realities.

3. India should be diligent in its reporting obligations to the international instruments she has ratified and make more use of the mechanisms that exist

   International transparency and accountability can only exist when States fulfill their reporting obligations to international human rights treaties. Furthermore, bringing national

concerns to the attention of various international organs is a means for generating technical and financial assistance that contributes to effective implementation of human rights norms. India has nine overdue reports to the UN treaty monitoring bodies, including three to the Committee on Economic, Social and Cultural Rights. India should make all reasonable efforts to submit these reports, in the case of the ICESCR paying particular attention to the reporting obligations outlined in the General Comments of the Committee. India should also invite relevant UN Special Rapporteurs to visit the country.[32]

4. State and civil society have a mutual responsibility to report violations of human rights and monitor the measures taken during relief.

It is imperative that the government assumes a more substantive role in monitoring relief and rehabilitation schemes. As in the case of the Gujarat riots, deplorable living conditions in relief camps are often linked to the government's failure to support and monitor relief efforts, whether sponsored by the State or civil society. It is the State's responsibility to assess whether its citizens have access to basic amenities and then assure the fulfillment of their right to those amenities. In turn, it is the responsibility of civil society organs to monitor the actions of the State and to seek redress when it does not comply with domestic and international obligations.

5. *India should withdraw its declaration with regard to Article 16(1) to CEDAW.*

Article 16(1) of CEDAW prescribes States parties to take measures to eliminate discrimination against women in family and marriage and to ensure, among other rights, "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property." India's statement that it will abide by this provision only in so far that it does not interfere with

32. Until July 2003, 48 countries worldwide have issued open invitations to all Special Rapporteurs of the UN Commission on Human Rights. India is not on this list.

its "policy of non-interference in the personal affairs of any Community" creates an ideological impediment to the fulfillment of the right to adequate housing.

6. Civil society must make creative use of the human rights framework, which includes international legal instruments and emerging advocacy networks, to seek redress for violations of rights.

   Emerging conceptions of human rights are challenging traditional assumptions about 'duty holders' and how change can be fostered within the rights framework. In contrast to an approach that stresses States as violators, the contemporary human rights regime not only identifies the State as a vehicle for change but also creates additional opportunities for civil society to raise objections to State actions and publicly address violations. Ultimately, the project of ensuring progressive realisation of economic, social and cultural rights falls to the holders of these rights; civil society can then contribute to the structure and use of a human rights framework that is most conducive to this task. Human rights education and learning at all levels is essential for the creation of a widespread temper imbued with human rights consciousness.

# *Important Statements / Decisions/ Opinions of the Commission*

## 1. Declaration adopted at the Colloquium on Population Policy – Development and Human Rights, 9-10 January 2003, New Delhi

The Department of Family Welfare, Ministry of Health and Family Welfare; the National Human Rights Commission and the United Nations Population Fund (UNFPA) jointly organized a two-day Colloquium on Population Policy – Development and Human Rights, on 9th and 10th of January, 2003 at the India Habitat Centre, New Delhi. The participants of the Colloquium appreciated the efforts made by the State Governments / Union Territories and the Union Government to frame and implement population policies, and, after having deliberated on these population policies and the related human rights issues, agreed to:

Recognize the importance of having a population policy framed by the Central and State Governments to achieve population stabilization goals of the country.

Further recognize that the population policies ought to be a part of the overall sustainable development goals, which promote an enabling environment for attainment of human rights of all concerned. Therefore, a rights-based approach is imperative in the framing of the population policies. Further, it is important that framing of such a policy and its implementation require a constant and effective dialogue among diverse stakeholders and forging of partnerships involving all levels of Government and civil society.

Appreciate the efforts of the Government of India in framing the National Population Policy, 2000 of India which affirms the commitment of the Government to its overriding objective of economic and social development, improving the quality of lives of people through education and economic empowerment, particularly of women, providing quality health care services, thus enhancing their well being, and providing them with opportunities and choices to become productive assets in society, as a necessary concomitant to population stabilization and reduction in fertility rates.

Note with concern that population policies framed by some State Governments reflect in certain respects a coercive approach through use of incentives and disincentives, which in some cases are violative of human rights. This is not consistent with the spirit of the National Population Policy. The violation of human rights affects, in particular the marginalized and vulnerable sections of society, including women.

Note further that the propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed choice and the human rights of the people, particularly the rights of the child. Similarly, the use of contraceptive targets results in undue pressure being put by service providers on clients.

Call upon the Governments of States / UTs to exclude discriminatory / coercive measures from the population policies that have been framed, or are proposed. States in which such measures do not form part of the policy, but are nonetheless implemented, also need to exclude these discriminatory measures.

Emphasize that in a situation where the status of women is low and son preference is prevalent, coercive measures further undermine the status of women and result in harmful practices such as female foeticide and infanticide.

Affirm that reproductive rights can not be seen in isolation, as they are intrinsic to women's empowerment and empowerment of marginalized sections of society. Therefore, giving priority to health, education and livelihood of women is essential for exercising these rights, as also for reduction in fertility rates and stabilization of population.

Acknowledge that reproductive rights set on the foundation of dignity and integrity of an individual encompass several aspects such as :

- the right to informed decision-making, free from fear of discrimination;
- the right to regular accessible, affordable, good quality and reliable health care;
- the right to medical assistance and counselling for the choice of birth control methods appropriate for the individual couple;
- the right to sexual and reproductive security, free from gender-based violence.

Emphasize that capacity-building initiatives at all levels should mainstream rights-based perspective into various programmes.

Further emphasize that for a successful implementation of any programme for population stabilization, a rights-based approach is far more effective than a coercive approach based on disincentives.

Recognize that monitoring the human rights impact of policies and their implementation by governments is critical for ensuring that the policy processes conform to the rights frame work as enshrined in the Constitution of India, national laws and in international human rights instruments.

Call upon the Central and State Governments to ensure that domestic

laws on the subject promote proper exercise of reproductive rights, prevent harmful practices that derogate from a proper exercise of such rights, and protect every individual's right to a life with dignity while aiming at population stabilization and ensure allocation of adequate financial resources for the implementation of a population policy founded in human rights and development.

**Recommendations adopted at the Colloquium on Population Policy – Development and Human Rights, 9-10 January 2003, New Delhi**

- State specific population policies to be formulated keeping in view the conceptual framework of NPP.
- In the light of the constitutional mandate, a right based dialogue needs to inform the population policy processes.
- Policy should enable equal opportunity environment.
- Revisioning population policy with a fundamental shift in the approach where people in general and women in particular are not viewed as mere resources but as human agents with freedom of choice and capability.
- The means adopted for population stabilization should ensure equity implications are not violated.
- Demystifying the understanding of reproductive rights at the level of community, policy makers and programme managers.
- All the population policies should be examined for ensuring protection and promotion of human rights.
- There should be clarity and consistency in the population policy and legislative framework. e.g. legal age of marriage.
- Making registration of marriages and births compulsory.
- Population can be stabilized by creating an enabling environment, supportive development, inter-sectoral coordination.
- Behavioural changes not only for the community but also for those responsible for policy making, implementation and enforcement.
- Women's empowerment is not to be treated as a means to population stabilization but as an end in itself.
- Involvement of civil society and social group in policy formulation within a rights perspective.
- Translating human rights in programme realities is critical, for eg. access to quality heath care, improving access to service and availability for information, transparent legal framework will help in this process. An international e.g. in Iran investment in health

service has helped in quantum leap in health services and population stabilization.

- Engage in meaningful dialogue with the state governments in an objective assessment of disincentives in a human rights framework. Initiate correctional steps for those coercive policies that are already in place.
- The two-child norm, which dis-empowers women both directly and indirectly, must be examined critically since it is a violation of human rights.
- Radical changes in resource allocation for ensuring the rights of the under-privileged and marginalized for equity and equal opportunity.
- Policies need to recognize that young people are sexually active and have reproductive health needs as well as rights.
- Policies need to be guided by human rights perspective bringing accountability in mainstream decision making.

**2. Extract from proceedings of the Commission held on 17 January 2003 in relation to allegation of starvation deaths in KBK districts of Orissa**

**NATIONAL HUMAN RIGHTS COMMISSION**
**SARDAR PATEL BHAWAN, NEW DELHI**

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Case No. 37/3/97-LD
Dated: 17 January, 2003

Name of the Complainant: : Shri Chaturanan Mishra

CORAM

Justice Shri J.S. Verma, Chairperson
Justice (Smt.) Sujata V. Manohar, Member
Shri Virendra Dayal, Member

PROCEEDINGS

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**Right to Food**

Throughout the hearing in respect of this case, the petitioner Dr. Amrita Rangasami, Director, Centre for the Study of Administration of Relief (CSAR), has been raising the fundamental issue of the nature of right involved in a situation in which deaths occur as a result of starvation or prolonged mal-nutrition. She has asserted that there is a dichotomy between the Constitution of India and the Relief Manuals and Codes of India which govern relief administration. She has argued that while the Constitution recognises the Right to Food as an integral part of the Fundamental Right to Life, the Manuals and Codes are, more or less, a replication of the Model Famine Code of 1910 under which relief is administered as an act of benevolence on the part of the State and the status of the 'beneficiary' continues to be that of a recipient of State charity.

The Commission has considered Dr. Rangasami's submission most carefully. Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The expression 'Life' in this Article, has been judicially interpreted to mean a life with human dignity and not mere survival or animal existence. In the light of this, the State is obliged to provide for all those minimum requirements which must be satisfied in order to enable a person to live with human dignity, such as education, health care, just and humane conditions of work, protection against exploitation etc. In the view of the Commission, the Right to Food is inherent to a life with dignity, and Article 21 should be read with Articles 39(a) and 47 to understand the nature of the obligations of the State in order to ensure the effective realisation of this right. Article 39(a) of the Constitution, enunciated as one of the Directive Principles, fundamental in the governance of the country, requires the State to direct its policy towards securing that

the citizens, men and women equally, have the right to an adequate means to livelihood. Article 47 spells out the duty of the State to raise the level of nutrition and the standard of living of its people as a primary responsibility. The citizen's right to be free from hunger enshrined in Article 21 is to be ensured by the fulfilment of the obligations of the State set out in Articles 39(a) and 47. The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making the Right to Food a guaranteed Fundamental Right which is enforceable by virtue of the constitutional remedy provided under Article 32 of the Constitution. The requirements of the Constitution preceded, and are consonant with, the obligations of the State under the 1966 International Covenant on the Economic, Social and Cultural Rights to which India is a party. That Covenant, in Article 11, expressly recognises the right of everyone to an adequate standard of living, including adequate food.

It follows, therefore, that there is a fundamental right to be free from hunger. Starvation constitutes a gross denial and violation of this right. As starvation deaths reported from some pockets of the country are now invariably the consequence of misgovernance resulting from acts of omission and commission on the part of public servants, they are of direct concern to the Commission under the provisions of the Protection of Human Rights Act, 1993.

Persons living in conditions of poverty and hunger in areas such as the KBK districts have often been found to be suffering from prolonged hunger and mal-nutrition. Even when their deaths cannot, in a strictly clinical terms, be related to starvation, the tragic reality remains that they often die of prolonged mal-nutrition and the continuum of distress which has, inter-alia, rendered them unable to withstand common diseases such as malaria and diarrhoea. The situation is all the more painful in view of the fact that granaries of the Food Corporation of India are overflowing – a matter that is, at present, under consideration of the Supreme Court.

The Commission, therefore, agrees with Dr. Rangasami's view that the present practice of insisting on mortality as a proof of starvation is wrong and needs to be set aside. In the view of the Commission, therefore, there are obvious policy implications as far as the obligations of the State are concerned. The Right to Food implies the right to food at appropriate nutritional levels. It also implies that the quantum of relief to those in distress must meet those levels in order to ensure that the Right to Food is actually secured, and does not remain a theoretical concept.

The Commission also agrees with the petitioner that destitution and the continuum of distress should be viewed as the necessary conditions for the prevalence of starvation. There is thus a concomitant need for a paradigm shift in public policies and the Relief Codes in this respect.

Dr. Rangasami acknowledges that the State of Orissa has revised the

objective of relief administration to mean the elimination of destitution. However, it has not made the paradigm shift from the domain of benevolence to that of the right of a citizen. She has argued that the Govt. of India's current conceptualization of calamity as well as the season of its prevalence, has limited relief to the short term only. In contrast, a human rights approach to food and nutrition, would imply that the beneficiaries of relief measures should be recognised as "claim holders". Viewed from this perspective, the prevalence of distress-conditions threatening starvation constitutes an injury requiring the imposition of a penalty on the State. The penalty would be claimed for the affected groups as a whole rather than on the basis of individual claims. The Commission finds much merit in this view. Indeed, it is of the opinion that the remedy provided under Article 32 of the Constitution applies to groups no less than to individuals.

Dr. Rangasami has accordingly suggested the amendment of paragraphs 163, 164, 168B and 169 of the Orissa Relief Code in order to bring that Code in line with the Constitution of India. She has specifically proposed that it be reformulated to accomplish the following:

(i) a paradigm shift from the domain of Benevolence to that of Right;

(ii) a change from the assessment of harvest to the assessment of hunger;

(iii) a shift in the timing of State-intervention to the hunger season; and

(iv) a devising of the terms of cognizance for starvation and destitution.

The Commission is informed that the State Government has constituted a Committee headed by the Agricultural Production Commissioner (APC) and other officers as well as non-official members to discuss and deliberate on the suggestions made by Dr. Rangasami on amendment of the Orissa Relief Code.

Given the views of the Commission as explained above, it would like to see rapid progress in the work of the Committee and it would also like to be kept informed of its efforts. The outcome of these efforts could have far-reaching and positive consequences both for Orissa and, based on its example, the rest of the country.

Dr. Rangasami has also suggested the following for the consideration of the Government of India:

(i) The need to revise the present criteria used to determine the relief that is provided - she has proposed that the 'basket' of relief provided should be prescribed in terms of adequate nutritional requirements and not in fixed monetary terms. This would ensure automatic revision of the outlays required to keep pace with rising costs.

(ii) The devising of the criteria for the provision of assistance to small farmers in a manner that it is linked to the elimination of destitution and the halting of distress migration, distress sale of crops, labour and land, and protection against impoverishment.

The Commission sees much value in these suggestions which implicitly raise serious questions regarding the quantum of resources realistically required for Calamity Relief and the method of their utilisation. The Commission, therefore, requests Dr. Rangasami to develop these ideas further and to provide the Commission with a paper on this subject so that the views of the Government of India can be obtained on them.

In concluding these Proceedings, the Commission would like to observe that they are being held at a time when, universally, there is a demand that every effort be made by the State and by civil society to eradicate the poverty and hunger that constitute an affront to the dignity and worth of the human person. First and foremost among the United Nations Millenium Development Goals (MDG) is the pledge made by all Heads of State and Government to halve, by the year 2015, the proportion of the world's poor and of people who suffer from hunger. Given the circumstances of our country, India has a special responsibility in this regard. The prevalence of extreme poverty and hunger is unconscionable in this day and age, for not only does it militate against respect for human rights, but it also undermines the prospects of peace and harmony within a State. For all of these reasons, the Commission will continue to be deeply involved with the issues raised in these hearings in the period ahead.

The Commission would like, once again, to place on record its deep appreciation of the most able and constructive contribution that it has received throughout the hearing of this matter from the learned counsels appearing before it: Shri Sanjay Parikh for the petitioner, Shri Jayant Das and Shri Raj Kumar Mehta for the State Government of Orissa, and Shri Ajay Kumar Vali for the Union of India. The Commission also reiterates its gratitude to Dr. Amrita Rangasami, Director, CSAR for the insights and thoughts she has brought to bear to the consideration of this matter by the Commission.

A copy of these Proceedings may be forwarded to the Registrar General of the Supreme Court of India for being placed before the court in Writ Petition (Civil) No.42/97, pursuant to orders therein dated 28 April 1997 and 26 July 1997.

**(Justice J.S. Verma)**
Chairperson

**(Justice Sujata V. Manohar)**
Member

**(Virendra Dayal)**
Member

## 3. Statement of Dr Justice A.S. Anand, Chairperson, National Human Rights Commission of India to the 59th Session of the Commission on Human Rights on 16 April 2003

Madam Chairperson,

Thank you for giving me the floor.

I speak on behalf of the National Human Rights Commission of India of which I have recently been appointed the Chairperson. I had earlier had the privilege of serving as the Chief Justice of the Supreme Court of India between 1998-2001.

The experience of the Indian Commission indicates, as does my personal experience both in the Supreme Court and now in the Commission, that there is a natural symbiosis, indeed a synergy, between the work of an independent judiciary and an independent human rights institution.

We therefore agree with the view of Mr. Vieira de Mello, eloquently expressed earlier in this Session, that the key to the protection of human rights around the world lies in the development of independent "national protection systems based on the rule of law."

We welcome, in particular, his emphasis on the need for "practical activity" if the cause of human rights is to be properly served. That cause is ill-served if politicised, or if it falls victim to empty rhetoric or double-standards. All of us have much to learn from each other. No country has an impeccable human rights record.

Madam Chairperson,

In the view of our Commission, the work of the High Commissioner in support of national institutions has been one of the most worthwhile activities of the United Nations in respect of human rights over the past decade. It should therefore be strengthened. We believe that the High Commissioner can find a wealth of experience within the growing number of national institutions, upon which he can draw, in order to pursue and supplement his "practical activities" around the world. This experience is rooted in the realities of working at the level where it most counts – the ground level, within each nation, where the hard work, in the final analysis, has to be done.

Madam Chairperson,

The National Human Rights Commission of India has, in the past year, continued to interact closely and beneficially with the Office of the High Commissioner and other national institutions, both at the regional and the global levels, in addition to pursuing its fundamental responsibilities within India itself.

At the regional level, it hosted and assumed the chair of the Seventh

Annual Meeting of the Asia-Pacific Forum (APF), held in New Delhi between 11-13 November 2002. The Meeting admitted the national institutions of Malaysia, the Republic of Korea and Thailand as full members of the Forum, thus increasing their number to 12. The Meeting, which was also attended by observer institutions, governmental and non-governmental organizations, discussed, among other things, the role of national institutions in the Prevention of Trafficking in Persons, and in the effort to develop an International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

The work of the Asia-Pacific Forum is greatly enhanced by the opinions it receives from its Advisory Council of Jurists, comprising some of the most eminent legal luminaries of the region. At its last meeting, the Forum had before it the views of the Advisory Council of Jurists on the issue of Trafficking. The Forum has now sought the advice of that group on the issue of the primacy of the Rule of Law in countering terrorism world-wide while protecting human rights – a matter of critical importance in this day and age. We are of the view that the jurisprudence being developed in our region both by our courts and by our national institutions can be of interest and benefit to others as well.

At the global level, our Commission has served as a member of the International Coordination Committee of national institutions from 1994 to 2002 and as its Chair for a number of those years. It believes, however, that it is a healthy principle to rotate the membership and chair of such bodies, whether at the global or regional levels, on a regular basis. It hopes that this principle will be followed at both levels since a desire to participate in the better protection of human rights is the desire of peoples in all regions and nations, and the monopoly of none.

Madam Chairperson,

It is our view that national institutions are both the catalysts and monitors of good governance within their respective jurisdictions and can play a unique role in the defence and furtherance of human rights if they are pro-active, if they take preventive measures to stave-off or mitigate violations, and if they are fearless in bringing to book those who have violated human rights. It is therefore a matter of some concern to us if any national institution, whether in our region or elsewhere, is subjected to extraneous political, financial or other unwarranted pressures.

In seeking to fulfil its role, our Commission has, in the past months, continued to act in defence of the range of civil and political rights, as also economic, social and cultural rights, relevant to the circumstances of our country. Our efforts are documented at some length in our Annual Reports to Parliament, the monthly Newsletters that we publish and, increasingly, on our web-site. By way of illustration:

- Despite frequent and unspeakable acts of terrorism directed against innocent civilians in the country – notably in the Akshardham Temple in the State of Gujarat and in Nadimarg village in the State of Jammu and Kashmir recently – the Commission has reiterated its stand in respect of the Prevention of Terrorism Act, indicating that it intends to fulfil its responsibility under its Statute to ensure that the Act is not implemented in a manner that is violative of human rights, the Constitution and treaty obligations of the country.
- The Commission has continued to press for the implementation of its recommendations in respect of the tragic human rights violations that occurred in Gujarat last year, starting with the burning of the Sabarmati Express in Godhra on 27 February 2002 and continuing with the violence that ensued. The Commission has urged the authorities of the country, at the highest level, to ensure that justice is done, that civil and criminal action is taken against those guilty of acts of omission or commission, and that appropriate reparation is provided, individually and collectively, to those who have suffered.
- As regards economic and social rights, the Commission has taken the view that the Right to Food is inherent to a life with dignity under Article 21 of the Constitution, which is an enforceable right, and it has made detailed recommendations in respect of allegations relating to deaths by starvation in the State of Orissa.
- Given the importance of the linkages between Population Policy, Development and Human Rights, the Commission held a colloquium on these matters where detailed discussions were held in respect of the use of 'incentives and disincentives' in the framing of Population Policies and emphasis was laid on the need to protect the reproductive rights of women.
- Further, in recent months, the Commission has taken a number of steps in respect of Trafficking. It has pursued its nation-wide Action Research on Trafficking in Women and Children and organized a sensitization programme on the prevention of sex tourism and trafficking;
- The Commission has made detailed recommendations to the Central and State Governments in respect of issues relating to vulnerable sections of society including those with disabilities, dalits, tribals, bonded and child labour.
- Protection of the rights of minorities has been a matter of particular importance to the Commission.

Madam Chairperson,

These are deeply troubled times in which we live. Everywhere the pervasive threat of terrorism has cast a pall on efforts to promote and protect human rights, for terrorism is deeply hostile to human rights, including the most fundamental of all rights, the right to life itself. The Commission has always held the view that the actions which any State takes to fight and triumph over this evil must themselves fall within the parameters of the Rule of Law and conform to the high standards that we have set for ourselves – in our Constitutions, our laws, and in the great human rights treaties adopted since the founding of the United Nations.

With the sound of gun-fire and the cries of the innocent victims of violence ringing in our ears, I feel it appropriate to conclude these comments with the words of advice and caution of Mahatma Gandhi who wisely observed:

"Peace will not come out of a clash of arms, but out of justice lived and done"

That is a message we can well remember today.

**4. Excerpt from the minutes of the meeting taken by the Chairperson, NHRC with the J&K Government officers involved in the administration of relief to Kashmiri Pandit migrants at Jammu on 17 May 2003.**

Justice A.S. Anand, Chairperson, NHRC took a special meeting of the J&K Government officers involved in the administration of relief to Kashmiri Pandit migrants at Government Guest House, Jammu on 17 May 2003. The meeting was attended by Shri Ravi Thussu, Relief Commissioner (M), Shri Manohar Singh, SE Electrical (M&RE), Smt. Shakuntala, JD (Education), Shri Pawan Kotwal, DC Jammu and Shri Shiv Rattan Singh, Asstt Commissioner (Relief). Some subordinate officers of the Relief Department and the Camp Commander of Jammu Camps were also present.

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The Chairperson explained the obligation of the State Government to provide reasonably good living conditions to the migrant families in the context of their fundamental right to life which means not mere survival or animal existence but a life with dignity. The fact that these families were forced to leave their homes in Kashmir Valley under unfortunate circumstances causing them enormous pain casts a special duty on the State administration not only to meet their basic physical needs but also ensure that their self respect and self confidence are restored and their sense of belonging is revived.

Shri Chaman Lal, Special Rapporteur presented a summary of the observations made by him in his visit to the migrant Camps on 16 May 2003. Detailed report on his visit is enclosed. The Special Rapporteur acknowledged a marked improvement in infrastructure like approach roads, internal lanes, drains, water supply and sanitation since his last visit in February 2000. He complemented the administration for the efficiency of cash disbursement and ration distribution at the Camps. However, he found that the camp schools are still without Laboratory and Library facilities and the medical cover provided to the inmates is unsatisfactory as before.

The Relief Commissioner (M) and the SE, PHE accepted the observations of the Special Rapporteur after obtaining clarifications on some points. They informed the meeting about some steps that have been initiated to improve the drinking water supply and medical facilities at the Camps.

The Chairperson remarked that the basic irritants highlighted by the Special Rapporteur were not insurmountable. The meeting identified the following Action Points for improving the living conditions in the Camps:

The water supply system installed at Nagrota exclusively for the migrant families will be inspected by a senior officer of the PHE to make sure that it functions efficiently to its full capacity. The suggestion of the Special Rapporteur to provide a stand-by pumping motor at Nagrota was accepted by the SE, PHE who admitted that some problems are being faced

at Nagrota because of shortage of manpower and the ban on recruiting additional staff.

Execution of a special report for installation of an independent water supply network at Camp Muthi-II under the Rajiv Gandhi Water Mission at an estimated cost of 1.21 crores would be expedited. Pending the completion of this project, 5 hand-pumps will be installed at this Camp in accordance with the decision already taken. The complaint of the inmates about poor quality of water from 3 hand-pumps installed recently will be immediately looked into by the PHE.

Water supply at Purkhoo-I Camp will be improved by installing the new pipes of larger diameter, which are reported to have been procured.

Sulabh Latrine Blocks installed at some of the Camps will be provided with running water supply by fitting the overhead tanks. The complaint regarding a poor supervision over Safai Karamcharis after the Municipality transferred this responsibility to an NGO will be duly examined and corrective action taken.

The medical facilities provided at the Camps will be improved by raising their status of primary Health Centres at least at Nagrota-I, Purkhoo-II, Muthi-I & II and Mishriwala. The centralized supply of medicines by the Health Directorate should be on the basis of demands/requisitions placed by the Camp Dispensary. One of the Camp Doctors and one representative of Relief Commissioner (M) may be associated with the Purchase Committee constituted for the purpose of procuring medicines for Camps. Patients requiring specialist treatment for diseases like Diabetes, Heart-ailments, chronic-asthma, psychiatric disorder etc should be identified and proper arrangements should be made for their health care.

The Camp schools would be provided Science Laboratory and Libraries as per the norms applicable to Government Schools.

The Engineering Wing working in the set up of the Relief Commissioner needs to be empowered by granting its head an officer of the rank of the Assistant Executive Engineer, the financial powers sufficient enough for undertaking day to day urgent works.

As already directed by the Commission, the Camps are to be visited periodically by the Divisional Commissioner and Senior Officers of other Departments such as PHE, Electricity and Education etc. to improve coordination of relief activities at the functional level.

The coverage of the Anganwadi Centres established at Nagrota-I and Purkhoo-II! can be expanded by enrolling more beneficiaries. The Centre sanctioned at Muthi-I and Muthi-II are required to be made operational by persuading the inmates to provide necessary space for the purpose.

In his concluding remarks the Chairperson exhorted the officials involved in relief administration to follow the message of Mother Teresa

who said, "You have a heart to love and hands to serve." He reminded them that their duty was not merely to ensure an efficient running of the relief schemes but to make the migrants feel that their human dignity is respected. He suggested that the Administration should try to arrange at least a weekly visit of a psychiatrist for the counseling of the inmates reported to be suffering from mental depression and other psychiatric disorders. He emphasized the need for greater involvement of the NGO sector and the Civil Society in this endeavour of restoring the lost sense of belonging of the migrants. The Administration has to make all efforts to counter the migrants' feeling that they are abandoned children and convince them by its performance and conduct that it cares for them.

The meeting ended with a Vote of Thanks to the Chairperson by the Relief Commissioner (M) who assured a prompt follow-up on maters discussed in the meeting. Immediately after the meeting, the Chairperson met delegations of (i) Jammu & Kashmir Sharanarthi Action Committee, Jammu, (ii) Victims of Nadimarg (Kashmir) Massacre (Regd.) and (iii) State Kashmiri Pandits Conference and heard their grievances.

**Excerpt from minutes of the meeting of High Level Committee constituted by NHRC held on 15 July 2003 in Srinagar**

Agenda item No. 01:02 Observations/ directions conveyed in the special meeting

The observations made during the meeting of the Chairperson, NHRC at Jammu (convened on 17th May 2003, in the Circuit House, Jammu) with the senior officers of the State Government were presumed to be read by the Committee members.

**Agenda item No. 01:03**: Unanimous demands presented by the Migrants to Special Rapporteur (NHRC) at different camps.

Demand No.1: Enhancement of cash assistance

The Chief Secretary informed the Committee that the proposed enhancement in cash relief to the Kashmiri migrants has been rejected by the Government of India. The Committee felt that the matter may be pursued through NHRC in favour of the proposal.

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Agenda Item No.01 :04: Action Points on the observation of the Special Rapporteur:

The Relief Commissioner (M) gave a brief account of the meeting taken by the Chairperson NHRC following the visit of Special Rapporteur to the camps at Nagrota and Jammu, with the officers of the departments connected with relief measures of the migrant camps. He informed the

Committee of the following progress in respect of the action points pointed out in the report of the Special Rapporteur: -

(A) Water Supply in different migrant camps

Proposed action was in progress in respect of some cases and action has already been taken in respect of other cases.

(B) Sanitation in the Migrant camps

Sequel to the meeting of the Chief Secretary, J&K with the Home Ministry, New Delhi, funds for the project "Sanitation" have been provided to the tune of Rs.2.30 Crores by the Government of India. The project would be implemented in due course of time.

(C) Medicine in migrant camps:

In this connection, the Hon'ble Minister for Planning, Finance & Law assured that in case there is requirement of additional funds for providing standard quality and quantity of drugs in the migrant camps, the same would be provided by the Finance Department.

(D) Empowerment of Engineering Wing of Relief Organisation

The proposal as contained in agenda sub-item, was agreed to.

(E) Registration (as pointed out in the observation of NHRC Rapporteur)

The Committee noted action taken by the Relief Organisation, in the matter, with satisfaction. However, it was observed that in respect of these two particular cases the relief should not be stopped for want of timely submission of the report by the CID. The Committee observed that as a matter of practice the CID should submit its report within two months to the Relief Organization and in case it is not received within two months, the Relief Organization may take action on the merits of the case. Further, in order to thoroughly establish status of migration, it was desired by the Committee that the Revenue authorities should be co-opted for verification of the actual migration of the family (outside the valley). Such report could be given by the Dy. Commr. concerned on the basis of Revenue Agency Report and /or on the basis of CID. The Hon'ble Minister for Planning, Finance and Law desired that a review of migrant status of registered Muslim migrants need to the taken as, reportedly, some of these, already registered migrants, have managed their registration, earlier, without experiencing threat perception. In this connection the Hon'ble Minister for Revenue informed the Committee that the re-verification process had already been initiated.

At the end of the meeting the Special Rapporteur pointed out individual grievances of the following individuals who had petitioned to the NHRC for redressal of their grievances:

1. Petition of Shri Virender Gurtoo
2. Petition of Shri Badri Nath Raina
3. Petition of Shri Rajinder Premi
4. Petition of Shri Janki Nath
5. Petition of Shri Nareh Raina
6. Petition of Smt. Nancy Koul.

In connection with the above petitions the Committee desired these be examined by the Relief Commissioner and report submitted to the Committee as well as to the Commission. Further, some of the individual complaints were brought to the notice of the Committee by Shri A.N. Vaishnavi in respect of which it was decided that the Relief Organisation, after examining these cases would do the needful at its level.

The meeting ended with vote of thanks to the chair.

(sd/-)
Convener

(sd/-)
Chairman

## 5. Promoting the Rights of People with Disabilities: Towards a New UN Convention - An International Workshop for National Human Rights Institutions from the Commonwealth and Asia Pacific Region held in New Delhi, India, 26 to 29 May 2003.

### Introduction

1. National Human Rights Institutions (NHRIs) from the Commonwealth and Asia Pacific region, consisting of NHRIs from Afghanistan, Australia, Fiji, Ghana, India, Iran, Republic of Korea, Malawi, Malaysia, Mauritius, Mongolia, Nepal, New Zealand, Nigeria, Northern Ireland, Philippines, South Africa, Sri Lanka, Thailand and Uganda, met in New Delhi, India from 26th to 29th May 2003 to discuss a proposal to develop a comprehensive and integral United Nations Convention to promote and protect the rights of persons with disabilities.

2. The workshop participants expressed their gratitude to the National Human Rights Commission of India for hosting and organising the workshop in partnership with the Asia Pacific Forum of National Human Rights Institutions, the British Council and the United Nations Office of the High Commissioner for Human Rights and to the United Kingdom Foreign and Commonwealth Office and the United Nations Office of the High Commissioner for Human Rights for their financial support.

3. Participation also included representatives from governments, non-governmental organisations, international agencies and experts working in the field of human rights and disability.

4. Dr Justice A.S. Anand, Chairperson of the National Human Rights Commission of India and the Chairperson of the Asia Pacific Forum of National Human Rights Institutions, Dr Morna Nance, Acting Director, British Council India and Mr Orest Nowosad, United Nations Office of the High Commissioner for Human Rights, spoke at the inaugural session. In their statements the distinguished speakers highlighted the important role of national human rights institutions in protecting and promoting the human rights and dignity of persons with disabilities and in the possible development of a proposed new United Nations Convention in this respect.

5. The workshop held nine working sessions relating to various aspects of the rights of persons with disabilities. It considered, inter alia, country papers on the impact of national legislation and administrative practice; the role of NHRIs in promoting the rights of persons with disabilities; "mainstreaming disability" – experiences of UN Conventions (hard instruments); existing (soft) UN instruments relevant to disability; international monitoring mechanisms and

complaints procedures; the nature and key elements of the proposed new Convention on disability – perceptions of NHRIs and NGOs; and partnership strategies for action in the lead up to the new UN Convention.

6. Following detailed discussions on each of the above matters, the workshop adopts the following preliminary conclusions and recommendations to the Ad Hoc Committee. These are without prejudice to the more detailed positions that NHRIs may adopt, individually or jointly, as work on the new Convention proceeds.

**Conclusions and Recommendations to the Ad Hoc Committee adopted by the New Delhi Workshop**

The NHRIs present at the workshop from the Commonwealth and Asia Pacific region:

7. Welcome the decision of the United Nations General Assembly to establish an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities (the Convention).

8. Welcome the decision of the Ad Hoc Committee to specifically invite NHRIs to participate in their work and agree to respond positively to the invitation and to make available suggestions and proposals to be considered in the development of the proposed Convention.

9. Request the United Nations and the Ad Hoc Committee to take the necessary measures to ensure the participation of persons with disabilities in their activities and ensure the widest possible participation of organisations of persons with disabilities.

10. Strongly affirm the need for the development of a comprehensive and integral Convention.

11. Stress that the Convention should be a 'rights based' instrument built on international human rights norms and standards and social justice. It should be informed by the overarching principle that all persons with disabilities, without exception, are entitled to the full benefit and enjoyment of all fundamental human rights and freedoms on the basis of equality, dignity and without discrimination.

12. Stress that the situation of all disability groups and the diverse conditions related to gender, race, colour, age, ethnicity and other considerations must be taken into account when elaborating the Convention.

13. Propose that the following elements should be included in the proposed Convention.

**Preamble**

14. *The Preamble to the Convention should:*

- stress the need for the Convention;
- recognise the value and applicability of existing international human rights instruments (both hard and soft) to disability;
- recognise the impact of dual disadvantage and multiple discrimination faced by individuals such as, women, children or indigenous people with disabilities, or other status, and
- stress the Convention's links to these instruments and the need for a comprehensive rights based treaty.

**Objectives**

15. The objectives of the Convention should:

- recognise that persons with disabilities are entitled to the full range of civil, political, economic, social and cultural rights;
- recognise the progressive realisation of certain rights;
- ensure that the principles of non-discrimination and equal opportunity apply to persons with disabilities;
- acknowledge that the lack of provision of reasonable accommodation and/or positive actions to eliminate barriers to full participation is a form of discrimination; and
- promote international cooperation to support national efforts.

**Definitions**

16. With regard to the definition of 'disability' the Convention should:

- stress that disability is not an individual pathology. It has a range of implications for social identity and behaviour, and largely depends upon the context and is a consequence of discrimination, prejudice and exclusion.
- not be restrictive. For example it should cover physical, sensory, intellectual, psychiatric and multiple disabilities. Disability can be permanent, temporary, episodic and perceived.

17. With regard to the definition of 'discrimination' the Convention should:

- address all forms of discrimination including direct, indirect, hidden and systemic discrimination;
- recognise that equality of opportunity requires that any relevant restrictions or limitations caused directly or indirectly by a disability should be remedied by appropriate modifications, adjustments or assistance;

- require affirmative action, reasonable accommodation or 'special measures' to provide barrier free access in all spheres for full participation and to provide enabling environments, where necessary, in order to achieve equality of opportunity and treatment. Such action or measures should not be regarded as discrimination.

**Scope**

18. The Convention shall apply both to public and private institutions and spheres.

**State Party Obligations**

19. The Convention should place a positive obligation on State Parties to take legislative, programmatic and policy actions to achieve the Convention's objectives.

20. The Convention should recognise the responsibility of State Parties to ensure an enabling environment and a barrier free society.

**Specific Articles**

21. The full range of civil, political, economic, social and cultural rights contained in existing international human rights instruments should be incorporated in the Convention.

22. In addition to the application of existing international human rights law, the Convention should contain specific articles dealing with specialised areas and issues relating to civil, political, economic, social and cultural rights that, by the very nature of the context of disability, require codification, with due respect being paid to the principles of natural justice.

**Monitoring**

23. The Convention should have an effective monitoring mechanism which includes the possibility of conducting inquiries into systemic violations.

24. Any expert committee established under the Convention should include persons with disabilities.

25. The Convention should include national institutional frameworks to monitor and promote compliance with the Convention, in which national human rights institutions can play a constructive role.

**Appendix – Additional Conclusions and Recommendations**

The workshop also made the following conclusions and recommendations to other bodies.

Recommendations to National Human Rights Institutions

26. NHRIs should inform their governments about the importance of developing a comprehensive and integral Convention and recommend that they actively support its development.

27. NHRIs should raise awareness within their respective societies about the importance of developing the proposed Convention while, at the same time, ensuring the implementation of existing international human rights standards relating to the rights of persons with disabilities.

28. NHRIs should consult with persons with disabilities and relevant non-governmental organisations about the development of the proposed Convention.

29. NHRIs should continue to participate actively in the development of the proposed Convention.

30. NHRIs should establish and strengthen a disability rights component in their work, including their complaint handling procedures.

31. NHRIs should take the necessary measures to ensure the participation of persons with disabilities in their activities.

**Recommendations to the United Nations Office of the High Commissioner for Human Rights**

32. The United Nations Office of the High Commissioner for Human Rights is encouraged to continue to support to the extent possible within available resources, including through technical cooperation and advocacy, the effective participation of NHRIs and their regional associations in the development of the proposed Convention.

33. The United Nations Office of the High Commissioner for Human Rights is encouraged to support the work of NHRIs in the protection and promotion of the rights of persons of disabilities at the national level.

34. The United Nations Office of the High Commissioner for Human Rights is encouraged to assist in the establishment of a disability 'focal points' network amongst NHRIs and to facilitate the establishment of a comprehensive and accessible website on issues relating to disability.

35. The United Nations Office of the High Commissioner for Human Rights is encouraged to continue to work with other partners, as exemplified by this workshop, in the promotion and protection of the rights of persons with disabilities.

**Recommendations to the Asia Pacific Forum of National Human Rights Institutions**

36. The Asia Pacific Forum of National Human Rights Institutions should

continue to provide support, as requested, for the activities of its member institutions in the development of the proposed Convention.

37. The Asia Pacific Forum of National Human Rights Institutions should, on request, support the work of its member institutions in the protection and promotion of the rights of persons of disabilities at the national level.

38. The Asia Pacific Forum of National Human Rights Institutions should continue to implement the decisions of its members relating to the rights of persons with disabilities reached at its Seventh Annual Meeting.

39. The Asia Pacific Forum of National Human Rights Institutions should, in consultation with the United Nations Office of the High Commissioner for Human Rights, seek to arrange for the circulation of the paper prepared for the New Delhi workshop entitled "Promoting the Rights of People with Disabilities: Towards a new UN Convention" as a conference paper of the Ad Hoc Committee.

**Recommendations to the British Council**

40. The British Council should continue to support the effective participation of NHRIs in the development of the proposed United Nations Convention.

41. The British Council is encouraged to continue to work with other partners as exemplified by this workshop in the promotion and protection of the rights of persons with disabilities.

## 6. Statement of NHRC and The Asia Pacific Forum of National Human Rights Institutions to the 2nd Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection And Promotion of The Rights and Dignity of Persons With Disabilities in New York on 18 June 2003

In April 2002 the United Nations High Commissioner for Human Rights stated that "it will be of utmost importance that not only States but also National Human Rights Institutions ... are able to contribute their experience to the elaboration of the new Convention" on the rights of persons with disabilities.

Mr Chairman, national human rights institutions were therefore very pleased that this Ad Hoc Committee decided to specifically extend an invitation to us to participate in your work.

National human rights institutions play a crucial role in translating international human rights norms and standards into practical action at the ground level, where of course it matters most. National human rights institutions believe, therefore, that they have much to contribute to this process of developing a new Convention.

For example, the National Human Rights Commission of India has undertaken a number of significant investigations into violations against the rights of people with disabilities – particularly with regard to the treatment of people with intellectual and psychiatric disabilities – in India. Ms Anuradha Mohit, our Commission's Special Rapporteur on the rights of people with disabilities, will be able to provide you with much more detailed information on our activities during the course of this session. But the experience of the Indian Commission working in this field strongly demonstrates the need for the development of a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights of Persons with Disabilities. While existing international human rights standards require that persons with disabilities should enjoy the same basic human rights as all other human beings, in many respects, this is not the case and they are subjected to widespread violations of their human rights. It is the view of National Human Rights Commission of India that the development of a specific Convention on the rights of peoples with disabilities is, therefore, long overdue.

Mr Chairman

I am pleased to state that this view of the Indian Commission is also strongly held by the 12 national human rights institutions from Australia, Fiji, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka and Thailand that make up the Asia Pacific Forum of National Human Rights Institutions. At the Seventh Annual Meeting of the Forum, which was held in New Delhi, India, in November

2002, Forum members stated that a comprehensive and integral convention was necessary to give "status, authority and visibility" to disability issues and that this could not be achieved through the process of reform of existing international instruments and monitoring mechanisms. Moreover, Forum member institutions believed that a single comprehensive treaty would better enable the State Parties to understand their obligations in clear terms. The elaboration of a new treaty would thus complement existing international standards for the rights of people with disabilities. Finally Forum member institutions *"agreed to respond positively to the invitation of the United Nations Ad Hoc Committee to participate independently in the development of the possible new convention"* [1] and, following a process of consultation with people with disabilities themselves, to make available to this Ad Hoc Committee suggestions about elements that should be included in the new Convention. Forum members therefore requested that *the Forum secretariat, in cooperation with its member institutions, develop and advocate proposals for a possible new convention for the consideration of the Ad Hoc Committee.*[2]

Mr Chairman

In following up the decisions of Forum's seventh annual meeting, the National Human Rights Commission of India agreed to host an International Workshop on the Development of the Proposed New International Convention from the 26th to 29th May 2003 in New Delhi, India. This international workshop was organized in cooperation with the Asia Pacific Forum of National Human Rights Institutions, the British Council and the United Nations Office of the High Commissioner for Human Rights. 21 national human rights institutions from both the Commonwealth and the Asia Pacific region, consisting of the institutions from Afghanistan, Australia, Fiji, Ghana, India, Iran, Republic of Korea, Malawi, Malaysia, Mauritius, Mongolia, Nepal, New Zealand, Nigeria, Northern Ireland, Philippines, South Africa, Sri Lanka, Thailand and Uganda attended along with representatives from governments, non-governmental organisations, international agencies and experts working in the field of human rights and disability.

The workshop held nine working sessions on issues such as the impact of national legislation and administrative practice; the role of national human rights institutions in promoting the rights of persons with disabilities; mainstreaming disability – the experiences of United Nations

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1 Paragraph 13, Concluding Statement of the Seventh Annual Meeting of the APF, http://www.asiapacificforum.net/activities/annual_meetings/seventh/concluding.htm

2 Discussion paper, Seventh Annual Meeting of the APF, http://www.asiapacificforum.net/activities/annual_meetings/seventh/meeting_papers.htm

Conventions (hard instruments) and existing (soft) instruments; international monitoring mechanisms and complaints procedures; the nature and key elements of the proposed new Convention and perceptions of national human rights institutions and non-governmental organizations; and partnership strategies for action for the development of the new Convention. Following detailed discussions on each of these matters, the workshop adopted a set of preliminary conclusions and recommendations for consideration of this Ad Hoc Committee.

I understand that a copy of a comprehensive background paper and the concluding statement of the workshop have been submitted to the Ad Hoc Committee. I will, therefore, simply highlight the key conclusions. The participants:

- Strongly affirmed the need for the development of a comprehensive and integral Convention;
- Stressed that the Convention should be a 'rights based' instrument built on international human rights norms and standards and social justice. It should be informed by the overarching principle that all persons with disabilities, without exception, are entitled to the full benefit and enjoyment of all fundamental human rights and freedoms on the basis of equality, dignity and without discrimination.
- Stressed that the situation of all disability groups and the diverse conditions related to gender, race, colour, age, ethnicity and other considerations must be taken into account when elaborating the Convention.

I would draw the attention of members of the Ad Hoc Committee to the full concluding statement and, in particular, the series of specific recommendations it makes relating to elements that should be included in the provisions of the proposed Convention.

Mr Chairman

One of the primary objectives of a disability convention should be to transact a shift from an approach based on welfare to one firmly grounded on human rights. The development of a comprehensive and integral international convention provides an opportunity to demonstrate the indivisibility and interdependence of rights on one hand, and on the other, the symbiotic interplay between development and human rights. The development of such a Convention would be a signal achievement of the early years of the 21st Century – and it is an objective that all national human rights institutions look forward to realising.

## 7. NHRC's Statement on the Best Bakery Case dated 31 July 2003

On 31 July 2003, in response to repeated requests from representatives of the print and electronic media regarding the action being taken by it in the Best Bakery Case, the Commission set out its position in the following words:

"Deeply concerned about the damage to the credibility of the criminal justice delivery system and negation of human rights of victims, the National Human Rights Commission, on consideration of the report of its team which was sent to Vadodara, has today filed a Special Leave Petition under Article 136 of the Constitution of India in the Supreme Court with a prayer to set aside the impugned judgement of the Trial Court in the Best Bakery case and sought directions for further investigation by an independent agency and retrial of the case in a competent court located outside the State of Gujarat.

The NHRC has, inter-alia, contended in the SLP which was filed on 31 July 2003, that:

- The concept of fair trial is a constitutional imperative and is explicitly recognized as such in the specific provisions of the Constitution including Articles 14, 19, 21, 22 and 39A of the Constitution as well as the various provisions of the Code of Criminal Procedure 1973 (Cr.P.C).
- The right to fair trial is also explicitly recognized as a human right in terms of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by India and which now forms part of the statutory legal regime explicitly recognized as such under Section 2(1)(d) of the Protection of Human Rights Act,1993.
- Violation of a right to fair trial is not only a violation of a fundamental right under our Constitution but also violative of the internationally recognized human rights as spelt out in the ICCPR to which India is a party.
- Whenever a criminal goes unpunished, it is the society at large which suffers because the victims become demoralized and criminals encouraged. It therefore becomes the duty of the Court to use all its powers to unearth the truth and render justice so that the crime is punished.
- It is, therefore, imperative in the interests of justice for the Hon'ble Supreme Court, in exercise of its powers under Article 142 of the Constitution, to lay down guidelines and directions in relation to protection of witnesses and victims of crime in criminal trials which can be adhered to both by the prosecuting and law enforcement agencies as well as the subordinate judiciary. This is essential in order to enhance the efficacy of the criminal justice delivery system.

- The Commission has also filed a separate application (on 31 July 2003) under Section 406 Cr.P.C. before the Supreme Court for transfer of four other serious cases, namely, the Godhra incident, Chamanpura (Gulburga society) incident, Naroda Patiya incident and the Sadarpura case in Mehsana district, for their trial outside the State of Gujarat."

As these matters are now before the Hon'ble Supreme Court, it would be inappropriate for the Commission to comment any further on them in this Journal.

*Journal of the NHRC*, Volume 2, 2003, 176-189

# *Activities of the Asia Pacific Forum*

Kieren Fitzpatrick

## 1. Executive Summary

The Asia Pacific Forum of National Human Rights Institutions (the APF) was established in July 1996. The APF is a regional organization made up of national human rights institutions. The National Human Rights Commission of India was a foundation member and continues to play a significant role.

The role of the APF is to undertake technical cooperation projects to (i) help strengthen the operation of its member institutions to improve domestic human rights observance, (ii) promote the establishment of new national human rights institutions and (iii) promote regional cooperation on human rights issues. On establishment the APF had 4 member institutions. Over the last seven years its membership has grown to 12 institutions with additional institutions expected to join soon.

The APF is seen both regionally and internationally as being a very successful initiative – and this is particularly significant given the absence of any other formal regional human rights arrangements in the region.

## 2. The Asia Pacific Forum

### *2.1 Origins*

National human rights institutions improve the lives of people within their jurisdiction by protecting and promoting human rights. They are a relatively recent development among mechanisms for the promotion and protection of human rights. They are a means whereby states can more effectively work to guarantee human rights within their own jurisdictions. They do not replace the role of the

courts and judiciary, legislative bodies, relevant government agencies, parliamentary committees, political parties or non-government organisations (NGOs). Rather, they are a unique and important complement to these other elements of state administration and civil society. They are independent authorities established by law to protect the human rights of the people of their country. National human rights institutions generally have functions or power to:

- receive and act upon individual complaints of human rights violations;
- promote conformity of national laws and practices with international standards;
- promote awareness of human rights through information and education and carry out research;
- submit recommendations, proposals and reports on any matter relating to human rights to the government, parliament or any other competent body;
- encourage ratification and implementation of international human rights standards and to contribute to the reporting procedure under international human rights instruments; and
- co-operate with the United Nations, regional institutions and national human rights institutions of other countries and non-government organisations.

The past several years have seen an increase in the number of national human rights institutions established in the Asia Pacific region as more and more countries recognise the importance of practical mechanisms to make international human rights commitments and standards effective at the domestic level.

In July 1996 four national human rights institutions of the Asia Pacific region met in Darwin, Australia, together with the United Nations Office of the High Commissioner for Human Rights (OHCHR), a number of regional governments and non-governmental organizations. The four national human rights institutions were from India, Indonesia, Australia and New Zealand. The purpose of the meeting was to discuss ways to improve the

effectiveness of existing national human rights institutions through co-operative activities.

At the conclusion of the workshop the four participating national human rights institutions adopted the *Larrakia Declaration*.[1] This Declaration emphasized the importance of cooperation among all actors involved in the defence of human rights and the need for appropriate assistance and support to be provided to existing national institutions, governments and civil society working towards the establishment of national institutions. With the objective of creating a mechanism whereby cooperation might be systematically fostered, the national human rights institutions of the region established the Asia Pacific Forum of National Human Rights Institutions (the APF).

The Philippines Human Rights Commission, which was unable to send representatives to attend the meeting in Darwin, joined the APF soon after its formation.

### 2.2 *Membership*

Membership of the APF is open to all national human rights institutions within the Asia-Pacific region. There are three categories of membership – (i) full members (ii) candidate members and (iii) associate members. Only those national human rights institutions that have been established in full compliance with the criteria set out in the *Principles Relating to the Status of National Institutions* (more commonly known as the *Paris Principles*) can become full members of the APF.[2]

The Paris Principles provide that a national human rights institution must have as broad a mandate as possible, be independent, pluralistic, accessible, characterised by regular, effective functioning, have a representative composition and possess adequate powers and resources.

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1. http://www.asiapacificforum.net/activities/annual_meetings/first/concluding.htm

2. Endorsed by the UN Commission on Human Rights and the General Assembly (Commission on Human Rights resolution 1992/54 of 3 March 1992 and General Assembly resolution 48/134 of 20 December 1993, annex). For the full text see http://www.asiapacificforum.net/about/paris_principles.html

Since its establishment, the APF has grown dramatically from four to twelve member institutions and it has taken a leading role in promoting regional cooperation between national institutions and strengthening their capacity to protect and promote human rights.

The commissions that currently constitute the full members of the APF are the:

- **Australian** Human Rights and Equal Opportunity Commission
- **Fiji** Human Rights Commission
- National Human Rights Commission of **India**
- **Indonesian** National Commission on Human Rights
- **Malaysian** Human Rights Commission
- **Mongolia** National Human Rights Commission
- National Human Rights Commission of **Nepal**
- **New Zealand** Human Rights Commission
- **Philippines** Commission on Human Rights
- National Human Rights Commission of the **Republic of Korea**
- Human Rights Commission of **Sri Lanka**, and
- The National Human Rights Commission of **Thailand**.[3]

In addition the APF is currently processing applications for membership from the human rights commissions of **Afghanistan** and **Palestine**. Other countries such as Bangladesh, Cambodia, Iran, Japan, Jordan, Pakistan, Papua New Guinea, Solomon Islands and Timor Leste are contemplating the establishment or strengthening of national human rights institutions. Newly created national institutions may apply for membership of the APF subject to meeting or committing themselves to meet the *Paris Principles*.

National institutions that are not established in conformity with the Paris Principles are welcome to attend and take part in all

3. See http://www.asiapacificforum.net/member/members.htm for further details on each of the above institutions, including their powers, functions and composition.

APF activities. However these institutions are not entitled to vote or take part in the APF's decision-making processes.

Governments and non-governmental organizations within the region can be associated with the APF as observers. Meetings of the APF also provide for observer status to be given to non-regional governments, relevant institutions, United Nations agencies and human rights non-governmental organizations.

*2.3 Objectives*

The member institutions of the APF determined that its objectives are to:

* respond where possible with personnel and other support to requests from governments and civil society in the region for assistance in the establishment and development of national institutions;
* expand mutual support, cooperation and joint activity among member institutions through:
  (i) information exchanges
  (ii) training and development for institution members and staff
  (iii) development of joint positions on issues of common concern
  (iv) sharing expertise
  (v) periodical regional meetings
  (vi) specialist regional seminars on common themes and needs
  (vii) responding promptly and effectively to requests from other national institutions to investigate violations of the human rights of their nationals present in a country that has a national institution;
* welcome as participants in the Forum other independent national institutions which conform with the Paris Principles;
* encourage governments and human rights non-governmental organizations to participate in Forum meetings as observers.[4]

4. http://www.asiapacificforum.net/activities/annual_meetings/first/concluding.htm

### 2.4 *Structure and Management*

In response to the APF's rapid development and growth, its member institutions undertook an examination of the APF's institutional structure to ensure that it could effectively meet its ongoing operational requirements and anticipated future development.

At the Fourth Annual Meeting of the APF, held in the Philippines in 1999, APF members formed a working group to examine various legal and governance options for the APF. The working group reported back to all member institutions at the Fifth Annual Meeting of the APF, held in New Zealand in 2000, and the member institutions resolved that the APF should become a legally independent non-profit regional organization. APF members also requested the working group to prepare the groundwork for this new legal structure. The working group prepared a draft constitution, strategic plan, business plan and fundraising plan for the APF. This package of governance proposals were unanimously adopted at the Sixth Annual Meeting of the APF held in Sri Lanka in 2001. The main organizational elements of the APF are, therefore, as follows:

- The APF's constitution establishes a *Forum Council* which is comprised of one councillor nominated by each full member institution of the APF.[5] The Forum councillors are the decision-making body of the APF and exercise all the powers conferred by the constitution.[6]

- The Forum councillors are responsible for electing a *Chairperson* of the Council. Councillors unanimously elected Dr. Justice A.S. Anand, former Chief Justice of the Supreme Court of India and current Chairperson of the National Human Rights Commission of India, as the present Chairperson of the APF.

- Forum councillors also elect two *Deputy Chairpersons* (currently Justice Khatri, former Chief Justice of the Supreme Court of Nepal and current Chairman of the Nepalese Human

5. http://www.asiapacificforum.net/about/constitution.html

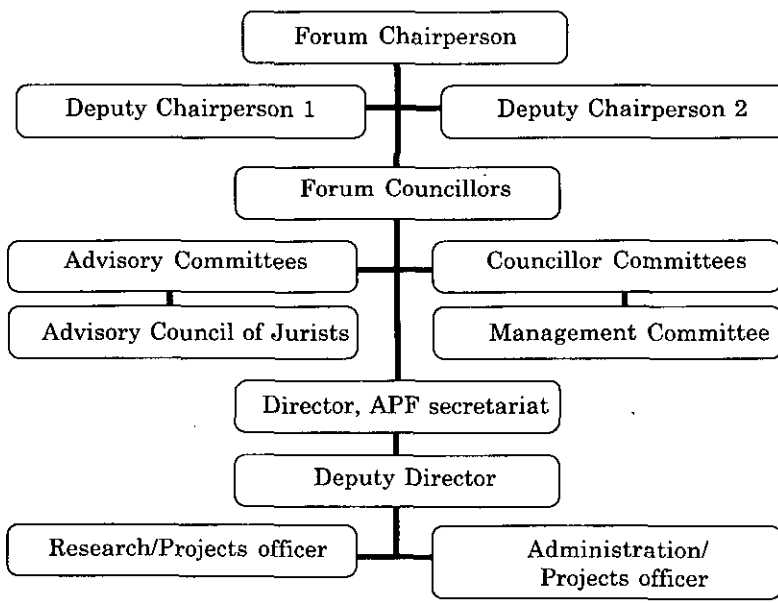
6. Details of the current Forum Councillors can be found at http://www.asiapacificforum.net/about/forum_council.html

Rights Commission and Dr Radhika Coomaraswamy, current Chairperson of the Sri Lankan Human Rights Commission).

- The Forum councillors can establish a number of *committees of councillors*. The structure currently has a *management committee* to oversee the work of the APF.
- The Forum councillors may also decide to establish a number of *advisory committees*. The *Advisory Council of Jurists* falls within this structure.[7]
- The *Director* of the APF secretariat is responsible for implementing the decisions of the Forum councillors and managing the staff of the APF. The Director reports to the Chairperson and Forum Councillors through the management committee. The *secretariat* currently has 3.5 staff.[8]

Below is the diagrammatic view of the organization:

**Figure 1: Structure of Asia Pacific Forum**




7. See http://www.asiapacificforum.net/jurists/jurists.html for further details.
8. See http://www.asiapacificforum.net/about/secretariat.html for further details.

## 3. Activities

In order to meet its objectives, the APF undertakes a wide range of regional activities on human rights. The approach of the APF is to focus on practical outcomes through constructive cooperation and dialogue. The work of the APF can be categorized under three broad areas:

(i) Strengthening the capacity of individual APF members to better enable them to undertake their national mandates.

(ii) Assisting governments to establish their own national institutions in compliance with the minimum criteria contained in the Paris Principles.

(iii) Promoting regional cooperation on human rights issues.

Under these three broad areas the APF's operations have concentrated on the development and delivery of the APF's annual meetings, technical cooperation projects and information dissemination.

### *3.1 Annual Meetings*

The annual meetings of the APF are the largest and most comprehensive regular human rights meeting in the Asia Pacific region. They are a mechanism for the practical advancement of human rights, particularly because they bring together national human rights institutions, the United Nations, governments and NGOs in a harmonious, practical and largely non-political setting. Through this mechanism the APF has demonstrated its role as a catalyst for the mobilisation of technical co-operation funds for human rights initiatives and as a facilitator for the establishment of new national human rights institutions.

The APF held its first annual meeting in Darwin, Australia in July 1996, its second in New Delhi, India in September 1997, its third in Jakarta, Indonesia in September 1998, its fourth in Manila, the Philippines in September 1999, its fifth in Rotorua, New Zealand in August 2000, its sixth in Colombo, Sri Lanka in September 2001 and its seventh in New Delhi, India in November 2002. Each was a considerably larger meeting than the one before, indicating the

strong interest in the Asia Pacific region in the promotion of national human rights institutions. Both New Delhi meetings were opened by the Prime Minister of India, the Jakarta meeting was opened by the President of Indonesia, the Manila meeting was closed by the President of the Philippines, the Rotorua meeting was opened by the Attorney General and Associate Minister of Justice of New Zealand and the Colombo meeting was opened by the Chief Justice of the Sri Lankan Supreme Court.

In 1996 the Darwin meeting set the foundations for the co-operation of national human rights institutions in the region by the establishment of the APF. The meeting agreed to a core set of basic principles by which the APF operates. The Darwin meeting therefore symbolised a new and much needed direction for regional human rights co-operation in the Asia Pacific.

In 1997 the New Delhi meeting reaffirmed the commitment of participants to fundamental human rights principles, including the universality and indivisibility of human rights. The meeting considered that the APF should increase its efforts to promote and implement regional, multilateral and bilateral programs of practical technical assistance. The meeting addressed the issues of national human rights complaints mechanisms and child sex exploitation and decided in principle to establish an international human rights law advisory panel. The Philippines and Sri Lanka Human Rights Commissions were admitted as the APF's fifth and sixth members.

In 1998 the Jakarta meeting focused in particular on economic and social rights, in the context of the economic crisis affecting Asia. It also formally established an Advisory Council of Jurists to assist in developing regional human rights jurisprudence, it agreed to establish a APF web-site and decided to hold a workshop on the theme of *National Institutions and Non-Governmental Organisations: Working in Partnership.*

In 1999 the Manila meeting continued the APF's focus on economic, social and cultural rights together with an undertaking to explore closer engagement with relevant organisations (such as financial institutions and non-state actors). The meeting established a network of focal points on the human rights of women, including the issue of trafficking, within each APF member institution. The

APF also decided to hold a regional workshop on *The Role of National Human Rights Institutions in Advancing the Human Rights of Women,* in Suva, Fiji in May 2000. At the meeting the APF agreed to develop two references on the death penalty and child pornography on the internet for the Advisory Council of Jurists. The Fiji Human Rights Commission was admitted as the APF's seventh member.

In 2000 the Rotorua meeting focussed on international, regional and domestic strategies for the protection and promotion of economic, social and cultural rights. Participants noted that the International Covenant on Economic, Social and Cultural Rights could be used as a 'shield' against the implementation of structural adjustment measures that violate the provisions of the Covenant. The National Human Rights Commission of Nepal was admitted as the APF's eighth member. At the meeting APF members developed a co-ordinated position in preparation for the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.* A highlight of the meeting was the inaugural session of the Advisory Council of Jurists established by the APF at its Third Annual meeting in Jakarta in 1998. The Advisory Council developed reports for the APF's two references on the death penalty and child pornography on the Internet.

In 2001 the Colombo meeting consolidated and built upon the program of practical, co-operative activities developed by the APF to strengthen the functioning and assist in the development of regional national human rights institutions. The meeting was held over four full days beginning with a two day private meeting of its member institutions and the OHCHR which provided an opportunity for extended discussion of the APF's management, its functioning and future needs. During the first two days of the meeting the members of the APF adopted a new Constitution for the APF and admitted the Mongolian Human Rights Commission as the 9th full member of the APF. The second two days of the meeting saw APF members agree on action on a number of important matters including: a commitment to develop a reference on trafficking for the Advisory Council of Jurists; a decision to hold a regional workshop in 2002 on trafficking with a focus on HIV/AIDS, internal displacement and the rights of women. A highlight of the meeting was the official launch of the APF's video

documentary, featuring the work of the national human rights institutions of India, Indonesia and Fiji.

In 2002 the New Delhi meeting focussed on international, regional and domestic strategies for the protection and promotion of trafficked persons – particularly women and children. The national human rights institutions of Malaysia, the Republic of Korea and Thailand were admitted as the APF's 10th, 11th and 12th members. A highlight of the meeting was the second session of the Advisory Council of Jurists which conducted a detailed examination of the issue of trafficking. APF members also reached a coordinated position on the issue of a proposed new United Nations convention on the rights of persons with disabilities.

The Eighth Annual Meeting of the APF was to be held in September 2003 but was postponed due to security concerns. It will now be held in Nepal in February 2004. The agenda for the meeting focuses on the consistency of international human rights law and anti-terrorism measures.[9]

### 3.2 *Technical Cooperation Projects*

These projects are developed in cooperation with partner institutions, governments or civil society. The objectives of technical cooperation are to:

- improve the levels of appropriate skills and knowledge among the staff of national institutions in the region
- enhance national institution structures and procedures in accordance with the Paris Principles to facilitate a more effective system to protect and promote human rights
- provide governments and civil society in the region wishing to establish a national institution with assistance and information to facilitate the development of a national institution in accordance with the Paris Principles.

9. Further details on all these meetings, including the full text of the concluding statements and background papers, can be found on the APF's web-site – http://www.asiapacificforum.net/activities/annual_meetings.htm.

The APF's approach to developing technical cooperation projects is a very practical one. As each member of the APF has developed an extensive reservoir of expertise and experience, in the first instance APF members help and support each other to strengthen human rights observance through the provision of joint training, advice and institutional capacity building programs.

Technical cooperation projects developed within the framework of the APF generally fall into two categories - (i) country-based or bilateral projects and (ii) regional projects.

Country-based or bilateral projects are developed between the APF and a particular institution, government or civil society organization. The nature of these projects tend to be medium to long term technical cooperation activities focused on the development and strengthening of national human rights institutions.

Regional projects tend to be issue-based and short to medium term. These projects are developed by the APF and focus on identified regional areas of common need or concern. For example the APF has run a number of regional workshops focusing on the transfer of practical skills and knowledge. The workshops provide an opportunity for the staff of national institutions to meet at a regional level to exchange information and develop expertise and common standards.

In addition to the workshops the APF runs regional training programs. For example the APF is currently implementing a training program on human rights investigation skills. The APF has also developed and implemented programs for:

- human rights law courses
- strategic planning workshops
- training in alternative dispute resolution
- development of complaints processing systems, and
- strengthening public affairs and information programs.

The APF has implemented technical co-operation country based projects with Bangladesh, China, Fiji, Malaysia, Mongolia,

Papua New Guinea, Republic of Korea, Thailand, Timor-Leste, and Vietnam. The APF has also undertaken assessment missions and developed project designs with the Fiji, Indonesia, Nepal, Philippines and Sri Lanka Commissions.

*3.3 Information Dissemination*

The APF disseminates information on the role and functions of national human rights institutions. The objectives in this area are to:

- improve awareness among political and administrative decision-makers and the wider community of the value and importance of national human rights institutions
- improve awareness among relevant regional governments and agencies of appropriate functions, powers, structures and legislation for national institutions established in accordance with the Paris Principles
- improve awareness among regional national human rights institutions of the legislation, casework, techniques, procedures and outcomes of other national institutions both within and outside the region
- provide information about APF activities to members institutions, governments, United Nations agencies, non-government organizations and the general community.

The APF has established a comprehensive website (www.asiapacificforum.net) and produces a regular newsletter that is distributed throughout the region. In addition the APF has produced a video documentary on the role of national institution in the Asia Pacific region, which has a particular emphasis on the work of the Fiji, Indian and Indonesian Commissions.

**4. Conclusion**

The establishment of the APF has responded to the need for a regional mechanism to promote cooperation and mutual assistance between national human rights institutions.

In the seven years since its establishment, the APF has become

the pre-eminent regional mechanism for the promotion and protection of human rights. As the Asia Pacific region does not have a regional inter-governmental human rights treaty or commission, the APF provides the main framework through which national human rights commissions, governments, the United Nations, NGOs and other organizations can cooperate effectively. Indeed, the United Nations Commission on Human Rights has recognized the valuable role that independent national human rights institutions can make in the Asia Pacific region "... as one of the most important building-blocks necessary..." in the development of regional arrangements for the promotion and protection of human rights.[10]

Through the APF, the national institutions of the region have agreed to cooperate to promote institutional strengthening. This common desire for action on this issue reflects the reality that new or less developed national human rights institutions face common problems, including the lack of human and financial resources and a need for information on international best practices, as well as a need for training and technical assistance. The APF, through the expertise of its individual member institutions, is therefore playing an important role in assisting these new national human rights institutions.

The APF opens up important new avenues to advance human rights protection in the region in a constructive and co-operative environment. It provides a framework of regional co-operation to develop practical programs that aim to genuinely improve the enjoyment of human rights by individuals and vulnerable groups in the region. The level of interest from other countries in the region indicates that the APF can expect its membership to continue to increase significantly, promoting an effective and positive regional co-operative effort in support of human rights.

10 www.unhchr.ch/html/menu2/2/chr.htm

*Journal of the NHRC*, Volume 2, 2003, 190-193

# Book Review

K. Gopal Iyer: *Migrant Labour and Human Rights in India* (New Delhi, Kanishka, 2003) Rs.995 pp. 1-XIV and 1-482 including annexures and index.

People migrate; but human rights do not migrate with them. From such migration, cultural diversity is born – but not without inviting hostility, discrimination, unequal treatment, insecurity, anger, frustration, despair and atrocity. International migration battles against huge immigration walls, racism, refugee creation and the politics of old biases pressurizing new beginnings. Human rights dispensations seek to mellow immigration regimes with humanity and fight racist backlashes. Internal or inter-state migration produces social conundrums of no lesser – and more often than not greater – intensity. However, the problems of migration within nation states, especially those of poor workers, tend to be neglected. The 'nation-state' is one of the most powerful creations of political history. Within its fold, much remains congealed - until social, political and legal forces challenge its ignominies that evade detection from the discipline of justice.

This book is solely concerned with the migration of workers within India. Who are these migrants? If Judge H.U. Mahida judgment in the Best Bakery case is to be believed, the bane of India's problems are rural-to-urban migrations which create urban congestion, overcrowding, hate, riots and violence. So, what is the solution? Returning workers back to where they came from? Even if such a solution is implied by the judge, that would be as absurd as it is impractical. India cannot be divided into 'no-go zones' into which migration is prohibited, despite and irrespective of what the privileged urban interests or rural antipathies may want. On this, Article 15 of the Constitution (which prohibits discrimination only on grounds of religion, caste, sex, place of birth or any of them) is crystal clear. Similarly, Article 16 outlaws discrimination in respect of equal opportunities to public employment on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. India is one. Except within sensitized security zones, labour and commerce can move freely throughout the nation without fear

of favour or disfavour. But this is on paper. Paper laws – no less constitutional protections as any other - provide only paper protections. Ground realities suggest otherwise - portraying discrimination and cruelties which march hand in hand with the migration of the poor. These become the 'real' law of the land that actually governs the day-to-day lives of people as they live it.

Preoccupied with overcrowding cities, rural-to-rural migrations have been ignored. Suneet Chopra's essay (Chapter 19) is more than forthright in exposing this unjust neglect. Agricultural migration takes place due to the struggle for sheer survival not general self betterment (Jan Breman: Chapter 15). Once migrated, the migrants are in the clutches of feudal landlords – as in the case of West Champaran (K.Gopal Iyer: Chapter 8). It is rare that such labour receives fair wages (cf. S.R. Ahlawat: Chapter 14). No doubt in some cases migratory remittances strengthen the original home base (Uma Rani and Shylendra: Chapter 16) but not without creating distress conditions in that home base for those left behind – especially the women (Archana Roy Chapter 7; and note Leela Gulati's sensitive study of Kerala households on the role of the 'left-behind' women – even in higher profile international migrations to the Gulf which is not in this volume). Whatever their limited, incidental, partial and marginal successes, intra-rural migrations wreck home bases and leave women vulnerable without obviating cruel inequities in the host area in which landlordism, caste and regional prejudice terrorize the rural migrant into low wages, exploitation and atrocity. Rural-to-rural migration consists of over 50% of India's population and is neglected by lack of state legislation and non application of industrial justice machinery. Such workers are thrown to the social winds without protection or reserve. They live – amidst danger even to their lives. Sometimes – but not always – they are able to repatriate more than marginal returns. Beyond that, they are defenceless.

The rural-to-urban migrations conjure disturbing images whether for the textile or garments trade (A.S. Ahluwalia: Chapter 11; A.S. Sidhu Chapter 20) or to sell vegetables in Ludhiana (M.S. Sidhu Chapter 12) or as head load workers (Chandrasekher : Chapter 13) or to the sugar industry (Kishan Chand: Chapter 21) or to smaller scale steel plants (Amitabh Kundu Chapter 10). The end results may be different. Some migrants may be better treated than other migrant works in other comparable or non-comparable locations (see Kundu; Ahlawat supra). But, by and large, the basic

condition of life for migrant workers are terrible (M.S. Sidhu) – amidst deprivations, vulnerability, injury and death (Chandrasekher).

Contrary to their demonic reputation that migrant workers show greater criminal tendencies than their local counterparts, they, generally, tend to be more law abiding – with a lesser crime rate, even though accused of kidnapping, rape and murder (S.V. Singh and G. Yadav: Chapter 17; and K.P. Singh: Chapter 18). Agricultural migrants are less likely to commit crimes than domestic servants or factory worker migrants. Their reputation precedes them. Bias crosses the gap to reinforce preemptively determined but unjustified reputations. Except for some industries, migrants are paid unequally and living in conditions of penury - twice cursed by bad working conditions and deprivation in their home base. They move because they have to and must – to survive.

Although migrant workers are a distinct class, they are not protected as a class. No formula has been devised to give them special protection. To the extent to which they are entitled under the Minimum Wages Act, they will get protection under Section 13 of the Inter State Migration Act 1979 (ISM Act 1979). But such legislation does not cover the bulk of the rural migrants. Likewise the scope of the contract labour legislation of 1970 is limited. Migrants are protected from contractor raj by the ISM Act of 1979 but insufficiently so. In any event, a disastrous decision of the Supreme Court in the Steel Authority case (2001) 7 SCC 1 countenances the abolition of contract labour but not the absorption of those workers into permanent employment. The Bonded Labour (Abolition) Act 1976 has limited efficacy.

The Inter-State Migration Act 1979 is an insufficient framework to cover all migrants. But, it is not without potential. Section 13 of the Act needs elaboration and implementation - possibly amendment to ensure equal and fair wages. The industrial dispute machinery is onerous and crippling for migrants. It is imperative that welfare machinery, a suitable pro-active complaints and oversight machinery and appropriate support systems have to be added to this relevant but outmoded Act which has to be put in a new framework.

If the human rights dispensation is to be worked out, there is a need for two clear initiatives. The first objective must be to move towards creating social security for workers – especially agricultural

workers. While Kerala and Tripura have enacted legislation for the agricultural worker (since 1974) and Maharashtra has created an employment guarantee scheme from 1979, the plight of the agricultural worker remains impaired throughout India with no structure, or processes to ensure a fair wage criteria.

The second policy objective should be to ensure anti-discrimination legislation with equal pay beyond the narrow parameters of the existing equal pay legislation. In England, America and elsewhere, there is a strong statutory framework to deal with race and sex discrimination – especially in the area of employment. India needs to think through such legislation so that the four corners of the republic are fully and fairly available to all – especially the poorest of the poor who move as an act of survival to suffer humiliation, exploitation and despair. So, the ISM Act of 1979 needs re-examination.

In all this, the National Human Rights Commission (NHRC), which sponsored this insightful anthology, has a further role to play. Firstly, it must set up a wide ranging review of the ISM Act 1979 and associated legislation and their working. Secondly, it must set up its own oversight machinery as part of a cell on socio-economic rights. Thirdly, this book should be taken as a preliminary initiative to inaugurate annual and special publications based on empirical examination, and suggesting remedial measures (eventually resulting in reports to the nation and parliament). The distinction between publication and formal reports is important because the latter cannot enter the public domain until laid before parliament. It is through publicatory exposure that much can be brought to light, and remedied. Fourthly, there is a need for a National Migrant Labour Commissioner or Commission as an administrative and, later, statutory mechanism for oversight and enabling machinery.

Human rights are not limited to claims against the state; but to ensure just, fair and humane treatment amongst people. There is much in Indian society that is gratuitously cruel and indefensibly unfair. India still has to confront and discipline disturbing areas of *indifference, hostility and cruelty which terrorize the social* landscape and are an embarrassment to just human endeavour.

This book is a reminder of the unfinished agenda which is yet to begin.

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# Book Review

Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India*, (Oxford University Press, New Delhi, 2002) pp XV+ 382, Rs 495 ISBN019566116-8

This is a much reviewed and praised book and the author deserves to be complimented for selecting a challenging research theme. The goal the young author sets for himself is formidable as he hopes not only to advance theory but also to provide "a way to peace" in India and beyond. For this reason, a reviewer should interrogate his claims and conclusions closely because they have tremendous implications for the lives of millions of individuals and numerous groups.

I shall start with a few brief comments on the crucial concept of ethnic group and the research design of the book. The term "ethnic" as defined by Donald Horowitz[1] includes all ascriptive group identities and the author accepts it (pp 4-5). This means all inter-nation, inter-regional, inter-generational, inter-gender, and of course inter-religious, inter-tribal, inter-caste conflicts are "ethnic conflicts". By this sleight of hand the author perhaps want to enhance the range of applicability of his findings and conclusions. But this umbrella use of the notion of ethnic group is a liability and not an asset.

Terms and concepts arise out of specific historical experiences and contexts. The term "communal" crystallized in the Indian Subcontinent during British colonialism and it refers to identities of religious communities. There have been communal conflicts, communal representations, communal awards and the like. In the Indian subcontinent communal and national are juxtaposed; communal is negative and pejorative, national is positive and commands approbation. And, partition of the sub-continent instantly rendered all religious communities other than Hindus in India minorities. Conversely, all religious communities other than

Muslims are minorities in Bangladesh and Pakistan. Therefore 'communal conflicts' in the subcontinent is a confrontation between 'nationals' who are perceived as legitimate insiders and 'communals' who are stigmatized 'outsiders'. These renditions of the words "national" and "communal" have tremendous significance for understanding the texture of communal violence in India.

However, the term ethnic is of crucial importance in the 'New World' because it consists of settlement societies, products of immigration and conquest. Ethnicity is an identity and a socio-cultural resource to press for citizenship entitlements in the countries of the New World. That is, ethnicity is a product of dissociation between territory and culture. Further, the majority-minority juxtaposition is invalid, in the US for example, because all are minorities, including the White Anglo-Saxon Protestants (WASP), the dominant group. Similarly, the distinction between insiders and outsiders too is insignificant because except the microscopic and marginalized minority of 'Natives' all are 'outsiders'.

While the religious minorities of the Indian sub-continent are in their ancestral homeland, they are subjected to a process of "ethnifocation" by defining them as outsiders. The 'communal minorities' of the Indian subcontinent are national minorities and to treat them as 'ethnic minorities' is to endorse, even if unwittingly, the 'evil designs' of the religious majorities. For these reasons to conflate the notions of communal and ethnic groups is a fatal error. Varshney and his reviewers so far, are impervious to this vital fact.

Methodologically this book is innovative in that it employs an experimental design; it compares three pairs of urban centres. Of the six urban settlements compared three are afflicted by recurring communal violence and communal peace persists in the other three. "But India's Hindu-Muslim violence in city-specific" (p. 7) and Rural India is largely exempt from communal violence, admits Varshney. If so, the natural setting for comparison ought to have been localities situated on a rural-urban continuum because as one moves from rural to urban communities one should expect communal violence to increase gradually. But such a research design

would have undermined the suggested causal link because there are peaceful urban centres too.

In Indian rural settings everyday engagements keep peace but "...associational engagement is a sturdier bulwark of peace" (p.50) in the case of cities. Alas! associational engagements hardly exists in Indian villages. Therefore, the capital role assigned to civil society as the agency of communal peace by the author is not a crucial and/or universal causal factor, but is determined by the property of the situation. In pre-industrial urban settings where everyday engagements prevailed there would be communal peace, but in industrial-urban settings characterized by anonymity and impersonality communal violence can easily trigger off. That is, relevance of associational engagement for communal peace is determined by the texture of social structure be it an urban or rural community.

Eight urban centres with five percent of India's total population and 18% of India's urban population account for 50% of India's communal violence. This being so case studies of these eight urban centres would have been more suitable to unfold the causal link between communal violence and the specific characteristics of these sites of violence as the author is wanting to focus on specificities of localities. Further, proliferation of associations is largely, although not exclusively, a function of the size of urban centres and their administrative status. Thus provincial capital cities like Lucknow, Hyderabad and Ahmedabad studied by the author, have the possibility of more inter-communal civic associations and yet only the former has enduring peace and the latter two are riot-prone. Once again the causal link between civic engagement and communal peace seems to be tenuous.

Varshney endorses the notion of 'institutionalized riot system', suggested by Paul Brass[2]. But such a system is possible only when the representatives of state — members of legislatures, police and bureaucrats — collaborate with civil society agencies and criminals. If so a comparison between those urban centres in which the "riot system" is institutionalized and those in which institutionalized peace system prevails would have been a more rewarding exercise. But then, the state will have to be a major player in this schema(see below)

At least five neighbourhoods — two Hindu dominated, two Muslim dominated (one violent and one peaceful each) and one or two mixed neighbourhoods were studied (p.19) in each city. That is, the units of analysis are not peaceful or riot-prone cities but such neighbourhoods. Two methodological implications may be noted here. One, we have to assume that violence is a micro-level phenomenon and it occurs independent of regional history and past memory. But often violence is inflicted on a community to settle the past mistakes committed by some distant ancestors. Second, everyday civic engagements are more common at the neighbourhood level. The neighbourhood peace committees are ephemeral and disappear when violence ceases. But durable associational civic engagements often envelop an urban centre as a whole or it's substantial part, depending upon the population size. That is, there is a mismatch between the actual sites of violence, that is city neighbourhoods, and the sites of associational engagement which are taken to be the real bulwark against riots.

Varshney identifies four traditions of enquiry in social science which attempt to explain "ethnic violence". These are essentialism, instrumentalism, constructivism and institutionalism. "Civil society is the missing variable in all available traditions of enquiry" (p.39). Therefore he propounds a fifth tradition linking civil society and ethnic conflict. But as I have noted above associational engagements are rarely institutionalized at the neighbourhood level which are the real sites of communal violence thereby putting Varshney's argument in jeopardy. I am persuaded to make these methodological comments because Varshney makes tall claims about the methodology he uses in the book.

Varshney begins his substantive analysis by referring to three master narratives in Indian politics in the twentieth century. These are secular nationalism which is inclusionary, religious nationalism which is exclusionary and the caste narrative which focuses on the hierarchical and unjust nature of the Hindu social order. He suggests that secular nationalism and caste narrative moderates communal violence but religious nationalism aggravates it. However, there is no consensus even with regard to these labels. Thus secular nationalists are accused of appeasing religious minorities, particularly Muslims and literally labeled as "pseudo-secularists"

who endanger the Indian nation! The two main versions of religious nationalism are Hindu and Muslim; Hindu nationalists are characterized as fascists and communalists by secularists and Muslim nationalists are stigmatized as fundamentalists by Hindu nationalists. Those who indulge in caste narrative are accused of dividing "Hindu society" and straying into the hands of Muslims and Christians. Therefore, to link one or another master narrative with communal violence is problematic. Intentionality of self-labeling and consequentiality of labeling by others do not always match.

The inter-communal civic structures crystallized in all the six urban centres analyzed in the book during 1920s and 1930s, which seems to be an all-India pattern as the anti-colonial movement which fought a common external enemy, the British, was at its peak. But by late 1930s and 1940s the narratives of religious nationalism intensified and climaxed in partition. Understandably these macro processes and master narratives enveloped the entire subcontinent, local variations apart. In explaining communal violence Varshney suggests that the local specificities are crucial. Thus in Aligarh the narrative of religious nationalism gained currency leading to the intensification of Hindu-Muslim conflicts. In contrast, in Calicut caste narrative which highlighted injustice within the Hindu society gained currency and consequently the Hindu-Muslim differences have been moderated, averting communal violence according to Varshney.

However this is only part of the story. Other relevant factors which are <u>not</u> taken into account are the following. One, Muslims in Aligarh and the rest of North India are perceived to be products of conquest and forceful conversion by the conquerors. In contrast, ancestors of Calicut Muslims came as traders, locally married and settled down. That is, modes of incorporation of Kerala Muslims and those in rest of India drastically varied. Two, north Indian Muslims were/are held responsible for the vivisection of Bharatmata. But such an accusation is irrelevant in the case of South Indian Muslims. Three, Aligarh Muslim University (AMU) was not only socially and culturally insulated but it was also recognised as the epi-centre of Muslim communalism and the brain behind the two-nation theory. There was nothing comparable to AMU in Calicut.

Having compared the two urban centres — Calicut and Aligarh — Varshney suggests that Calicut's communalism could be construed as "good" in that the Muslims focused on their socio-economic improvement through bargaining with the state and other religious communities. In contrast, Aligarh's communalism is "bad" because it was geared to create a Muslim sovereign state. However, these characterizations could be and in fact are hotly contested as I have noted above.

At any rate we need to go beyond opinions and get into an analytical mode to deconstruct the complex phenomenon of communalism. Elsewhere I have identified[3] different types of communalism which can be placed on a continuum constituting a hierarchy of threat to state and society. Thus on the one end of this continuum is secessionist communalism which conceives a religious community as a political entity and hence a nation deserving its own sovereign state, the Aligarh variety, posing the greatest threat to the state. On the other end of the continuum is, assimilationist communalism which pursues the project of monoculturalism which poses the greatest threat to multicultural societies. In between there are at least four other types: welfarist communalism, the Calicut variety; Separatist communalism which demand politico-administrative units for religious communities, but within the existing sovereign state; retreatist communalism which coerces religious collectivities to withdraw from active public life; and retaliatory communalism manifesting in communal riots. Varshney deals only with retaliatory communalism without situating it vis-à-vis the other types.

The second pair of urban centres compared in the book is Lucknow and Hyderabad. Lucknow is peaceful for two reasons according to the author. First, the intense intra-Muslim sectarian Shia-Sunni conflict promotes Hindu-Muslim amity via political co-operation between Shia Muslims and Hindus. Second, the interlinkage between Hindu traders/entrepreneurs and Muslim workers in Chikan industry. But neither of these crystallize as associational engagements although chikan industry provides ample opportunity for everyday engagement between Hindus and Muslims. That is, even as associational engagements are largely absent, peace prevails in Lucknow.

In Hyderabad there is considerable integration among the elites, Hindus and Muslims. The new prosperity of Muslims thanks to large-scale migration to Gulf countries increase the size of Muslim elite. Further, the Muslim elites of Hyderabad live in the new parts of the city. All these augment the potentiality of greater inter-communal associational civic engagement. And yet, Hyderabad was/is torn asunder by riots. Why? The data provided by Varshney reveal that in Hyderabad riots occur in the old city. That is, when religious communities are physically and socially segregated the possibility of communal violence increases. If so, the clue to understand the occurrence of riots is not the absence of inter-communal associational engagement but ghettoisation.

Ghettoisation also prompted the formation of an exclusive Muslim political party — the Majlis-e-Ittehadul Muslimeen (MIM) and a Muslim enclave from which Muslim candidates could be elected regularly to different levels of the political structure — Parliament, State Assembly, Municipal Corporation. Hindu nationalists responded in the same coin by strengthening their organizational base and ideological appeal. This provided the requisite political clout both to Muslims and Hindus to retaliate through riots as and when the situation warranted.

The third pair of urban centres compared are Ahmedabad and Surat, the first riot-prone; the second peaceful. However till 1969 Ahmedabad too was a peaceful city when the most massive Hindu-Muslim riot between 1950 and 1995 struck the city. Varshney lists three main reasons for communal harmony in Ahmedabad. These are (1) the influence of the Congress Party which brought together communities under a common political platform; (2) the influence of an array of Gandhian social and political institutions to initiate social transformation and to undertake social reconstruction; (3) the effective functioning of business associations, labour unions, co-operatives and professional associations. But yet the possibility of civic engagement, particularly associational engagement, was limited because of ghettoisation; Muslims lived in the walled city and Hindus lived outside this area.

In contrast in the old part of the city of Surat the Hindus and Muslims are well-knit through economic links and are not willing

to wreck it for political gains. Varshney reports that most riots in Surat, if and when occurred, took place in the newly emerged shanty towns wherein the inhabitants are segregated on religious, caste, linguistic or tribal bases. Once again, ghettoisation seems to be providing the clue to understand communal riots. However, de-ghettoisation is a necessary but not a sufficient condition for inter-communal harmony.

Varshney's obsession with the potentiality of civil society to deliver peace is such that he writes: "A more powerful state in India is likely to make the country more vulnerable to ethnic warfare, not less" (p.286). Conversely, he could also state: weaker the Indian state greater is the prospect for ethnic peace! To begin with it may be noted that the juxtaposition between powerful and weak, or hard and soft state is misplaced in this context. What is required is a just state whose arbitrations are accepted as impartial and final by the citizens of all communities. In a paradoxical sense Varshney is right in that the state in Gujarat was "powerful" in 2002 and hence the carnage that had happened! But it would not have happened if the state, that is its legislature and executive, were impartial and if its criminal justice system were impeccable, the eroded faith in the state would have been restored.

This brings me to the last comment. The author is making a fatal error when he insists that inter-communal civic-engagements is all that is required for communal peace to endure. Admittedly, it is a necessary condition. But the sufficient condition for durable communal peace would require an impartial and just democratic state operating as a final arbiter between the confronting communities in conjunction with a robust civil society.

Let me conclude by noting that Kenneth Gillion[4] wrote in 1968: "The most tragic problem of modern Indian political history — the communal problem — has fortunately had only a small role in the history of Ahmedabad" (p.171). But the abominable communal riot of Ahmedabad in the following year i.e. 1969, rendered this observation ludicrous. The great confidence that Ashutosh Varshney reposes on inter-communal civic engagement for maintaining communal peace ignoring the role of the state in his book published in 2002, should shatter all of us after the communal carnage in

Gujarat in the same year. How true is the last sentence of his text: "Much remains to be learned". (p.300)

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