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PREFACE

The Commission has been engaged in "spreading 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" and has been conducting training programmes, seminars and workshops apart from circulation of newsletters and special reports. In 2002, the Commission started an Annual Journal to facilitate sharing of ideas, experiences and information on human rights issues, both national and international. By facilitating research and publication, the Commission sought to create an important platform for building a body of high quality scholarship on human rights and a community of human rights scholars.

Keeping in view the inextricable links between violence and human rights, the Commission decided that the Journal for 2008 would focus on various dimensions of violence. In addition to articles on this main theme, the Commission has also decided to include a few general articles on 'poverty' and 'constitutionalism'.

As has been the practice, there is a separate section on important statements/ decisions/ opinions of the Commission in 2008. The year 2008 has witnessed a flurry of activity in the Commission. These include national conferences on "Relief and Rehabilitation of Displaced Persons", "Right to education", "Human Rights and Mental Health", workshop on Detention and regional workshops on "Rights of Persons with Disability". Based on deliberations in these conferences and workshops, the Commission has made concrete recommendations.

I sincerely hope that the NHRC's Journal for 2008 will stimulate thinking and research and also spread awareness about Human Rights issues.

24th November, 2008

Justice S. Rajendra Babu
(Former Chief Justice of India)

SECRETARY GENERAL
NHRC

From the Editor's Desk

The National Human Rights Commission's Journal which started in the year 2002 has generated a great deal of interest and debate among the scholars, human rights practitioners and others on several contemporary issues.

The articles from distinguished jurists, academics, senior government officers and others in the last six volumes of the Journal have enriched the human rights discourse and contributed a great deal to the spreading of human rights awareness and in inspiring practical action.

The Commission has been following a careful and detailed process while bringing out its annual Journal. There is an Editorial Board comprising the Chairperson and Members of the Commission with participation from eminent jurists, senior academics. The Board meets every year to deliberate on the broad theme for the Journal, sub-themes and to identify experts who could be requested for contributing articles or for reviewing books. Concurrently, the Secretariat of the Commission works on a section on important statements, orders and proceedings of the Commission.

This year has been a very hectic year for the Commission. A number of national, international and regional conferences, seminars and workshops were organized on important issues. Landmark orders were passed by the Commission in many cases of human rights violations. All these have been reported in the section on important statements/orders of the Commission for the information of the general public.

In 2007, the Commission decided to focus on the theme of globalization and sought articles from eminent experts on the implications of globalization on human rights. The recent events in 2008 including economic meltdown have once again underscored the importance of analysing and understanding implications of globalization on human rights. This year, the Commission has decided to focus on violence and its ramifications on human rights. In addition, a few general articles of importance have also been included.

I hope the Commission's Journal for 2008 would be found useful by all who are concerned with human rights issues. I would also welcome suggestions for improving the quality of the Journal.

(Akhil Kumar Jain)

ARTICLES

Strikes, Bandhs, Chakajam and Human Rights

*Justice D. M. Dharmadhikari**

The present disturbed scenario of India in which the culture of strikes bandhs and Chaka Jam, meaning forced stoppage of all public activities, on various small and big public demands or issues, is becoming a recurring nuisance resulting in serious violation of human rights of the common man.

The strike tactic has a very long history. Towards the end of the 20th dynasty under Pharaoh Ramses III in ancient Egypt in the 12th century BC, the workers of the royal necropolis organized the first known strike or workers' uprising in history. The use of the word "strike" in this sense that it is how understood first appeared in 1768, when sailors, in support of demonstrations in London, "struck" or removed the topgallant sails of merchant ships at port, thus crippling the ship.

Article 19 of the Constitution of India guarantees to every citizen various important human rights as fundamental rights. Every citizen has a fundamental right of "freedom of speech and expression"; "to assemble peaceably and without arms"; "to form associations or unions"; "to move freely throughout the territory of India"; "to reside and settle in any part of the territory of India": " to practice any profession"; or " to carry on any occupation, trade or business".

All the above guaranteed fundamental rights, however are subject to reasonable restrictions which can be imposed by law by the State. Reasonable restrictions on the guaranteed fundamental right of 'speech and expression' can be imposed on the ground of 'security of the State', 'friendly relations with foreign states', 'public order', 'decency or morality' or to avoid 'contempt of court', 'defamation' or 'incitement to an offence'. The fundamental guaranteed right 'to assemble peaceably and without arms' can be restricted by suitable law in the interest of 'sovereignty and integrity of India' and 'public order'.

Similarly, the guaranteed fundamental right 'to form associations or unions' can be restricted by law in the interest of 'sovereignty and integrity of India', 'public order' and 'morality'.

* Chairperson, MP Human Rights Commission, Bhopal

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The present culture of strikes bandhs and chaka-jam has a historical background as these techniques of dissent, protest and resentment was adopted by Indians against the British during the Independence struggle. In the long more than 100 years of struggle for independence in India, non-violent and even violent protests against the foreign ruler were held to be legitimate. It is only during the independence struggle under the leadership of Mahatma Gandhi that insistence was on non-violent agitational methods against British. Gandhiji evolved various techniques of non-violent protests like Satyagraha, Civil Disobedience, boycott of foreign products and goods, non-co-operation with the British Government etc. He had even appealed to the students to give up studies and join the independence struggle. He also led the non-violent labour strike of mill workers in Surat.

In industrial relationship, resort to strike was recognised as a legitimate tool in the hands of workers against their employers and it was held to be a legitimate right of workers for 'collective bargaining'. Violence during strike in industry has always been treated to be an offence which is held to be punishable. The Industrial Disputes Act defines 'strike' to mean – 'a ceastion of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed, to continue to work or accept employment'. Such a strike in a master-servant relationship may take various forms such as 'pen down', 'sit down', 'sympathetic' or 'token hunger strike', 'rally' and 'mass casual leave'. The strike in the Industrial sector is regulated by law and where it is resorted to or continued during pendency of a conciliation or adjudication of industrial dispute, it can be declared illegal by the Labour Court and thereafter the employer is grented liberty to take disciplinary action against the workers who continue the illegal strike.

Outside employer-employee relationship, the question is whether strikes leading to coercion and violence and Bandhs or chakka Jams can be allowed as a legitimate right of protest or public demand to all sections of the people in a democracy. 'Democracy', it is said, does not merely mean government of elected representatives. In real democracy sovereignty vests in the people and therefore peaceful strikes, Dharnas, agitations, demonstrations and in extreme cases organiging peaceful strikes, are the legitimate weapons with unarmed people against their own elected government, more so, in eventualities where a democratically elected government itself becomes a source of people's oppression.

Article 19 of the Constitution does not expressly confer any fundamental right on a citizen or citizens to organize Strikes, Bandhs or Chaka Jams. The question that is being debated in free India in its 60 years of constitutional governance is whether non-violent strikes, demonstrations, dharnas, bandhs and chaka jams can be allowed as a fundamental right of citizens and as part of their guaranteed fundamental freedom of 'speech and expression', 'assemble peaceably and without arms' and 'forming associations or unions'.

As early as 1961, the Supreme Court of India in *Kameshwar Prasad v. State of Bihar*[1] held that even a very liberal interpretation of Article 19 (1) (c) would lead to a conclusion that Trade Unions have a guaranteed fundamental right to 'strike'. Later in *All India Bank Employees Association* case[2], the Supreme Court rejected the contention that right to 'form associations' guaranteed by Article 19(1)(c) carried with it a concomitant right to strike. The Supreme Court held that *"to read each guaranteed right as involving the concomitant right necessary to achieve the object which might be supposed to underlie the grant of each of such rights, for such a concomitant would, by ever expanding circles in the shape of rights concomitant to concomitant right and so on, lead to an almost grotesque result."*

It is now firmly settled by later decisions of the Supreme Court that the right to strike is not a fundamental right. In the case of *T. K. Rangarajan vs. Government of Tamilnadu*[3] -the two-judge bench of the Supreme Court, while pronouncing on legality of the mass strike of government employees in Tamil Nadu, which resulted in almost paralyzing the government, went to the extent of saying that 'there is no legal, moral or equitable right with the government employees to go on strike'.

The decisions in T. K. Rangarajan's case gave rise to a lot of debate and criticism of the views expressed by the Supreme Court. Lawyers, jurists and former judges criticized the decision and sought its review by a larger bench, saying that the right to resort to non-violent strike is a valuable right not only in a industrial or master and servant relationship but is the only legitimate and effective weapon in democracy for people without arms against unjust decisions or actions of the government and its various organs.

The critics contend no doubt that during strikes, others who are not party to it have to suffer and many times right to strike is being misused, but for that reason non-violent strikes cannot be condemned as unethical or immoral.

Critics also say that in the earlier decisions of the Supreme Court in industrial disputes and industrial matters, the right to strike has been recognized in these words;- *"In the struggle between the capital and labour, the weapon of strike is available to labour and is often used, as is the weapon of lock-out available to the employer and can be used by him*[4]

Article 8(1)(d) of the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides that States party to the Covenant shall undertake to ensure:

"The right to strike, provided that it is exercised in conformity with the laws of a particular country".

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1 (1962) Supp 3 SCR 369
2 AIR 1962 SC 171
3 AIR 2003 Vol. 6 SCC 581.
4 1960 II LLJ 275.

India is a signatory to the Covenant and is therefore bound to provide *Right to strike* as enshrined in *Article 8(1) (d) of ICESCR,* through legislative measures or by other appropriate means. Thus the Industrial Disputes Act regulating relationships of management with labour is a democratic law fully in tune with ICESCR. Non-violent strikes in democratic country by various sections of people against the action of government, their departments or wings or limbs should be allowed but such a right needs to be regulated by suitable law in a way as to allow people to adopt non-violent methods of expressing protest, dissent, criticism or opposition to the unjust and illegal acts of those in power and at the same time save common men from being coersed or harassed by the strikers.

BANDHS

The first landmark decision on "strikes" and "bandhs" was that a peaceful strike is held to be legitimate and not unconstitutional, where's bandh is held to be unconstitutional, being a gross violation of human and fundamental rights of others - is of full bench of Kerala High Court in the case of Bharat Kumar K. Palicha v. State of Kerala[5]. The full bench decision of Kerala High Court in the case of Bharat Kumar K. Palicha was affirmed in toto by a shortly worded decision of the Supreme Court in *Communist Party of India (M) v. Bharat Kumar and others*[6]

The full bench judgment of the Kerala High Court as affirmed by the Supreme Court draws a distinction between a "bandh" and 'a call for general strike' or "hartal". The calling for bandh is clearly different from a call for a general strike or hartal.

> A call for a bandh holds out a warning to every citizen that if he were to go out for his work or to open his shop, he would be prevented and his attempt to take his vehicle on the road will also be dealt with. It is true that theoretically it is for the State to control any possible violence or to ensure that a bandh is not accompanied by violence. But in our present set-up the reluctance and sometimes the political subservience of the law-enforcing agencies and the absence of political, will exhibited by those in power at the relevant time, has really led to a situation where there is no effective attempt made by the law-enforcing agencies either to prevent violence or to ensure that those citizens, who do not want to participate in the bandh, are given the opportunity to exercise their right to work, their right to trade or their right to study. The increasing frequency in the calling, holding and enforcing of the bandhs in the State and the destruction of public and private property cannot also be ignored. Thus the plea that the Court cannot presume or generalize that calling of a bandh always entails actual violence or the threat

1 AIR 1997 Kerala 291
2 1998(1) SCC 202

of violence in not participating in or acquiescing in the bandh, would not be tenable.

The concept of a bandh by political parties or organisations can be understood as one where people are expected not to attend to their work or to travel for any purpose or to carry on their trades with a threat held out, either express or implied, that any attempt to go against the call for the bandh would result in danger to life and property. Even if there is no express or implied threat of physical violence to those who are not in sympathy with the bandh, there is clearly a menacing psychological fear instilled into the citizen by a call for a bandh which precludes him from enjoying his fundamental freedoms or exercising his fundamental rights. Therefore, it cannot be said that the calling for a bandh does not involve the holding out of any threat express or implied to the citizen not to carry on his activities or to practice his association on the day of the bandh. The call for a bandh implies a threat to the citizen that any failure on his part to honour the call, would result in either injury to person or injury to property and involves preventing a citizen by instilling into him the psychological fear that if he defies the call for the bandh, he will be dealt with by those who are allegedly supporters of the bandh.

When a citizen is coerced into not attending to his work or prevented from going out for his work or from practicing his profession or carrying on his business, there is involved a violation of his fundamental right at the instance of another. From our understanding of the concept of bandh as set out above, there is such a violation of the rights of the citizen when a bandh is called and held.

It is true that there is no legislative definition of the expression 'bandh' and such a definition could not be tested in the crucible of constitutionality. But does the absence of a definition deprive the citizen of a right to approach the Court to seek relief against the bandh if he is able to establish before the Court that his fundamental rights are curtailed or destroyed by the calling of and the holding of a bandh? When Article 19(1) of the Constitution guarantees to a citizen the fundamental rights referred to therein and when Article 21 confers a right on any person, not necessarily a citizen – not to be deprived of his life or personal liberty except according to procedure established by law, it would not be proper for the Court to throw up its hands in despair on the ground that in the absence of any law curtailing such rights, it cannot test the constitutionality of the action. When properly understood, the calling of a bandh entails the restriction of the free movement of the citizen and his right to carry on his avocation and if the legislature does not make any law either prohibiting it, curtailing it or regulating it, it is the duty of the Court to

step in to protect the rights of the citizens so as to ensure that the freedoms available to him are not curtailed by any person or any political organization".

Thus according to the judgment of full bench of Kerala High Court, which has been affirmed by the Supreme Court, organizing bandh or chakka jams is a serious violation of fundamental and human rights of others who are neither the sponsorers nor active or inactive supporters of the bandh or chaka jams.

As the full bench of the Kerala High Court had not declared a call of general strike to be a unconstitutional or in violation of fundamental / human rights of others not parties to it, a trend seems to have set in which organizations or political parties give a call for strike and in the course of strike force a bandh or a chaka jam on others. Consequently violence and sometimes communal clashes take place.

The recurrence of bandhs under the guise of the call for strike also came up before the Kerala High Court for consideration in the case *Kerala Vyapari Vavasayi Ekopana Samithi, Ottappalam and others vs. State of Kerala.*[7]

The Kerala High Court held that imposing bandh in the course of a strike must be effectively controlled by the State machinery through policeand if necessary by other means. Taking notice of the fact that in the course of hartals and bandhs, people are forced to bring their activities to a complete halt and many times public and private properties are destroyed. the court made the following observations:-

(i) The mere calling of a hartal or the advocating of it as understood in the strict sense, cannot be held to be objectionable. But the moment it comes out of the concept of hartal strictly so-called and seeks to impinge on the rights of others, it ceases to be a hartal in the real sense of the term and really becomes a violent demonstration affecting the rights of others. That facet of it has certainly to be curtailed and can be curtailed by the High Court at the instance of others who have equal constitutional rights, while exercising jurisdiction under Art. 226 of the Constitution. It is clear that what is called and enforced as hartal is not what is meant strictly by that term but a form of bandh involving intimidation and coercion of those who do not want to respond to the call or to participate in it. Hartal is not intended to be a weapon to be resorted to every other day for showing protest but is a weapon that must be rarely used on the occasion of national calamity or issues relating to the safety of the country or the preservation of democracy.

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[1] AIR 2000 KERALA 389

(ii) Inndulging in destruction of public and private property and causing loss of production and holding the society to ransom in the name of staging a hartal cannot be considered to be a constitutional act based on rights conferred by the very Constitution. The expenditure to be incurred by the executive to mobilize sufficient force to meet every hartal call cannot also be ignored. No party or organization can have a right to compel incurring of such non-productive expenditure merely because they feel like calling for a hartal. There is no such freedom in anyone guaranteed by the Constitution.

(iii) Therefore the stand of respondents that they can continue to call for and enforce hartals as part of their right either to demonstrate support or for achievement of their objects, cannot be accepted in that form especially in the context where the enforcement of it or calling of it, involves impairment of the rights of others similarly situated.

(iv) There cannot be any doubt that forcibly compelling an individual or a group of individuals to participate in a general strike or to join a hartal would amount to interference with the rights of those persons equally safeguarded by the Constituion. It is therefore clear that those who call for hartal cannot take shelter behind the plea that hartal was only a legitimate weapon of mass protest and at the same time create an atmosphere of physical and psychological fear so as to compel others to toe the line or to prevent them from exercising their rights.

(v) Further, no political party or organization has a right to create a blockade of municipal office so as to prevent people from going to these offices for attending their business. Even not allowing private vehicles to ply on the roads on the day of hartal by the political party or organisation would also be improper. .

In the same case Kerala High Court also held that where such violent hartals, bandhs or chaka jams are organized by political parties, complaints can be made to the Election Commission of India under Section 29 A(5) of Representation of the Peoples Act and the Election Commission, after affording fair hearing to the affected parties, can take a decision for deregistration or cancellation of registration of that political party or organisation which is found to be guilty. Political parties who send law makers to legislative Bodies should not become law breakers.

To control the menace of violent strikes and all form of bandhs and chaka jams, the Kerala High Court issued the following important directions, amongst others, in the nature of the mandamus:-

(i) We declare that the enforcement of a hartal call by force, intimidation, physical or mental and coercion would amount to an unconstitutional act and a party or association or organisation

that calls for a hartal has no right to enforce it by resorting to force or intimidation.

(ii) We direct the State, Chief Secretary to the State, Director General of Police and all the administrative authorities and police officers in the State to implement strictly the directives issued by the Chief Secretary dt. 6-2-1999 and the directions given by the Director General of Police dt- 4-2-1999 and set out fully in the earlier part of this judgment.

(iii) We issue a writ of mandamus to the Election Commission to entertain complaints, if made, of violation of Section 29A (5) of the Representation of the People Act, 1951 by any of the registered political parties or associations, and after a fair hearing, to take a decision thereon for deregistration or cancellation of registration of that party or organisation, if it is warranted by the circumstances of the case.

(iv) We direct the State of Kerala, the Chief Secretary to the Government, the Director General of Police and all other officers of the State to take all necessary steps at all necessary times, to give effect to this judgment.

(v) We direct the State, District Collectors, all other officers of the State and Corporations owned or controlled by the State to take immediate and prompt action, for recovery of damages in cases where pursuant to a call for hartal, public property or property belonging to the Corporation is damaged or destroyed, from the perpetrators of the acts leading to destruction/ damage and those who have issued the call for hartal.

After the decision of the Supreme Court which affirmed the judgment of the full bench of the Kerala High Court, a five judges bench of the Supreme Court in the case of Ex Capt. Harish Uppal v. Union of India[8] considered the legal issue whether lawyers can resort to strike and if they have such a right what is the nature and extent of the same. The Supreme Court after long hearings given to all concerned parties recorded its conclusion thus:

> *It is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts etc. It is held that lawyers holding vakalats on behalf of their clients cannot not attend courts in pursuance of call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or*

[1] (2003) 2 Supreme Court Cases 45

coercion of any nature including that of expulsion can be held out. It is held that no Bar Counsil or Bar Association can permit calling of a meeting for purpose of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that the courts are under no obligations to adjourn matter because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their board even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a vakalat of a client, abstains from attending court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him.

The afore mentioned decisions of the Kerala High Court and of the Supreme Court and the views considered for and against, as were espoused by various sections of society, lead to a reasonable conclusion that peaceful non-violent strikes, demonstrations and agitations as parts of guaranteed fundamental rights of 'assembling without arms' and 'freedom of speech and expression' are valid. The bandhs and chaka jams, which compel others, not parties to the call, violate the fundamental and human rights guaranteed in the constitution of the non-supporters or those who are not parties to the call. Reasonable restrictions in the public interest can be imposed on such violent strike calls, bandhs or chaka jams. Most often bandhs and chaka jams result in loss of lives and properties of innocent as also seriously hamper daily life of people, who are neither supporters nor sympathizers of the strikers. It is necessary that law should regulate all kinds of strikes and completely ban Bandhs and Chaka jams.

Violent demonstrations, strikes, bandhs and agitations, which were held to be legitimate during freedom struggle are no longer legal and constitutionally permissible in Free India. Despite repeated decisions of Supreme Court that strikes and bandhs, leading to loss of lives and public or private properties are gross violation of the Constitution and the Laws, Bandhs in the garb of call for strikes are being organized in much larger scale and with a frequency never witnessed in the past.

In the recent past, agitation of Gujjars of Rajasthan demanding their inclusion in Schedule Castes led to month-long strike in which human life

was disrupted and railway properties were destroyed. For months railway traffic was disputed causing incalculable and irreparable harm and inconvenience to common men.

The public agitation sponsored by a political party with bandhs in Singur as a protest against acquisition of land by Tata Company also resulted in use of firearms by the Police and consequent loss of human life, as also of livelihood and survival of poor people and farmers.

The strikes and Bandhs called in Jammu in support of demand of land for shelter of Amarnath Pilgrims and counterstrike and agitation in Kashmir against proposal of Government to hand over land to Amarnath Shrine, seriously paralyzed life for many days both in Jammu and in Kashmir. The two counterstrikes and agitations in Jammu and Kashmir gave rise to communal disharmony. A reactionarys call of strike in Madhya Pradesh led to communal violence in Indore, in which many lost their lives and properties.

A survey conducted by Hindustan Times to ascertain the views of common man on the right to strike and organizing bandhs and chakka jams shows 78% people were against bandhs and over 80% opposed political parties or religious institutions organizing bandh. A sample random survey of about 1031 people, revealed that half of women from 9 cities in Rajasthan, Punjab, Haryana, Delhi and North Central Region and three out of 4 people want a legal ban on bandhs and eight out of 10 favour severe punishment or hefty fines for the ringleaders of mob violence. 62 percent of the people say the bandh organizers should foot the bill or suffer punishment. Only 55% of the people expressed the view that in extreme circumstances, when civil liberties are suppressed or where land and property is forcibly acquired, bandh may be held to be legitimate. It is significant that most of people are against police firing and only 9% support shoot-at-sight order for arsonists. Those who believe that bandhs are justified are meagerly 15%. Another 10% preferred voluntary participation. 95% people said that political parties organize bandhs for narrow sectarian gains and for personal profits.

The heartening result of the social survey is that majority of people affirm citizens' activism minus the violence and trouble. Civil disobedience and peaceful dharnas, rallies and lighting of candles have the support of 60%. Another 3%, in which 19% would choose 'gheras' – only 11% prefer violent confrontation, if the agitators are victims of injustice.

Opinion is divided on, which section suffers the most but more respondents think that the bandhs hit the poor people, labourers and street vendors than the big and medium enterprises or the middle class, students and housewives.

From a constitutional prospective, the basic question is what should be the permissible legal method of protests in democracy, because protest is dissent and opposition to the acts and policies of those in power. It is a part of democratic process. Democracy is meaningful only if people have participation in the governance.

As the Supreme Court in a 1998 verdict has upheld the full bench Kerala High Court ruling declaring bandhs illegal and made it applicable to the entire country, political parties are trying to get over the verdict by declaring hartal instead of calling a bandh but they virtually thereby paralyze the daily life of people and the transport systems.

Bandhs and hartals were powerful means of protests during colonial rule. Mahatma Gandhi used non-violent hartals as a powerful weapon against British rule, but every form of violence must be seen to be illegal in a constitutional democracy, which guarantees 'freedom of speech and expression' as also 'rule of law'. All objectionable forms of protest in a democracy by people have to be distinguished from the right to peaceful strike, which is always recognized to be a permissible and legal means of workers to negotiate terms with their employers.

Despite the decision of Supreme Court that violent strikes and all forms of bandhs and chaka jams are unconstitutional and violative of human rights of others, Political parties with impunity are violating the Court orders. The Apex Court has been compelled to invoke contempt of power against the highest government functionaries in Tamil Nadu. Disregarding the decisions of the Supreme Court that the lawyers, being professionals engaged on contract by their clients under the rules of their profession and being officers of court, have no right to strike in a manner to deprive people access to courts, on minor issues arising inside and outside courts, the lawyers go on strike and paralyze the working of the courts. Law facilitators are thus becoming law violators.

Violent strikes, bandhs and chaka jams cannot be allowed to be organized to adversely affect the human rights of those who are not parties to it or supporting them.

To enforce the law laid down by the Supreme Court on violent strikes, bandhs and chaka jams the following suggestions need serious consideration:-

(1) A call for non-violent strike, if results in bandh or chaka Jam and in the course there of people are hurt or their lives are lost and private or public properties are destroyed, criminal cases should be instituted against the organizers of the bandhs. Those indulging in criminal activities during bandhs should be fined to be recovered coercively on the spot. Criminal cases under penal code be registered against those found to be the offenders.

(2) Political parties or organizers who organize such illegal bandhs should be made to pay compensation for injuries and loss of human life and private or public properties.

(3) An effective remedy to common men of approaching a specially constituted judicial or quasi-judicial body should be provided, where the victims of such illegal strikes, bandhs or chaka jams may approach for seeking early redressal and payment of compensation for the loss they sustain as also to take penal action against the offenders.

(4) A separate comprehensive legislation, in the light of decisions of Supreme Court on the subject, is a felt necessity to ensure holding of peaceful strikes and controlling completely bandhs and chaka jams.

The Scenario of Human Rights, Violence and Terrorism in India

*Justice S.R.Nayak**

Today, sovereignty of nations and Human Rights of the people are violated leading to tension and conflicts between nations and amongst the peoples of the world. Presently the nations as well as individuals are very much concerned with the problems of human rights and consequences arising from their violation. Today peace and security of mankind is in danger, and Human Rights are violated all over the world incessantly and with impunity. If there is one single ideology widely accepted round the world today, it is the concept and ideology of human rights. Out of the traumatic experience and shock of the dark days of the two world wars in the first half of the last century, when human dignity stood compromised as never before in human history, was born the Human Rights movement. In the last 60 years, Human Rights have become, at least in the free and Democratic world, a live and vibrant issue. Various developments connected therewith are, indeed, gratifying on the path of human development.

Ever since the UN General Assembly adopted the Universal Declaration on Human Rights in 1948 and declared "all human beings are born free and equal in dignity and rights" and "everyone is entitled to rights and freedoms without distinction of any kind..." the concern for human rights has assumed global dimensions. Its significance has pervaded every inter-State, intra-State political relations and diplomacy. It has been a subject of discussion in almost all national and international conferences, discourses, deliberations, negotiations and transactions. It has been a subject of interpretation in every religious, political, social and economic ideology. It has been a subject of study in all academic disciplines.

Awareness to protect human rights has grown to such an extent that today it is being used as a yardstick to measure the civilization of societies, states, regimes and positive laws. It is being used as a criterion for making value judgments, both by individuals and governments. It is being used as limitations on the governments and authorities. It is being used as a vehicle of development in every international monetary and humanitarian aid.

* Chairperson, Karnataka State Human Rights Commission

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History is now spoken and written in the language of human rights- the rights protected and guaranteed.

The concept of human rights represents an attempt to protect individuals from oppression, exploitation and injustices. They provide certain standards to achieve human goals for all the people and all the nations. The human rights movement has been exercising profound influence among the world community. The inherent dignity of the human being is regardless of his nationality or political status. There is a universality about human rights which make them a common concern of all the people world over. Such concern on the part of the people and the activist role of the enlightened alone can save and protect human rights, check abuse of power and prevent violation of human rights.

The primitive man had no notion of human rights or fundamental rights though he enjoyed limitless and absolute freedoms. human rights are essentially a product of democracy. Rousseau said: " All men are born free but everywhere they are in chains" and I think, it is due to socio-economic, political imbalances caused by the ruling elite. The casualty is the rampant human rights violations everywhere, particularly, those of disabled, marginalized people, children and women irrespective of the kind of political outfit of any country. Therefore, it is the bounden-duty of the States to strive for protecting the human rights of all. The States should direct the 'Rule of Law' as a dynamic, refined tool of social engineering to realize the goal. The States' actions must be people-oriented and supportive of human rights and human justice. In other words, the modern welfare States in the first instance must be the campaigners for the lowly, the lost and the last. Similarly, the Human Rights Commission established to protect human rights of the people must assume the role of vocal critics of grosser injustice against the manacled, the marginalized and the alienated, who often are the voiceless victims of disguised authoritarianism. Humanism is the soul of justice. Therefore, no cause is more worthy than the cause of human rights. They are the essence of man. They are what make man human. In a democracy, the true conception of the administration is that " the least concern of the least person is of the highest consideration of the State".

Therefore, the votaries of human rights at the national and international levels must understand and remove the thorns and obstacles on the way to peace and well being of the mankind. When the majority are poor and inequality prevails, conflict arises leading to violence. When people clash, human rights are often times the first casualties. This situation intensifies the conflict and violence escalates. To enforce the people's right to peace, social pressure is required to bring about social justice and equality, to enlarge democratic space to deepen its roots, to resolve through democratic debate and peaceful avenues. Today, in one world, we witness many worlds, many societies, innumerable contrasts and conflicts brought about by vested and greedy, domineering regimes amongst the nations as well as by such

Ruling elite within the nations. Artificial fissures are deliberately created and sustained by such vested interests to sub-serve their ends resulting in gross human rights violations. Distrust and hatred pervade the fabric of international relations, and the warring groups tend to stupidly seek solace beneath the destructive armaments- conventional and nuclear. There is trauma and tension; peace eludes mankind. Hunger, misery, exploitation leading to deprivation in a massive and intensive scale, have created an explosive situation. Unless mass poverty and macro-hunger are eliminated, self-respect and human dignity is assured to the constituents of the mankind, the disturbing situation we notice today may outburst with a leonine roar. It appears that modern States have no mind in that direction. On the other hand, the escalation of the arms race and the consequent cutbacks on social services and programmes inevitably lead to chronic mass unemployment, aggravation of social inequality and discrimination, the emergence of millions and millions of poor and homeless destitutes every year. Therefore, it is quite clear that only by establishing a dependable system of international security and peace by technique of distributive justice, the world would be able to eliminate the danger threatening the most essential human right- ' the right to live' without which all other civil and political rights will be meaningless and are of dead-letter. The very right to be human is possible only if essentials of existence, material and moral, are preserved and provided to every human being thereby creating tension-free and violence-free society. In order to do that the world and the States should prevent the emergence of greedy robbers and grabbers and the weak and meek who live and die in neglect, starvation or slavery.

The indiscriminate use of violence to achieve political objectives terrorism, on the face of it and in terms of its definition, undeniably involves human rights violations. Today, nations as well as individuals are very concerned with and threatened by the problems of terrorism, internal insurgency, communalism and religious bigotry. In fact, terrorism today poses the greatest threat to human rights and dignity. It also poses a threat to democratic governments and undermines the basis of nationhood. Although violence in politics and terrorism are not new phenomena, today, it has obtained a different character and presents many extraordinary challenges to the modern states. This, notwithstanding, the global response to terrorism, in general, has been feeble.

Since the last two decades the world has been witnessing large-scale violence and terrorism both at the national and international level. Many a time the efforts taken by governments and the international organizations such as UN and other apex bodies and humanitarian organizations have not brought sufficient and the needed results. In the Third World countries, violence has become the order of the day. Millions of people have lost their homes, lives, properties due to cross-border terrorism. In many parts of Asia, terrorism has spoiled the very nature of human beings and society. Acts of terrorism are on an unprecedented increase in recent times. Global

terrorism has become a grave challenge to mankind and civilization. States individually and the international community collectively are devising methods to deal effectively with the menace of terrorism. There is no internationally acceptable common definition of 'terrorism'. The international community so far has failed to agree upon an acceptable definition of the word "terrorism". In fact, it might be unworkable to define because terrorism is vague and subtle concept, and vacillates and alternates, according to historical, cultural, religious and geographical perspectives and circumstances. Terrorism is undeniably a crime, and terrorists are criminals. However, it needs to be noticed that what is regarded as an act of terrorism in one country is looked upon as an act of patriotism in another country depending upon the ideological commitments of the government of that country. For example, under a dictatorship or monarchy, personal or ideological resistance to the government by resorting to arms is terrorism, but a democratic government condones it as a political offence. Sometimes, independent States encourage terrorists in order to pull down governments in other States. Though terrorism is different thing to different people, most terrorism throughout history has been directed against government. As generally understood, terrorism is premeditated, politically motivated violence perpetrated against non-combating targets by sub-national groups or clandestine agents, usually intended to influence a targeted group. That is how 'terrorism' is defined by the State Departments of the USA. In other words, terrorism is an unlawful use of force or violence against persons or civilian population, or any segment thereof, in furtherance of political or social objectives held by the terrorist group concerned. United Nations has defined terrorism as "any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do a certain thing or abstain from enforcement of law ".

Terrorism is defined as the product of fanatical violence perpetrated generally in order to realize some political end to which all humanitarian or ethical beliefs are sacrificed. Most experts agree that terrorism is the use of threat of violence, a method of combat or strategy to achieve certain goals, that its aim is to induce a state of fear in the victim, that it is ruthless and doesn't conform to humanitarian norms and that publicity is an essential factor in terrorist strategy. Terrorism is unequivocally defined as the deliberate and systematic murder, maiming and menacing of the innocent to inspire fear for political ends. The General Assembly's Legal Committee approved a draft resolution strongly condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed. Approved without a vote, the text which went to the Assembly for adoption calls such acts " unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic,

religious or other nature that may be invoked to justify them ". It recommended that the Assembly urged all states to become parties to the relevant conventions and protocols, including the conventions for the suppression of terrorist bombings and the financing of terrorism.

Today, the impact of terrorism in maintaining law and order, in assuring peace and tranquility to law-abiding citizenry and in harnessing growth and development, both at the national and international level, is quite grave, gloomy and alarming. Global terrorism has, in fact, become an unprecedented challenge to the human civilization itself. We are living in a most threatening circumstance.

In India, global and national terrorist groups operate incessantly and menacingly, destroying national properties, killing innocent and non-combating civilians in thousands, arresting developmental activities in the affected areas. The State, both at the central level and State level, dispenses its limited physical and fiscal resources to contain this menace, but, we are not successful in the matter of containing, curbing and eliminating terrorism because of want of political will and legislative and infrastructure back-up. On the other hand, the area of operation of the terrorists has been expanding thereby posing a great threat to the internal security of the country. Internal security of the country is threatened by the acts of Jehadi terrorists, religious fundamentalists and Naxalites. Jehadi terrorist activities based on religious fatalism are not confined to Jammu and Kashmir, it has spread from the Kashmir valley and the capital of India to South India including State of Karnataka. The recent arrest of the most educated alleged terrorists hailing from Bengaluru and other parts of the State and targeting Indian Institute of Science and civilian localities in Bengaluru has shattered the image of Karnataka as a safe place of peace-loving people. Our Intelligence Agencies have already warned us that the whole of coastal Karnataka has become a hub of " sleeper cells " of Jehadi terrorists groups. Similarly, Naxalite menace and religious bigotry penetrated large parts of India, not leaving even our Karnataka State. They too quite often indulge in terrorist attacks.

Individual terrorism is governed by State law subject to international legal limitations of general applicability. Any State may apply and enforce its laws against terrorist activities committed in its territory. In some circumstances, a State may apply its laws to terrorist activities committed outside its territory, subject to general limitations in international law. Enforcement is of course subject to general human rights requirements: even terrorists are entitled to due process of law and fair trail, to freedom from torture and from inhumane treatment and punishment.

International law does not address acts of individual terrorists; it addresses States that are implicated in such terrorist activities. External support for domestic terrorists raises issues of intervention in internal hostilities. The international system's commitment to the impermeability of States, helps a "rogue State" that is prepared to practice terrorism to mask

its involvement. A State's refusal to extradite a terrorist raises questions under particular treaties and under the accepted exception to extradition for political offences.

Every State is required to afford protection against terrorist activities to foreign diplomats and foreign nationals generally. Every state is required to do what is necessary to prevent its territory from being used for launching terrorist attacks on another State's territory or against its diplomats, nationals or property. A State's failure to take such steps or any encouragement or condonation by a state of such activities in its territory, surely, tantamounts to such State's sponsorship of terrorist activities against another State, and such omissions and/ or acts would be clear and serious violations of international law. When terrorist activities for which a State is responsible are of sufficient magnitude, they may constitute a use of force against the territorial integrity of the target State in Violation of Article 2(4) of the Charter of the United Nations, and in some circumstances may amount to an armed attack.

The inter-State system and its commitment to State values tend to discourage a State victim of terrorist activities from responding by attacking another State based on unproven (and often unprovable) suspicions that the latter was responsible for the terrorist attacks. When evidence of such State sponsorship is clear and strong, there are nonetheless difficult legal issues as to the permissible response. Before the United Nations Charter, international law permitted a State to use some force in reprisal for a violation of law (following a demand for reparation) and permitted force in self-defense broadly construed, but the permissible response was limited by principles of necessity and proportionality. Surely the appropriate response is not counter-terrorism or other forcible intervention in another State (even if one is confident of that State's responsibility for the terrorist acts). But some response to terrorism is surely necessary and therefore must be permissible. Perhaps the system must develop a technique for collecting facts and offer collective responses. Unless the international system develops effective lawful collective response, target States will be tempted to use unwarranted measures and wage war without any moral and legal justification.

While dealing with terrorism, we cannot confine our discussion only to terrorists acts of 'Jehadi' terrorists or religious fundamentalists. We should also take into account the terrorist acts of Naxalites. Coming to Naxalism in India, it needs to be noticed that it has already engulfed our neighbouring country, Nepal. In India, the States of Andhra Pradesh, Bihar, Chhattisgarh, Jarkhand, Karnataka, Orissa, Maharashtra, Uttar Pradesh, and West Bengal are badly affected by Naxal violence, though in varying degree. Further, it is quite disturbing to note that Naxalites in considerable number, from Nepal have come to various parts of the country, especially bordering States such as Bihar, Jarkhand, and Uttara Pradesh. Under the disguise of giving a

voice to the downtrodden and marginalized, exploited people, Naxalites are threatening the very foundation of the democratic polity of our country by frequent and brutal terrorist acts. When democracy is in vogue, resort to violence to achieve political, social or economic objectives cannot be countenanced. Innocent youths, particularly those hailing from poor financial background are being indoctrinated into mindless violence.

Time has come for all of us to ponder over the problem arising out of terrorists acts and find solution to this menace so as to ensure internal security of the country. I am of the considered opinion that national policy on terrorism, extremism and naxalism should envisage striking at the votaries of these creeds with a determination to bring them to justice for their crimes, with iron hand while rendering socio-economic justice to the affected people. The national policy should be very clear, long-drawn and emphatic; the Government would make no concession to terrorists and strike no deals with them under any circumstance. In other words, the terrorists should be totally isolated in dialogue and deliberations on behalf of the people of the area where the terrorists operate; the socio-economic problems of those people is said to be the cause for breeding and sustaining terrorists. I suggest this, because, they are not only criminals but also they do not recognize or respect our Constitution, the Rule of Law and democracy. But, unfortunately for us, we find the greatest problem in the realm of national policy. Without a clear policy and systems in place on taking terrorism, the Government is shooting in the dark. The corrective should lie in recognizing the problem, strengthening policing and possessing necessary political will. The country needs a clear, unambiguous and stable policy to fight terrorism - whether it is Jehadi terrorism or terrorism indulged by religious fundamentalists or Naxalite Insurgency. The Parliament should bestow its thought keeping in mind the long-drawn internal security perspective, and assessing what would be the impact of internal insurgency and Jehadi terrorism on the security of the nation. The Parliament and policy-makers should realize that we being a democracy, our law and order agencies are not a free agent whereas the law-breakers are; the terrorists have freedom to attack at any place and at any time of their choice, whereas, the enforcement agencies have to make doubly sure that they are not hitting innocent bystanders or even the innocent looking terrorists, not even their abettors and sympathizers. They are held accountable by their political bosses of the day, the Human Rights Organizations, and above all the media. Terrorists have no such constraints or accountability. Therefore, the policy to be evolved or the law to be enacted should exclude considerations of adhocism, vote-bank policies, appeasement and 'willing to strike, but afraid to wound'. The policy or the law should provide for bolstering the counter-terrorist capabilities of agencies dealing with terrorism.

There is an urgent need to have a strong, effective, result-oriented legislative back-up so that law-enforcement agencies can bring destabilizing forces to book. Law would also play its expected role in continuing and

curbing terrorism. Both International Law and Municipal Law play a critical role in this regard. It is trite to say that law out-laws terrorism. Law sustains stability and fosters homogeneity. Terrorism strikes at both stability and homogeneity. Serial blasts in Delhi on 13.09.2008 and 20.09.2008 was a barbaric and inhuman and an act of cowardice. There is an imminent need to evolve political consensus to put up a united resistance against the forces of communalism, terrorism and naxalism, which are threatening to tear the secular fabric of the country. The impunity with which terrorists are carrying out their missions across the country, including the heart of the National Capital at regular intervals, is a very poor reflection on the competence and ability of the Nation, and any self-respecting people. Therefore, it is a time to act, to act decisively and with determination, to root out terrorism in all forms from the Indian soil. Can the people of India stand by the call of the time, is the question to be pondered over by all of us.

All of us know that it is not possible at all to combat and defeat divisible forces, whether they are external or internal, without creating universal harmony, security and sense of belonging amongst the people of the country. Peace and security are invariably inter-linked with human rights and relationship of harmonious world. Harmony requires peace, security and happy co-existence between different people, community and nation. Denial of human rights has its effect on peace, harmony and tolerance. In order to bring peace and harmony in the society, inequalities prevailing in the society in any form should be removed. Despite our historical wedding to liberalization and globalization in 1990s and discernible growth and development in wealth, there is no change in the disparity that existed before the said wedding amongst the people. So long as the State denies social and economic benefits of any development to the majority of its people, it is impossible to sustain social harmony and peace in the society. When the majority is poor and inequality prevails, conflict arises leading to violence. When people clash, human rights are often times the first casualty. This situation intensifies the conflict and violence escalates. To enforce the people's right to peace, social pressure is required to bring about social justice and equality, to enlarge democratic space to deepen its roots, to resolve through democratic debates and peaceful avenues. Naxalism or extremism shall not be viewed as a mere law and order problem. It needs to be understood that the socio-economic imbalances and prevailing inequalities in many spheres of human life are also the causes for the disturbing situation we notice today. Desired human rights regime can be established only upon harmony of internal social environment of the country amongst all its people. For achieving stable and harmonious relations amongst all the people of the country and to foster mutual understanding, respect, tolerance and peace human rights education is essential. Education has been called the technique of transmitting civilization. Civilization is nothing but the humanization of man in society, and man is humanized only when he lives a life in harmony with his true

aspirations and powers. Learning human rights should become a way of life and that way of life should lead to eradicate poverty, ignorance, prejudice and discrimination based on sex, caste, creed, race, religion and disability.

Perhaps, India is the only country in the world, which has embraced all religions and cultures without hesitation and fostered all sorts of ideologies, whether it is political, religious or philosophical. The strength of India lies in its national values like secularism, democracy, fraternity, universal brotherhood and tolerance. The effort of fundamentalist and terrorist elements in disrupting the national fabric of India has threatened the unity and integrity of the nation. The communal and divisive forces are engaged in cultivating hatred and prejudice in the minds of the people, especially the youth.

Considering the designs of the anti-national elements within and outside the nation, it has become the imminent need of the nation and all authorities of the State and peace-loving and peace-promoting organizations within the country to contribute their mite to combat and defeat the divisive forces in all forms within and outside the nation.

Taking swift actions against the enemies of mankind is a must. All terrorists are the enemies of mankind they cannot be classified as friends or sympathizers of some countries or some people and enemies of the others. Due to frequent and barbaric attacks of terrorists, Indian people are deeply wounded. However, it is the responsibility of Indians to remain calm and act out of wisdom, not simply out of anger or haste. What I wish to suggest is that caution and wisdom should dictate our national policy to deal with terrorists' menace, and the kind of legislative back-up to sustain the national policy decisions regarding the defence against terrorist forces. It is because we should be aiming at living in a safer world after this campaign, not under a permanent State of siege in an endless conflict. In our campaign against terrorism, we are required to define, with absolute clarity, what we really stand for and what we are definitively opposed to, and under any circumstance, we cannot be victims of blind.anger and hatredness ; we ourselves cannot violate human rights while opposing violators of human rights. We must ensure that intolerance, violence and hatred, even in pursuit of a higher cause, are not part of our agenda. Freedom, social justice and participatory democracy cannot be ensured by intolerant and repressive regimes. Any keen observer of the violent happenings of the 20th century would tell us that criminal actions, intolerance and the politics of hatred are not a solid foundation for the creation of a just and democratic society in which all individuals are able to fully exercise their rights. In the past, the path taken by the oppressed to achieve an egalitarian, fraternal and free society by wrong means and methods has often brought only new nightmares. Kennedy's wise statement, " those who make social change impossible, make revolution inevitable ", is apt to be remembered.

Violence and Women's Lifeworlds

*Kalpana Kannabiran**

INTRODUCTION

'Violence' straddles the lawful and unlawful, the legitimate and the "illegitimate", domination and resistance, injustice and justice, order and chaos, and takes many forms - holocaustian, war, peacekeeping, on the one side, and the range of violence of normal times on the other — against sexual minorities, persons convicted of crime, political suspects, all persons who are not men, and down the scale of graded inequality in the caste system, to name a few. Within the fields of violence of normal times, it is useful to delineate specific, overt practices of violence and subterranean forms that are embodied in systematic practices of exclusion - neglect, silence, non-recognition, denial of access - against particular classes that come within the meaning of violence, practices which embody the interlocking of violence with discrimination, as in the case of persons with disabilities. This interlocking, it must be emphasized, is also visible in overt forms of collective violence.

There is, especially in structural violence a deep foundational basis in systems of patriarchy. And because practices of violence are written on bodies, because the physical body bears the burden of the violence, as much as the mind retains a memory of it, there is an intimate, inverse connection between violence and well-being.[1] This connection also comes into play from the other end: there are legitimate and illegitimate, acceptable and unacceptable forms of illness and infirmity. There is also the question of the ways in which the normal is constructed especially in relation to "ability". What are the ways in which denial of recognition and legitimacy ties in with the experience of violence by groups so denied. Looking at this entire range therefore, violence is both objective fact and subjective

* Professor, NALSAR University of Law, Hyderabad

[1] An independent survey of the Government Mental Hospital in Srinagar found that post-traumatic stress cases increased from 1,700 in 1990 to 17,000 in 1993 and to 30,000 in 1998. Prabal Mahato, cf. Zamrooda Khanday, Negotiating reproductive health needs in a conflict situation in the Kashmir Valley, Trivandrum, Achutha Menon Centre for Health Science Studies, Sree Chitra Tirunal Institute for Medical Sciences and Technology, 2005.

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experience; it is overt and physical and subterranean, embedded in consciousness at the same time.

Violence structures consciousness in multitudinous ways, depending on social location. The law treats violence in multitudinous ways, depending on who the perpetrator is, who the victim, and what the circumstances. Is violence an exception? What is the relationship between violence and sovereignty? And violence and democracy?

In this essay I will attempt to explore the field of violence through a close look at violence against women in India. I have argued elsewhere that violence against women is perhaps more appropriately described by the phrase "violence of normal times" – it extends quite literally from the womb into and through the lifeworlds of women within families, between families, within communities, between communities, in relation to the state, for instance. Where groups are unequally placed in relation to each other and/or in relation to the state, the women of these groups bear the consequence of that inequality in ways that are specific and distinct from the ways in which men of the same groups might be affected.[2] To speak to the problem of violence against women, therefore, is perhaps the only way of addressing the problem of discrimination against women effectively, because the systemic and systematic violence that women are subjected to is inextricably tied to the deeply entrenched practices of discrimination that guarantee impunity to perpetrators of violence against women.

This essay will be organized into two sections. The first section will outline the issues and intersections between issues that are part of the field of "violence against women". The second part will attempt a presentation of the legal history of a few of these issues and the complexities therein. It is hoped that this approach will enable a nuanced understanding of the problem of violence against women.

SECTION I: FIELDS OF VIOLENCE

I. 1. Women and the Meaning of Custody

Custodial violence was the bridge between the women's movement, the civil liberties movement and legal scholarship in India in the late 1970s – custodial rape the critical issue – first with Mathura in Maharashtra[3] and soon thereafter with Rameeza Bee in Andhra. Custodial violence takes on gruesome meanings for women. Piloo, arrested on the charge of "awara gardi" (vagrancy) under Section 169 of the Indian Penal Code for vagrancy, could not have been more than sixteen years old. She stayed in jail for a few

[2] Kalpana Kannabiran, "Introduction", in Kalpana Kannabiran ed, 2005, The Violence Of Normal Times: Essays On Women's Lived Realities, New Delhi: Women Unlimited, 2005.

[3] Tukaram v. State of Maharashtra (1979) 2 SCC 143; and "An Open Letter to the Chief Justice of India (1979) 4 SCC 17-22. Letter written by Professors Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar and Lotika Sarkar.

weeks and then got out on bail provided for her by a constable in return for a spell as his mistress. This was a normal procedure. Single wardens or policemen would offer to stand bail for young destitute girls in return for temporary or long-term cohabitation. Meena, brought to India from Nepal by a Brahmin, was abandoned. She was sentenced to seven days in jail for vagrancy. She arrived (in Hissar Jail) in a fearful state, delirious, unable to walk, her rectum and vaginal area torn and bleeding. She had been kept in police custody for twenty-two days after her arrest. Every day five or six policemen had raped her. Practically deranged by this experience, she was then handed over to the jail authorities.[4]

Among the most shocking custodial deaths was the killing of 'dacoit queen' Haseena Begum. She was pregnant when she was gunned down after she had surrendered to the police and was taken into custody. The police paraded her naked corpse through the village as a lesson for others.[5] While torture in custody is always a violation of human dignity and bodily integrity, the desecration of the body of the victim of state violence remains unaddressed in law as also the degrading of the dead female body, through the sexualised spectacle.[6]

For women, however, "custody" has many faces. Section 376 of the Indian Penal Code sets out one field of custody – the public face of custody, in a manner of speaking, that the cases referred to above illustrate. Case law around writ jurisdiction, especially habeas corpus, demonstrates the convergence between domestic violence and custodial violence, where the threat of detention and custodial violence marks the alliance between policing practices of the family and the state and raises issues of citizenship in the domestic sphere.[7] It has been argued that the writ of habeas corpus, although discussed widely in relation to custodial violence and state repression in human rights discourse, has not received adequate attention in terms of its routine use in courts in cases of "choice marriages" [as opposed to arranged marriages]. Adult women have used it to challenge their own detention in state facilities; parents have used it to "recover" adult daughters who have married by choice; husbands of newly married girls have used it to claim them from their natal families that refuse to recognize the marriage; couples seek protection against possible arrest and detention on charges of abduction/rape. Writ jurisdiction, Pratiksha Baxi observes, "comes to detail contestation over the legality of the detention of

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4 Raman Nanda, "Jails in India: An Investigation. PUCL Bulletin, November 1981.

5 PUCL Bulletin, 1:6/10?81.

6 This was repeated in Gujarat in 2002 as part of a Hindu fundamentalist attack on Muslim women in which the state with all its might was complicit. On necrophilia see especially Martha C. Nussbaum, " 'Secret Sewers of Vice': Disgust, Bodies and the Law," in Susan A. Bandes, The Passions of Law, New York & London: New York University Press, 1999, p. 48.

7 Pratiksha Baxi, Shirin M. Rai, Shaheen Sardar Ali, Legacies of Common Law: 'Crimes of Honour' in India and Pakistan, Third World Quarterly, Vol. 27, No. 7, pp. 1239-1253, 2006.

a woman who is described by her family as a subject who has been *abducted* for the purpose of illicit sex or forcible marriage, and by the affinal family as a *consenting* subject."[8]

The multiple axes along which women are subjugated through interacting regulatory techniques that travel back and forth between state and community – between courts and panchayats, between statutory village panchayats and caste panchayats – is most evident, in the case of marriages by choice.[9]

I.2. The Dilemma of Choice

If marriage by choice presents a major obstruction to women's exercise of the right to personal liberty, the problems around the exercise of the right to reproductive choice foregrounds the dilemma of criminalizing a systemic practice while recognizing the vulnerability of the "agents". How is female infanticide (and now sex selective abortions of female foetuses) related to other practices classified as "social evils"? In a context where son preference and the abhorrence of female children is deeply entrenched, practices of eliminating girls has been described as gender cleansing and women, particularly female children have been described as the "endangered sex". The situation that women find themselves in however, is far from easy. Proactive responses from the state can result in holding mothers across generation complicit, while fathers and sons are liberated from the circle of complicity, – the patriarchal guarantee of impunity that simultaneously ties women in a double bind. The mother who bears daughters risks death or desertion at the hands of her affinal family, and the mother who ensures the birth of sons, which is the one pre-condition for her enjoyment of liberty in the home, faces the possibility of the loss of liberty at the hands of the state. Stepped up population control programmes likewise inevitably pose grave survival risks to girls. The central question that remains somewhat unresolved in debates on choice is, how does one reconcile an opposition to "sex selective abortion" with the absolute right to choice.

Choice in matters of contraception and sexual relationship is overwritten by sexual violence and fear for women affected by HIV/AIDS in high prevalence settings, affecting significantly their right to negotiate condom use or choosing to leave risky relationships. As the Positive Women's Network says, 'Being diagnosed with HIV/AIDS rewrites

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[8] Pratiksha Baxi, Habeas Corpus in the Realm of Love: Litigating Marriages of Choice in India. Australian Feminist Law Journal, 25:59-78, 2006.

[9] Pratiksha Baxi, Shirin M. Rai, Shaheen Sardar Ali, Legacies of Common Law: 'Crimes of Honour' in India and Pakistan, Third World Quarterly, Vol. 27, No. 7, pp. 1239-1253, 2006. See also, Prem Chowdhry, Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India, New Delhi: Oxford University Press, 2007. For an analysis of the subjugation of dalits, and dalit women by caste panchayats, see, Vasudha Dhagamwar, " 'The Shoe Fitted Me and I Wore it..." Women and Traditional Justice Systems in India, in Kalpana Kannabiran ed., The Violence of Normal Times: Essays on Women's Lived Realities, New Delhi: Women Unlimited, 2005, pp. 46-66.

women's lives. Fear of rejection, stigma, discrimination and harassment prevents them from disclosing their status.'

The question of choice is also critical to the articulation of the right to sexual orientation. Queer studies scholars have demonstrated through painstaking research the ways in which heteronormativity is established through the violent exclusion of all queer people, violence being used along different dimensions – inter-personal, intrapersonal, and collective. Queer women especially, more vulnerable in comparison with queer men, face physical and verbal abuse, battery, house arrest, coercion into heterosexual marriage and expulsion from the family home. There has been also of an increasing trend towards suicide pacts among queer couples unable to cope with violently hostile environments and the absence of legal protection.[10]

At the core of the problem of choice, is the question of culture and the collective conscience that does not militate against violent misogyny in our societies.

While able bodied women are crippled and disabled through violence and sexual assault, a woman with disability is, to use Andalamma's words, "like a kite, going whichever way the wind blows it," veering between the mercy and goodwill of parents, brothers, sisters, husband, in-laws on the one hand and complete destitution on the other.[11] Yet, we know from several such testimonies that it is not physical disability that is the problem. Physical disability helps us to see better and understand with greater clarity the general position of women in our society. Where women are generally denied the right to choice and valued only for their physical labour [especially in the household] and reproductive services, women with disability are at an added disadvantage. If the creation of barrier free access and communication in multiple non verbal languages is a pre-condition to the exercise of personal liberty in its fullest sense for differently abled people, how does the refusal to create barrier free environments as a norm in the entire public domain [to begin with] inform our understanding of liberty and choice? In a cultural environment that is structured around the violent policing of women, what are the specific implications of this general denial of liberty for differently abled women?

I.3. Hostile Environments

Women embody culture in deeply gendered ways and nurture traditions and practices that perpetuate stereotypes. The patriarchal construction that the honour of nations, communities and families rests on women, serves to control women and renders them vulnerable to extreme

[10] Bina Fernandez and Gomathy N.B. "Voicing The Invisible: Violence Faced by Lesbian Women in India", in Kalpana Kannabiran ed., The Violence of Normal Times: Essays on Women's Lived Realities, New Delhi: Women Unlimited, 2005, pp. 224 - 265.

[11] Andalamma, Testimony given at the Public Hearing on Violence against Women, Hyderabad, 7 March 2004 in front of a gathering of 5000 women and the jury consisting of Dr. Mohini Giri, Ms. Nalini Nayak, Dr. Ruth Manorama and Smt. Jeelani Bano .

violence. Redressal mechanisms are often constrained by the very stereotypes they try to remedy. Women who take husbands to court on charges of cruelty are told that they are educated and hence unwilling to adjust to a reasonable man;[12] similarly, measures devised by the police to ensure the safety and security of women on the streets are premised on assumptions that curtailment of mobility and silence in the face of verbal abuse are women's only guarantee for security in public places.[13]

The print media, cinema, television, popular literature, children's literature and textbooks show women in "traditional" roles. There is also the condonation of extreme forms of sexual violence and battery in the mass media that has troubling implications for practices of violence in contemporary Indian society.

Stereotyping in the media also foregrounds the image of the able bodied dominant Hindu woman as the norm and constructing relationship only along lines of heterosexuality, both of which invisibilise the predicament of caste, religious and sexual minorities in the country, as well as women with disabilities, rendering them more vulnerable to discrimination.

The power of cinema as a visual medium and its grip over people can scarcely be understated. Violence against women is an essential ingredient in mainstream Indian cinema with women being largely confined to the roles of mother, whore, wife, mother-in-law, their function being to subserve male interests and service the needs of men. Films also depict women entering new fields of work in very poor light. Women bus conductors, policewomen and women jailors for instance are either shown as comic relief or for sexual titillation. Similarly working class women – street vendors, domestic workers, municipal workers – are always portrayed as "immoral" women.[14]

While there are some instances of individual women being portrayed as resisting patriarchal domination, violence or injustice, the mainstream visual media has consistently caricatured women collectives and their struggles against structural violence, especially struggles against sexual and domestic violence.

For a hundred years in the late nineteenth century not a single female child was born in the royal house of the Raja of Porbandar. Reviewing research on female infanticide in contemporary India, Harriss-White, reiterating Amartya Sen, observes that the declining sex ratio since the turn of the century points to the fact that the missing women are a social product. Satish Agnihotri's painstaking documentation of district level data on sex

[12] Saritha v. R. Ramachandra, 2002 (4) ALT 592 (D.B.)

[13] In February 2004, the Delhi Police advertised 'Do's and Don'ts for Women' in leading newspapers. See Deepthi Priya Mehrotra, Beyond Violence and Silence, India Together by arrangement with Womens Feature Service, March 2004.

[14] For a more detailed treatment of stereotyping in the media see my essay in the Second and Third Alternative Report on CEDAW, Delhi: National Alliance of Women, 2006, Chapter 3.

ratio differences in the 5-9 age group, led him to map a Bermuda Triangle of twenty-four districts in North India where the sex ratio of children averages 774 girls to a 1000 boys.[15] Research from the southern state of Tamil Nadu shows that two thirds of female infant deaths and forty percent of female neo natal deaths are due to "social causes."

The 2001 census shows an increase in the sex ratio however the reason for alarm was the sharp decline by 18 points in the child sex ratio in the age group of 0-6 years. This decline is so widespread that out of 28 states and union territories, only 4 states - Kerala, Tripura, Mizoram and Sikkim and one union territory, Lakshadweep, point to an increase. Logically this means that these are the only areas in the country that are free from the socially degenerative practice of eliminating girl children. The states and union territories that have shown a sharp decline in sex ratio are Punjab (-82), Haryana (-59), Himachal Pradesh (-54), Gujarat (-50), Chandigarh (-54), and Delhi (-50), although these are states that display high indices of economic development. There are 122 districts spread out over 14 states having a Child Sex Ratio of less than 900.[16]

This practice alone already matches, even surpasses the worst episodes of crimes against humanity in scale. There are clear correlations between the proliferation of sex determination tests, increase in sex selective abortions ["female foeticide"] and decline in sex ratio with urban areas showing sharper drop in the sex ratio than rural areas. And not only do the numbers increase each year, but techniques for eliminating the birth of girl children proliferate. The most recent method of exterminating girls that is on offer is sex selective conception. Nussbaum provides a very useful and nuanced reading of the intersection of privacy jurisprudence with questions of culture, difference, equality and rights, arguing among other things that there must be "a reliance on equality and equal protection where the relevant issue involves systematic hierarchy and subordination"[17]. In the light of Article 21 of the Indian Constitution read with Article 15, sex selective abortions, by bringing about the physical elimination of an entire class of persons by actively preventing births of members of that class, is a direct infringement on the right to life, dignity and security of person for surviving members of

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[15] Barbara Harriss-White, "Gender Cleansing: The Paradox of Development and Deteriorating Female Life Chances in Tamil Nadu." in Signposts: Gender Issues in Post-Independence India, ed. Rajeswari Sunder Rajan, New Delhi: Kali for Women, 1999, pp. 124-153.

[16] A.R. Nanda, "National Population Policy: Small Family Norm and Sex Selection", Paper presented at the Seminar on the New Paradigm of Development and Sex Selection", New Delhi, August 2004. The sex ratio is defined as the number of females per 1000 males in the population. The sex ratio is a good indicator of gender equity in societies at any given point of time. In general sex ratios are an outcome of four different factors: differentials in mortality; sex selective migration; sex ratio at birth and sex differential in population enumeration.

[17] Martha C. Nussbaum, Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique. In Zoya Hasan, E. Sridharan and R. Sudarshan, eds. India's Living Constitution: Ideas, Practices, Controversies.; Delhi: Permanent Black, 2004, p. 273.

the class as also their mental well being, through the creation of an environment of terror and hate engendered by such elimination or "gender cleansing" as Barbara Harriss-White calls it.

A study of violence faced by school going girls in 12 countries in Africa and Asia, conducted by Action Aid revealed that most of this violence goes unreported and the problem has been underestimated.[18] This violence takes many forms - rape, sexual harassment, intimidation, teasing and threats - and affects all girls irrespective of age, race, class, caste or location. They face an added risk in contexts of poverty, war and long journeys:

> "In India, as in many other parts of the world, the 'patrifocal structure' legitimises "men over women - sons over daughters, fathers over mothers, husbands over wives and so on". In practice, this structure means that girls must be kept out of the public sphere, their behaviour and movements must be controlled, they must marry and procreate - whilst boys supported by family resources are free to be educated, work and move as they please in the outside world. Aspects of tradition and culture also ensure male domination and that girls are socialised to believe that they are inferior to men. Violence is therefore used as a tool to enforce and perpetuate the status quo."[19]

The term "hostile environment" was first used in the context of sexual harassment in the workplace,[20] more specifically in relation to the sexual assault on Bhanwari Devi, a dalit woman working on a government programme in Rajasthan. In examining violence against women, I would argue that the idea of "hostile environments" has very far-reaching possibilities in articulating the vulnerability of women to violence, and the entrenchment of cultures of impunity. This hostility is of course aggravated in the case of women who belong to marginalized groups and communities. "Hostile environment" then, far from describing merely the situation of women in the workplace can equally effectively be used to describe the domains where marginality and dispossession is produced and consolidated through the interlocking of discrimination and violence. Unpacking the idea of "hostile environments" with reference to female infants and school going girls is, in my view, an effective way of understanding the foundations of violence.

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[18] www.actionaid.se/files/StopViolenceAgainstGirls.pdf Last accessed on 19 September 2008.

[19] www.actionaid.se/files/StopViolenceAgainstGirls.pdf Last accessed on 19 September 2008.

[20] Visakha and Others v. State of Rajasthan and Others, (1997) 6 SCC 241.

I.4. The Persistent Problem of Sexual Assault

The current debates on sexual assault have a history that dates back to the Emergency of 1975. While the problem to begin with was in the way in which the offence of rape was constructed in the Penal Code, the more difficult problem had to do with the place of rape and the woman's sexualized body in the social imaginary in India. The early experiences of Mathura [a working class adivasi girl] and Rameeza Bee [a working class Muslim girl] marked the beginnings of civil liberties debates on criminal law, particularly the issue of custodial violence and custodial rape. These two cases especially demonstrate the ways in which sexual integrity is tied even within domains of criminal justice to the hierarchies of community in a plural society.[21] The trapping of women's bodies in discourses of honour, community and "Indian Womanhood" is a very complex reality that must be unpacked in order to restore to women across class, caste, community and region, a sense of integrity and justice.

The pervasiveness of sexual assault in India is best understood if the issue is plotted along two axes - the chronological axis and the axis of contextual plurality - both of which constantly intersect, merge and interchange with each other, causing a blurring of the distinction between different spaces and different discursive patterns that ought to be distinct. To look at contextual plurality first, there is a historically troubled relationship that "community spaces" have had with "courts". Yet, a consideration of community justice systems becomes indispensable to a consideration of justice, especially for women if only because the rhetoric of community courts has ever so often been echoed in the courts of trial and appellate courts over six decades since 1950.[22] If we were to further examine the problem of sexual assault on the chronological axis, from the experiences of minor girls who were subjected to marital rape in the colonial period to women during India's Partition, through the assault of women in North East India by the Armed Forces, to the rapes in custody of Rameeza Bee and Mathura, the experience of Bhanwari Devi and the mass assaults on Muslim women in Gujarat in 2002, it is clear that there is a "patriarchal delegation,"[23] that moves back and forth between family, community and public institutions. This results in the constantly re-iterated reading of the woman's body in pre-determined ways that are deeply ideological –

[21] For a more detailed analysis of sexual assault, see Kalpana Kannabiran, "Sexual Assault and the Law" in Kalpana Kannabiran and Ranbir Singh, eds. Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India, New Delhi: Sage Publications, 2008.

[22] I have elsewhere analysed discursive trends in judgements on rape in fair detail. See Kalpana Kannabiran, "A Ravished Justice: Half a Century of Judicial Discourse on Rape", in Kalpana Kannabiran and Vasanth Kannabiran, De-Eroticizing Assault: Essays on Modesty, Honour and Power, Calcutta: Stree, 2002, pp. 104-169.

[23] Kumkum Sangari, "Gendered Violence: The Discourses of Culture and Tradition", in Radhika Coomaraswami and Nimanthi Rajasingham, ed. Contested Terrains: Gender, Violence and Representation in South Asia, New Delhi and Colombo: Women Unlimited and International Centre for Ethnic Studies, forthcoming.

readings that lock women into castes, communities, tribes and classes, so that the woman never stands as a discrete individual who has been assaulted. She is always, to begin with a repository of patriarchal values that has been ["must be"] brutally violated. This delegation is embodied in the apparently disinterested field of medical jurisprudence where the formulation of the problem of rape and the "scientific" devices that form the basis of laws of evidence to try this offence - the two-finger test for instance — is but another demonstration of the patriarchal encoding of the female body. The medical doctor represents proprietary readings of the woman's body that are authoritative because they come from the realm of science.[24] Yet we know that biology has historically been used in the service of ideologies that justify dominance by relegating the social to the realm of the natural.[25]

Increasingly rights literature brings to light the troubling fact of the violent appropriation not just of children's labour but also their sexuality, both within the family and without. While family agency and complicity then are matters of concern, the inability of the family to provide protection against abuse by third parties is yet another fault line that can scarcely be ignored.

Child sexual abuse within the family has been one of the most complex issues before us. If comprehension is the first step in dealing with abuse, coping is the next, since it is rarely possible for victims to remove themselves immediately from an abusive situation. The most painful part of abuse then, is the period when the victim knows s/he is in constant danger of being abused and continues to experience it or live in perpetual fear because there is no instant road to freedom. Disclosure is also the most difficult in these cases, because inevitably disclosure is to another member of the family, and results often in kinship and community trapping the survivor and her supporters within the family if any in spirals of conspiracies to dis-able any possibility of redress.

I.5. What Conflict Means for Women

"Combatants and other state agents rape to subjugate and inflict shame upon their victims, and, by extension, their victims' families and communities. Rape, wherever it occurs, is considered a profound offense against individual and community honor. Soldiers and police can succeed in translating the attack upon individual women into an assault upon their communities because of the emphasis placed in every culture in the world

[24] Pratiksha Baxi, "The Medicalisation of Consent and Falsity: The Figure of the Habitue in Indian Rape Law," in Kalpana Kannabiran ed. *The Violence of Normal Times: Essays on Women's Lived Realities*, New Delhi: Women Unlimited in association with Kali for Women, 2005.

[25] See also, Jennifer Terry and Jaqueline Urla, Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture, Bloomington and Indianapolis: Indiana University Press, 1995.

on women's sexual purity. In other words, women are raped precisely because the violation of their 'protected' status has the effect of shaming them and their communities".[26]

The scale and gravity of the assault on Kashmiri women, women of north east India over the past two decades, Muslim women in Gujarat in 2002, adivasi women of Vakapalli in Andhra Pradesh in 2007, must be located within the larger framework of collective violence which has included the disappearance, mass killings of men of these communities and the collective sexual assault on women. In the case of the north eastern states and Kashmir, the primary distinction that has been drawn in the context of the political situation in these regions is between force (legitimate) and violence (illegitimate).[27] While this is a distinction states and governments make all too easily, as Charles Tilly points out, the distinction itself is fraught with insurmountable obstacles. What is the precise boundary between the two?

A study by the North East Network discusses several cases between 1966 and 2004 from Manipur, Nagaland, Mizoram and Assam, arguing that the trauma of assault in each of these cases is aggravated by the taboo on disclosure in communities tied as rape is to ideologies of honour and shame; apathetic governments that guarantee impunity to perpetrators of sexual assault; and skewed peace processes, like the Mizoram Peace Accord, that contain no special provisions for women survivors of conflict.[28] While most cases have gone completely unacknowledged by the government, a few cases of gruesome assault have been difficult to ignore. However, in these cases, where compensation has followed acknowledgement, the harm has been far beyond redress or remedy. With respect to Kashmir, in the context of increased disappearances, rape and abduction, and a heightened presence of the army, Zamrooda Khanday speaks of the "terror of the night" that curtails women's mobility and has resulted in a sharp rise in stress related morbidity among Kashmiri women.[29]

In Gujarat, the targeted attack on Muslim women by Hindu men, supported by Hindu women has been documented by several human rights missions that visited survivors in the aftermath of the carnage in Gujarat in February-March 2002. Syeda Hameed reports that testimonies of the aggravated sexual assault on Muslim women in February- March 2002

[26] Human Rights Watch, 1995, cf. Amrita Basu, "Engendering Communal Violence: Men as Victims, Women as Agents", in Leslie and McGee, Invented Identities: The Interplay of Gender, Religion and Politics in India, New Delhi: Oxford University Press, 2000.

[27] Charles Tilly, The Politics of Collective Violence, Cambridge: Cambridge University Press, 2003.

[28] Charles Tilly, The Politics of Collective Violence, Cambridge: Cambridge University Press, 2003. p. 108.

[29] Zamrooda Khanday; Negotiating reproductive health needs in a conflict situation in the Kashmir Valley, Trivandrum, Achutha Menon Centre for Health Science Studies, Sree Chitra Tirunal Institute for Medical Sciences and Technology, 2005.

ranged from rape and gang rape to insertion of objects into the body and stripping, followed in a majority of cases by gruesome murder. Several witnesses from Baroda reported to the International Initiative on Justice that the police often hit the stomachs of pregnant Muslim women in "combing operations" (house-to-house searches for Muslims) while shouting, "Kill them before they are born!"[30]

The violence was pre-planned, organized and targeted, and sexual violence was part of the strategy. The scale of harm put the experience within the frameworks of genocide and political pogroms – it was not merely another form of criminal violence.[31] Public and mass acts of sexual violence and gender based crimes such as cutting of breasts and uterus, forced nudity, stripping and parading women naked, forcible pregnancy, exhibiting sexual organs in the presence of women and mutilation of women's genital organs are no longer adequately expressed through the definition of rape in the Indian Penal Code, in these contexts. In Tanika Sarkar's words:

The pattern of cruelty suggests three things. One, the woman's body was a site of almost inexhaustible violence, with infinitely plural and innovative forms of torture. Second, their sexual and reproductive organs were attacked with a special savagery. Third, their children, born and unborn, shared the attacks and were killed before their eyes.[32]

Pertinent to our present concerns is the problem of state inaction and direct as well as indirect complicity. It can scarcely be argued that sexual assault of women in custody (even if they are suspected to be militants) comes within the meaning of legitimate force. Nor can it be argued that with respect to the permissible military actions against civilians during times of conflict, rape or sexual assault on civilian women, not to speak of women who are perceived as combatants in militant groups be condoned as falling within the frameworks of this permissible action. How do we then account for the persistent inaction and the active obstruction of the delivery of justice to victim-survivors in these and countless other cases? This complicity of governments, which includes inaction, and the continuing impunity granted to perpetrators raise urgent questions about the adequacy of ordinary criminal law in contexts of collective violence.

I.6. Fundamentalism and Captivity

Fundamentalism presents a very inhospitable terrain for freedom for women. Questions of women's vulnerability must be located at the outset

[30] 'Threatened Existence: A Feminist Analysis of the Genocide in Gujarat', Report by the International Initiative for Justice (IIJ), December 2003, Chapter 3:Centrality of Sexual Violence and Sexuality to the Hindutva Project, p.2.

[31] Upendra Baxi makes this distinction in "The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture," in Kalpana Kannabiran, ed., The Violence of Normal Times: Essays on Women's Lived Realities, New Delhi: Women Unlimited in association with Kali for Women, 2005, p. 335.

[32] Tanika Sarkar "Semiotics of Terror: Muslim Women and Children in Hindu Rashtra," Economic and Political Weekly 37. 28 (July 13, 2002).

within larger arenas of culture as ideology and practice that shape the ways in which communities act on women prior to, during and after conflict. Questions of culture in turn must be viewed in the context of the larger politico-economic forces of globalization and neo-liberalisation that condition and select specific articulations of "tradition," tying wars of imperialism up to wars of faith, so that it is no longer possible to distinguish between the two. Within this larger context, culture makes women's lives intelligible within patriarchal moorings, seeking to entrench them further in times of disturbance.

The more one looks at women's engagement with fundamentalism therefore, the more necessary it becomes to look at ideas/ideologies of culture and belonging that undergird these responses. One part of the question of culture – an important part of it – is that of religion as belief and community of belonging. The impossibility of silence on the troubled relationship between women, fundamentalism and war is brought home, for instance by the question that has become the cornerstone of patriarchal legends in different regions in the world, most certainly South Asia: "Haven't the greatest battles been fought over women?" The power of hegemonic – patriarchal versions of mythology in a religio-political context that witnesses frequent violent polarization between different religious groups can scarcely be understated. Mythology and legend run into the history of the present re-inventing the agency and/or the victimization of women in occupied territories, replaying themes of abduction, sexual assault, forced pregnancy, chastity/wifely virtue, selfless motherhood, and the denial of the right to abortion – the war cry dismembering women's bodies, extending the battlefield into homes and communities.

Martha Minow draws an interesting parallel between intimate violence and intergroup violence, pointing to the similarities, continuities and disjunctions in experience and law with respect to these two kinds of violence.[33] This is particularly relevant in situations where intergroup violence on women, especially in times of conflict, often involves "intimate" violence – sexual assault, forced marriage, forced pregnancy/sterilization. The use of the word "intimate" in this context is without doubt deeply problematic. Yet it is in the context of this very problematic usage that one needs to look at intimate violence [within the family] in conflict and post= conflict situations. Take the case from India, for instance. Gudiya's experience in the past few years – the return of her "disappeared" soldier-husband from a Pakistani prison, the public debate – conducted by the globalised electronic media – on whether she should return to him or continue to live with the man she married out of choice subsequently, whose child she was carrying; the decision of the community to return her to her first husband and return her child, when born, to her second husband who must now divorce her; the birth of that child; her unsuccessful attempts to

[33] Minow, Martha, Between Intimates And Between Nations: Can Law Stop The Violence? Case Western Reserve Law Review, Summer 2000, Vol. 50, Issue 4, p .851.

bear a child for her "original" husband; her illness and death in an army hospital; all in the space of a couple of years, encapsulate women's predicament within families and communities in times of conflict and in times of fundamentalism. And this draws for us in very poignant ways the connections between intimate and inter-group violence against women. But Gudiya's tragic experience also draws our attention to the insidious role played by the media in the new global era in manufacturing consent and denying the right of people to choice in their private lives by preying voyeuristically on vulnerability. Economic forces do not stay out of community spaces – in fact they shape them in images of increasing conservatism that are spawned and entrenched through the global media.

The history of Partition, especially women's experiences of abduction, recovery and rejection, echo the eerie timelessness of women's experiences of glorious battles and their sacrifice at the altar of family honour in times of war. Abduction is not a story of one side of a border alone, and it is often countered by deceit, appropriation and assault on women from the other side.[34] The experiences of women across borders are starkly similar, and women tell stories of loss even in times of victory, although stories of loss and violation in times of defeat, occupation or subjugation are numbing in their raw endless pain and victimization, the experiences of women in Gujarat in 2002 being yet another signpost in a long history of violation.

While the recovery of women in the aftermath of Partition and their rejection by their families has been written about, Minow's observation that situations of conflict also lead to an escalation of domestic violence bears reiteration. The assertion of dominance of those engaged in fundamentalist mobilizations is often offset by increasing conflict and violence in the home – virtually the only space where the men in these groups are certain of their authority and control. This could of course be extended to argue that fundamentalism, militarisation and militancy interlock in situations of conflict and rely on the use of weapons of war, which are essentially also symbols of masculinity and domination. For women in fundamentalist movements, – and women's agency is a critical question that we need to contend with – the test is inevitably about how well they are able to master masculinist discourses and strategies, and how well they are able to reconcile their "femininity" with aggression. For those who nurture men in combat, part of that nurturance is complete acquiescence, and submergence under the larger goals of combat, personal liberty in the home being but a small casualty – the chaste compliant wife and the selfless devoted mother being the ideal supports of men out at wars of "faith".

1.7. Well-Being in Violent Environments

Child sexual abuse, female infanticide, repeated abortions consequent on sex determination tests, the resulting homelessness and psychological

[34] Ritu Menon and Kamla Bhasin, Borders and Boundaries: Women in India's Partition, New Delhi: Kali for Women, 1998.

trauma inflicted by dowry demands on newly married women, rape and sexual assault of women in situations of armed conflict and communal violence; and the constant fear of aggravated assault especially in the case of dalit and adivasi communities, but also increasingly in the case of young women students, result in increased emotional and physical morbidity among women. This is aggravated by low levels of education, lack of autonomy in decision making, economic dependence and most importantly institutional spaces that are structured in ways that do not provide space for security or adequate redress for women. One part of the notion of well-being looks at the impact of recognizable forms of overt violence on victims/ survivors.

Gudiya's life story immediately highlights for us the connections between wellness and violence. As Seshadri and Haritas point out in the context of child sexual abuse,

> "sexual abuse has complex and long lasting consequences that can often paralyse the development and growth of a child, with trauma continuing well into adulthood. While the initial effects of child sexual abuse include fear, anxiety, depression, anger and hostility, aggression and sexually inappropriate behaviour, the long term effects frequently reported long term effects are self destructive behaviour, anxiety, feelings of isolation and stigma, poor self-esteem, difficulty in trusting others, a tendency toward revictimization, substance abuse, sexual maladjustment and psychological problems."[35]

This psychological aspect is embedded in a social context and is aggravated by insensitive handling by family members, which retards the healing process, a fact generally applicable to all forms of sexual abuse and domestic violence, as U.Vindhya's work has demonstrated as well.[36]

On another track well-being is contingent on enabling environments that promote harmony, decision making, dignity, robust livelihoods, health care and a quality of life that enhances capabilities.

Development projects across the country [Sardar Sarovar, Nandigram, Singur, Polavaram, to name a few] have paid scant attention to the needs of people of entire villages being displaced. Coal mining, the construction of

[35] Shekhar P. Seshadri and Kaveri I. Haritas, Preserving Wellness and Personhood: A Psychosocial Approach to the Child, in Kalpana Kannabiran and Ranbir Singh eds. Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India, New Delhi: Sage Publications, p.187.

[36] U. Vindhya, "Battered Conjugality: The Psychology of Domestic Violence" in Kalpana Kannabiran, ed. The Violence of Normal Times: Essays on Women's Lived Realities, New Delhi: Women Unlimited, 2005, pp. 197-223.

dams, the building of wildlife sanctuaries, industries and now special economic zones have posed the biggest threat to the survival and livelihood especially of indigenous adivasi and dalit communities. Displacement has meant not merely the loss of house or homestead, but land and natural resources that formed the basis of the economic survival of these communities as well. It has also meant a more deep-rooted dispossession in terms of the loss of community assets - schools, and local institutions and infrastructure around which these communities have built their lives. The quantification of relief and rehabilitation always weighs the benefit in favour of the state and/or the multinational corporation that is the prime mover. The process of displacement is often traumatic, with entire communities being asked to leave their villages in the middle of the monsoon or asked to demolish their homes themselves. The practice of uprooting people and tearing them apart from their contexts is in itself a process fraught with force and violence. In Ratnamala's words:

> "The roots of the tree go far below the earth. It can't just be plucked out from one place and put into another. There is an environment, a climate, and the quality of the earth itself that is specific to every region. People similarly built their lives around the conditions that are specific to a particular region, and in relation to their environment. When they uproot themselves from these surroundings and re settle somewhere else...village communities are flung apart ... As a result of this women lose their entire communities of support -- communities that they depend on in times of crisis, and in times of celebration..." [37]

Further, the policy, as displaced women in the Narmada Bachao Andolan argue, is biased against women, because single women are not seen as independent entities, while single men are — this difference is especially evident in the case of widowed and divorced women who were seen as part of the extended family while widowed or single adult men were treated on par with families.[38]

Even in instances where there is a land-based rehabilitation policy, as with the Sardar Sarovar Project there is a disbursement of cash compensation, which has undermined family survival, and affected women's position adversely. The cash in itself grossly inadequate is given

[37] M. Ratnamala, "Women and Forced Migration," Lecture delivered at the Workshop on Forced Migration organized jointly by Asmita Resource Centre for Women and the Calcutta Research Group, at Hyderabad, 22-24 February 2008. My translation from Telugu audio recording.

[38] M.P. Government declares Section 144 in Khargone to prevent public hearing by NCW: Women of 4 Narmada dams hold public hearing sans NCW Chairwoman, NBA Press Release, 6th December 2004.

to men, who, unable to purchase land with it, buy motorcycles or liquor instead. It is in women's interest therefore, in cases where displacement has already taken place that the displaced persons are given irrigated land with a minimum of two hectares per family, as that is the minimum that would be required to sustain the family.

Underscoring the interconnections between different fields of violence that congeal in contexts of displacement, Ratnamala echoes Minow's view when she argues that even overt manifestations of family violence are triggered and exacerbated by forced displacement and the loss of livelihoods. In these times of loss and crisis, placing money in the hands of men destroys entire communities:

> "When there is land, there is work around cultivation, and there is a mutual interdependence both at the family and community level leading to a certain degree of stability in these communities. The moment money enters the picture the instability that typifies money begins to typify people's behaviour as well... Women bear the brunt of the violence that results from this anarchy." [39]

If displacement foregrounds one set of crises faced by agricultural communities, mass suicides by farmers push another set of crises to the fore. Andhra Pradesh and Maharashtra have seen a spate of suicides by farmers in the last few years. By December 2004, 644 farmers from different castes had committed suicide in the Vidharbha, Marathwada and Khandesh regions. A majority of the farmers who died in Maharashtra were married and left families behind to cope with the debt.[40] The fact of having to care for families, pay off debts and deal with money-lenders makes women survivors extremely vulnerable to exploitation and assault. The shouldering of the entire responsibility of family, where men have migrated out in search of work, or have ended their lives, coupled with very scarce survival and livelihood options has a negative impact on women's physical and mental health as well. [41]

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[39] M. Ratnamala, "Women and Forced Migration," Lecture delivered at the Workshop on Forced Migration organized jointly by Asmita Resource Centre for Women and the Calcutta Research Group, at Hyderabad, 22-24 February 2008. My translation from Telugu audio recording.

[40] Causes of Farmer Suicides in Maharashtra: An Enquiry, Final Report Submitted to the Mumbai High Court March 15, 2005, Tata Institute of Social Sciences, Rural Campus, Tuljapur.

[41] Ranendra Kumar Das and Veena Das, The interface between mental health and reproductive health of women among the urban poor in Delhi, Trivandrum, Achutha Menon Centre for Health Science Studies, Sree Chitra Tirunal Institute for Medical Sciences and Technology, 2005.

Women figure in another important way, not only as survivors. Among the thousands of farmers who have taken their lives in the state of Andhra Pradesh, women farmers figure in large numbers. Their figures do not enter the official account because in the official reckoning, a farmer is a landed male with a title to land and women do not fit this description. There are women who have taken charge of entire families after the distress migration of adult men in the family to cities. There are others who are the heads of households despite the presence of adult men. The reason for the suicides by these women is the same. Mounting debts.

> In a single year from August 2001 there were 311 women's suicides in just Anantapur district alone. And these were only the recorded ones. There must have been a lot more that went unreported. Close to 80 per cent of these 311 were from villages. And most of the women were from a farming background. [42]

Different parts of the country have witnessed the spiralling of starvation deaths over the past five years, particularly acute in rural and forest areas. Mahabubnagar District in Andhra Pradesh, Kashipur in Orissa and Wyanad in Kerala are but a few instances. The reasons for chronic malnutrition, hunger and starvation are closely tied to the breakdown of traditional livelihoods because of trade liberalization policies, landlessness, the decline in real agricultural wages and the curtailment of adivasi communities' access to forests.[43] Caught in the trap of debt bondage, surveys have found that in the best situations, families "rotate" hunger, with one person going hungry each day. Children drop out of school in order to find work that will feed them. The pressure on women in rural households becomes more acute in this situation:

> "The time and energy they spend in fetching water, firewood and fodder shoots up. But their food intake goes down. The women eat last, after feeding the rest of the family. They then have to worry about feeding the livestock. That mix of rising exertion and falling nutrition will devastate many." [44]

The third National Family Health Survey conducted in 2005-2006 in all 29 states shows that the percentage of children in the age group 6-35 months who are anaemic is as high as 80% or more in Chhattisgarh, Gujarat and Punjab. It is only slightly lower - around 72-74% - in Orissa and

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[42] Dr. Rama Devi, cf. P. Sainath, "How the Better Half Dies", India Together, August 2004.

[43] Editorial, Economic and Political Weekly, August 24, 2002.

[44] P. Sainath, Clouds of despair: The poor and the permanent 'drought' The Hindu, Sunday, August 11, 2002.

Maharashtra. For adults, while anaemia is high among both sexes, it is very high among women, with the prevalence of anaemia among women more than double that among men in all states.[45] A close look at statistics reveals a correlation between poverty and poor access to basic health care, with mortality and morbidity rates being far higher for dalit and adivasi people than for other sections.

Where livelihood choices are completely undermined in rural areas, the exacerbation of poverty and the total absence of reasonable health care increases vulnerability of communities to illness and premature death.

Issues of reproductive health are especially critical to an understanding of women's well-being in violent contexts. As a result of the gas disaster in Bhopal, the Sambhavna Clinic found high rates of gynecological problems such as leucorrhea (white discharge from vagina), menstrual irregularities, amenorrhea, and sterility. Sambhavna records also indicate that in some neighborhoods near the Union Carbide factory, the average age of menarche is 13.75, more than a year later than the national average for India. Maternal mortality and morbidity for India as a whole are unacceptably high, with 130,000 women dying each year due to preventable causes related to maternal health, or one woman dying every five minutes.[46] Offsetting this is the fact that the market for womb space [in the form of surrogate motherhood or "reproductive tourism"] has emerged as the new capitalistic enterprise that is recommended to poor states and ICMR estimates that is could earn $ 6 billion in a few years.[47] Women's alienation from informed reproductive choice has far reaching consequences on their well-being and health. One recent study has found that while even the poorest communities have internalized the ideologies of family planning propagated by the state, this did not lead to informed and planned reproductive choice, but led instead to the use of abortions and terminal contraceptive methods which impacted adversely on mental health. [48]

There is an immediate relationship between the increasing ill health of India's impoverished and the increase in superstitions and dependence on the traditional healers and practitioners of witchcraft. The collapse of the public health system and inaccessibility of private health care has increased the incidence of diseases, unnatural deaths (eg. death due to cholera, small pox, drowning, fall from the thunder and lightening), ill

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[45] Jayati Ghosh, Nutrition Concerns, September 11, 2006, http://www.macroscan.com/cur/sep06/cur110906Nutrition_Concerns.htm

[46] Second and Third Alternative Report on CEDAW, Delhi: National Alliance of Women, 2006. Chapter 8.

[47] Jayati Ghosh, Rent a Womb: And Indian Expert, Deccan Chronicle, 11 November 2006.

[48] Ranendra Kumar Das and Veena Das, The interface between mental health and reproductive health of women among the urban poor in Delhi, Trivandrum, Achutha Menon Centre for Health Science Studies, Sree Chitra Tirunal Institute for Medical Sciences and Technology, 2005.

health. The impoverishment of communities has simultaneously led to the destruction of domestic animals and crops.[49] Witchcraft accusations and witch hunting - where women, primarily, are targets – then become the only tools available to communities in remote areas especially, to make sense of their lifeworlds. This one issue foregrounds for us the immediate connection between the absence/ denial of well- being and violence.

What is the relationship between neglect and violence? Ted Honderich's argument that the scale of human suffering, the inequality of its spread, the persistence in the patterns of inequality and the refusal to address it effectively, makes redundant the distinction between omissions and acts, is very pertinent to our consideration of this connection.[50] Where the consequences of overt violence and persistent negligence match each other in scale and effect - number of lives lost and number of years lost in each lifetime – and enjoy the same guarantee of impunity, does this scale of neglect not amount to collective violence?

SECTION II: VIOLENCE AGAINST WOMEN AND THE LAW

This section will take a cursory look at some aspects of law both in terms of the developments and shifts in interpretation as well as at civil society initiatives to address law prospectively.

II.1. Reflections on the Law and Sexual Violence

In 1995, in the case of *Bodhisattwa Gautam*[51] the Supreme Court observed that rape laws that were in force, "do not, unfortunately, take care of the social aspect of the matter and are inept in many respects," based as they were on common law doctrines that were weighted heavily against the woman. In a sharp departure, the Court placed rape in the framework of the fundamental right to life under Article 21 of the Constitution:

> Rape is ...not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. *It is a crime against basic human rights and is also violative of the victim's most*

[49] Second and Third Alternative Report on CEDAW, Delhi: National Alliance of Women, 2006. Chapter 8.

[50] Ted Honderich, Violence for Equality: Inquiries in Political Philosophy, London & New York: Routledge, 1989.

[51] Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR (SC) 922.

> *cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21*[52].

The "Right to Life" for the court was a right to live with dignity that would include all those aspects that made life "meaningful, complete and worth-living." The woman herself was re-constituted, not as a contingent, dependent being, but one who

> ...fortunately, under the Constitution enjoy[s] equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.[53]

This was also the year when the rules were framed for the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which came after Ministry of Welfare reports in 1986 showed that over half the thousand rape cases officially registered in India every year concern women belonging to the Scheduled Castes and Tribes.[54] The definition of atrocity under the section 3 of the Act included three clauses, which referred explicitly to sexual violence against women belonging to the scheduled castes and schedules tribes:

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[52] Justice S. Saghir Ahmed, Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR (SC) 922.

[53] Justice S. Saghir Ahmed, Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR (SC) 922 There is of course an equivocation here as well, especially with reference to the natural roles of women - mother, daughter, sister, wife - and their natural duties to society, to shape the destiny and character of men everywhere, but is one that can be glossed over, considering the way in which it took the judicial discourse on rape forward.

[54] Indian press reports have repeatedly commented that many such complaints concern allegations of rape by the police, but they are often not investigated, are difficult to prove and very rarely result in prosecutions. The Minister of State for Welfare informed the Rajya Sabha on 14 November 1986 that of all the 936 rape cases reported between January and June that year, 492 concerned women belonging to the Scheduled Castes and Tribes. The same ministry reported the following year that rape of women belonging to Scheduled Castes and Tribes was particularly common in the northern Indian states. On 5 March 1987 the Deputy Minister of Welfare was reported as saying that Uttar Pradesh headed the list with 229 such cases reported during 1986 and the first months of 1987, followed by 151 cases in Madhya Pradesh and 73 in Bihar during the same period. A December 1986 report before the Rajya Sabha noted 4,400 reports of rape registered by SC/ST women in the four and a half years between March 1982 and October 1986. Amnesty International, cf. PUCL Bulletin, 8:9/9?88.

> 3. Punishments for offences of atrocities.- (1) Whoever, not being a member of Scheduled Caste or a Scheduled Tribe,
>
> ...
>
> iii) forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe ...or commits any similar act which is derogatory to human dignity;
>
> ...
>
> xi) Using assault or force on any woman belonging *to a schedule caste or tribe with intent to dishonour* or outrage modesty.
>
> xii) Being in a position to dominate the will of a woman and using that position to exploit her sexually.

The gendered definition of assault drew on the specific experience of sexual assault and sexual slavery dalit women were routinely subjected to *in caste society.*

Four years later, the Supreme Court in *Chandrima Das,*[55] extended this interpretation further by invoking the Universal Declaration of Human Rights. The Court held that

The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

Under the Universal Declaration of Human Rights, 1948 and the Declaration on the Elimination of Violence Against Women adopted by the UN General Assembly in December 1993, there had been a grave and serious violation of Hanuffa Khatoon's human rights under international law, a fact the Court asserted it could scarcely ignore. In support of its view it quoted English cases where courts would presume that the Parliament intended, in the event of ambiguity in domestic legislation, to act in conformity with international standards laid down in conventions and not against them. It also invoked discussions at a judicial colloquium in Bangalore where the matter was discussed between lawyers and judges and a similar decision had been arrived at with respect to the application of international human rights instruments:

[55] Chairman, Railway Board and Others v Chandrima Das (Mrs) and Others, 2000 (2) Supreme Court Cases 465.

> Judges and lawyers have a *duty* to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.[56]

By 1995, the movement for "women's rights as human rights" had forced public attention worldwide on the question of women's rights against violence both in the contexts of debates in the World Conference on Human Rights in Vienna in 1993 and in Beijing at the Fourth World Conference on Women in 1995. Clearly this had a perceptible impact on jurisprudence on sexual violence in India, particularly in the Supreme Court.

Taking this process ahead, women's groups in Delhi approached the Supreme Court of India in 1997 for directions concerning the definition of the expression "sexual intercourse" as contained in section 375 of the Indian Penal Code.[57] The key elements of the petition provided by the women's groups may be summarized as follows: child sexual abuse, largely neglected by law, was sought to be brought within the definition of sexual assault; penetration, hitherto confined to penile-vaginal penetration, resulting in acquittal or mitigation of sentences to attempted rape, it was argued must be redefined to mean penetration whether anal, with objects, or any other method to encompass the range of assaults women and children were subjected to; women's consent should be defined to mean "unequivocal voluntary agreement". The entire effort aimed at bringing boys under the age of sixteen and women of all ages within the ambit of a comprehensive law on sexual assault. Further, two sections in the Evidence Act (146 and 155) which refer to past sexual history were recommended to be deleted.

It may be recalled that these sections first came into question in the case of Mathura and of Rameeza Bee, where past sexual history was used, not to disprove the assault, but to exonerate the accused. These provisions in the law, therefore were first problematised by women's groups and were subjected to a larger critique of the patriarchal basis of criminal law, especially that dealing with sexual assault on women – whether "outraging modesty" or rape. Further the fact that the accusation of rape relied heavily on medical and forensic reports, and it was physically impossible for assaulted women and children to ensure medical examination in the stipulated time, the recommendation drew on the experiences of women put before the Law Commission, that the "absence of a medical report in the case of a sexual assault shall not be a factor against the complainant/

[55] Chairman, Railway Board and Others v Chandrima Das (Mrs) and Others, 2000 (2) Supreme Court Cases 465.

[57] Sakshi petitioned the Supreme Court. As part of this process, three other organisations, namely, Interventions for Support, Healing and Awareness - IFSHA, All India Democratic Women's Association - AIDWA and the National Commission for Women - NCW also presented their views on the proposed suggestions. See the 172nd Report of the Law Commission of India on Reform of Rape Laws, 2000.

person assaulted." While providing additional safeguards against further trauma in the case of children who have been subjected to abuse, the recommendations urge that all officers in every part of the criminal justice system dealing with cases of sexual assault must be trained and sensitized in dealing with these issues.

The definition of rape, the Law Commission recommended, should be replaced by a definition of sexual assault, which would mean penetration by any part of the body or by an object into either the vagina, anus or urethra of a person or performing oral sex against the other person's will, without consent, with consent obtained through coercive means, with consent through impersonation/deceit, when the person is not in a frame of mind to give informed consent and when the consenting person is below the age of sixteen. The explanation to the definitional section states that "penetration to any extent is penetration for the purposes of this section", removing the rupture of the hymen as the critical marker of rape/sexual assault. In an attempt to introduce protection against child sexual abuse, a new section, 376E was sought to be introduced which spoke of touching the body of another person with sexual intent, or inviting the other person to do the same, without that person's express consent, bringing into the ambit of the definition persons who are in the position of trust or authority towards a young person.

After decades of finding that patriarchal predispositions and biases hindered a basic understanding of women's experience of sexual assault, with the norm being defined by the male experience, the need has been urgently felt by groups across the country for judicial and other officers who have an understanding of and empathy with women's experience of violence and discrimination under patriarchy.

II.2. Addressing Violence against Women through CEDAW

The articulation of violence against women as discrimination in General Recommendation 19 of CEDAW, enables groups working with survivors of violence to bring the attention of the Committee on the Elimination of Discrimination Against Women to bear on the denial of basic justice to those affected by the violence.

General Recommendation 19 recognizes the close connection between discrimination against women, gender based violence and violations of human rights and fundamental freedoms.[58] It defines Discrimination Against Women as stated in Article 1 of the Convention more elaborately and states: "The definition of discrimination includes gender based violence, that is violence that is directed against a woman because she is a women or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other

[58] Background Point no 4. of G.R. 19 LLth Session, 1992.

deprivation so liberty. Gender based violence may breach specific provisions of the Convention regardless of those provision expressly mention violence."[59] The Recommendation further states: "Gender Based Violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions is discrimination within the meaning of the article 1 of the convention".[60] It defines the "Right to life" as a basic Human Right and Fundamental Freedom[61], which includes the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment,"[62] the right to liberty and security of a person[63], the right to equal protection under the law,[64] the right to highest standard attainable of physical and mental health, [65] and the right to just and favorable conditions of work.[66]

Due Diligence

General Recommendation 19 also states: "The Convention applies to violence perpetrated by public authorities"[67] and emphasizes that "discrimination under the convention is not restricted to action by or on behalf of Government. Under Article 2 (e) State Parties have to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Further adding that, under General International Law and Specific Human Rights Covenants, States may also be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts of violence by providing compensation.[68]

In its specific recommendations on General Recommendation 19, the Committee recommended that State Parties should take all appropriate and effective measures to overcome all forms of gender based violence whether by public or private act;[69] ensure that laws against family abuse, rape, sexual assault and other gender based violence give adequate protection to all women and respect their integrity and dignity;[70] that appropriate protective and support services should be provided for victims;[71] that State Parties should encourage compilation of statistics and research on extent causes

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59 General Comment No 6. of G.R. 19 LLth Session, 1992.
60 General Comment No. 7 of G.R. 19 LLth Session, 1992.
61 General Comment, Point (a) of G.R. 19 LLth Session, 1992.
62 General Comment No 7, point (b) of G.R. 19 LLth Session, 1992.
63 General Comment No 7. point (d) of G.R. 19 LLth Session, 1992.
64 General Comment No 7, point (e) of G.R 19LLth Session, 1992.
65 General Comment No 7, Point (g) of G.R 19 LLth Session, 1992.
66 General Comment No 7, point (h) of G.R. 19 LLth Session, 1992.
67 General Comment No 8 of G.R 19 LLth Session, 1992.
68 General Comment No 9, G.R. 19 LLth Session, 1992.
69 Specific Recommendation 24 (a) of G.R 19 LLth Session, 1992.
70 Specific Recommendation 24 (b) of G.R. 19 LLth Session, 1992.
71 Specific Recommendation 24 (b) of G.R 19 LLth Session, 1992.

and effects of violence, and the effectiveness of measures to prevent and deal with violence;[72] that State Parties should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of the violence that result. State Parties should report on the measures that they have undertaken to overcome violence and the effect of those measures.[73]

Specific Recommendation 24 of General Recommendation 19 explicitly states that the State Parties should establish or support services for victims of family violence, rape, sexual assault or other forms of gender based violence, including refuges, specially trained health workers rehabilitation and counseling; that State Parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities; that State Parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken; that the measures should include effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence; that the measures should include protective measures including refuges, counseling, rehabilitation and support services for women who are the victims of violence and who are at risk of violence; that State Parties should report in all forms of gender based violence, and such reports should include all available data on incidence of each form of violence and on the effects of such violence on the women who are the victims and that State Parties should include information on the legal preventive and protective measures that have been taken to overcome violence against women and on the effectiveness of such measures.

The relevance of General Recommendation 19 is evident in the processes around the examination of the 2nd and 3rd Government report on CEDAW submitted by the Indian Government. The Committee at its pre session working group examined the Government report and raised a series of queries in October 2006 that it called upon the government to respond to. The opening comment was on Gujarat:

> The Special Rapporteur on violence against women reported that extensive violence against women took place in Gujarat in 2002, and that following the Gujarat riots, a culture of impunity was created where sexual violence was allowed to continue and that women victims of violence were denied access to justice...Please provide information on the events in Gujarat and their impact on women. This should indicate in

[72] Specific Recommendation 24 (c) of G.R. 19 LLth Session, 1992.

[73] Specific Recommendation 24 (e) of G.R 19 LLth Session, 1992.

> particular the steps the Government has taken to ensure access to justice and rehabilitation for women victims of violence in conjunction with the Gujarat events. It should also include information on the steps taken to investigate and prosecute perpetrators of violence against women committed during the events; what provisions the accused have been charged under; the status of arrests, if any; the status of trials and the status of convictions; and punishments given. State what victim protection measures were put in place during the trials, as well as the nature of legal aid and support given to victims. What were the obstacles in bringing perpetrators to justice, and what measures were put in place to overcome them, and with what results? In addition, please give details of steps taken by the central and state Governments to put in place gender-specific rehabilitation plans, and the number of women who have benefited from these plans. Also explain the steps taken by the Government to enable economic rehabilitation of the communities and rebuilding of basic infrastructures destroyed during the riots. Also explain what confidence-building measures have been taken for the reintegration of the society.[74]

In a situation of widespread discrimination, mass crime and the abdication by the state of all responsibility to provide effective redress, international instruments like CEDAW have strengthened the collective voice of survivors and their representatives in forcing accountability on a recalcitrant government:

> The Committee welcomes the State party's statement that recommendations from this Committee will be considered for inclusion in the proposed Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, and recommends the incorporation into the Bill of: sexual and gender-based crimes, including mass crimes against women perpetrated during communal violence; a comprehensive system of reparations for victims of such crimes; and gender-sensitive victim-centred procedural and

[74] CEDAW/IND/Q/3: http://daccessdds.un.org/doc/UNDOC/GEN/N06/467/90/PDF/N0646790.pdf

> evidentiary rules. The Committee further recommends that inaction or complicity of State officials in communal violence be urgently addressed under this legislation.[75]

It is in this context that international human rights interventions acquire significance.

II.3. Bringing the Bull into the China Shop: Legislating against Domestic Violence

A random survey of case law on domestic violence points to the fact that laws have made little difference to the way women are treated in their matrimonial homes. The number of women dying in matrimonial homes remains alarmingly high – women being poisoned, burnt, battered, drowned, shot, hanged and strangled within the safe and harmonious confines of the family. There is no doubt a marginal increase in the rate of convictions in cases where women have died gruesome deaths, and a perceptible shift in the conscience of judges. However, this impact is not as visible in cases where the woman escapes the cruelty of the matrimonial home alive. In that sense the objective of CEDAW remains unattained, since the Convention must further the interests of women who stay alive to enjoy a world free of discrimination.

The direct impact of CEDAW on the issue of domestic violence may be witnessed in the formulation of *The Protection of Women from Domestic Violence Act, 2005*, which has incorporated most of the recommendations of women's groups and human rights groups in the country that were presented to the Parliamentary Standing Committee. The Preamble declares that the enactment is in furtherance of the commitments made by the Republic of India to several international instruments such as the Convention on the Elimination of Discrimination Against Women (CEDAW), the Declaration on the Elimination of All Forms of Violence against Women adopted by the United Nations in 1993, the Constitutional guarantees under Article 14 and 15 of the Constitution of India which guarantees to women equality before the law and equal protection of the laws, and Article 21 which secures for women the right to life and personal liberty.

The new legislation on domestic violence was proposed to give women rights in the shared matrimonial home, to protect them against eviction by abusive husbands, and to protect them against further violence when they refuse to leave the home. It also recognizes the fact that women who are not

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[75] CEDAW (2007): Concluding Comments of the Committee on the Elimination of Discrimination against Women: India, 37th session, January 15-February 2.

http://www.un.org/womenwatch/daw/cedaw/cedaw37/concludingcomments AU/India_Advance%20unedited.pdf, para 25. The issues raised by the Committee have been addressed in a far more comprehensive manner by the Communal Crimes Bill that has been drafted by civil society initiatives that have worked on securing relief and redress for survivors in Gujarat.

married but who are in relationships that involve shared residence, may also be subjected to abuse. This is a fact that is rarely acknowledged publicly although it is widely prevalent. Women in such relationships are even more vulnerable because there are absolutely no protections in place for them.

Domestic violence has been defined as an act, omission or commission or any conduct by the abuser, which harms or injures or endangers the *health, safety, life, limb or well-being of the aggrieved person. This may be* physical sexual or economic abuse, or abuse related to any unlawful demand for any dowry; or other property or valuable security.

The abuse that women face is multiple and simultaneous. One confounding feature of existing legislations like the Dowry Prohibition Act hinges around the definition of dowry and the nexus between violence in the matrimonial home and transactions that fall within the meaning of dowry. The fact however is that violence in the matrimonial home is not confined to demands for dowry, nor does it abate with the satisfaction of those demands. Keeping this in view, the term "abuse" has been defined in expansive rather than restrictive terms.

A quick look at reported cases on dowry related violence demonstrates that the act of reporting occurs only when the violence has crossed the limits of endurance. Women do not report the first incident of abuse, nor are they encouraged to do so by either their families or even by the officers of the criminal justice system. They are rather counseled to return and "adjust" and in general be co-operative in order for the violence to abate. The view is that the physical authority of the husband over the wife is legitimate. In order to address the problem of grave assault, the proposed legislation states "a single act of commission or omission may constitute domestic violence."

One of the most serious problems faced by survivors of domestic violence is eviction from the matrimonial home. This becomes especially troublesome when the links of the abused woman with her natal family are tenuous. Women, in several cases even middle aged women with adult children face the grim prospect of destitution and homelessness at the will of the husband. To offer specific protection against this, the Domestic Violence Act states that "every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law." Being located in the matrimonial home after reporting spousal abuse logically increases the vulnerability of such women to grave assault, even loss of life. It is therefore not enough to offer women the right to reside in the shared household, there must be an additional protection against further abuse. This takes the shape of a "Protection Order" to prevent and obstruct

any possibility of an abusive behaviour on the part of the respondent. The Act recognizes that this can take place in several ways at different locations - home, workplace, children's school, telephonic/electronic communication. It also offers protection to persons providing shelter to the abused woman.

In addition the court, on being satisfied that domestic violence has taken place, may pass a residence order to restrain the Respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household; it may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the person aggrieved and any child as a result of the domestic violence; apart from preventing the person accused of abuse from committing acts of violence, the legislation for the first time introduces the principle of compensation for victim-survivors of abuse.

There is no doubt that this is a very complex issue with no easy solutions. But there is no doubt too that women suffer enormously from the material considerations in marriage that compound their ideological subjugation. The solution lies in large measure in the will to recognize the realities of a majority of women. It also lies in the will of the community [including the courts] to move towards greater egalitarianism and dignity with respect to women in the home and the world.

II.4. Outlawing 'Gender Cleansing'

> Query of the CEDAW Committee and Response of the Indian Government
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> Q 58: It is a matter of concern that the sex ratio is getting adverse in India and that, even in an advanced state like Kerala, the sex ratio is getting adverse.
>
> Ans: It is a fact that the sex ratio in the country has declined to 927 in 1991 (as against 945 in 1947). This reflects 'son preference' and the historical neglect of women's health problems. However, in Kerala, the sex ratio is not adverse. As per the latest census figures, Kerala has a sex ratio of 1036 females per thousand males.

The objectives of the *Pre Conception & Pre Natal Diagnostic Testing (Prohibition of Sex Selection) Act* are two fold: the prohibition of sex selection, before and after conception and the regulation of pre-natal diagnostic techniques. The Act permits the use of pre-natal diagnostic techniques *only* for the purposes specified under the Act. These are for the detection of chromosomal abnormalities, genetic metabolic diseases, haemoglobinopathies, sex-linked genetic diseases, congenital

abnormalities, other abnormalities or diseases as specified by the Central Supervisory Board.

In addition to the purposes stated a person can conduct the tests only if he is satisfied that the age of the pregnant woman is above 35 years; the pregnant woman has undergone two or more spontaneous abortions or foetal loss; the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;[76] or any other condition specified by the Central Supervisory Board.

The key provision in this Act is contained in Section 5 (2), which says that "no person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner."

The law works through the registration of units, maintenance of records by units and implementation of the mandate by medical professionals. In laying down the requirements, the law also details minimum requirements both in terms of competence, skill and qualification of professions as well as minimum equipment necessary for registering a unit under the act. Any unit registered under the Act is subject to strict scrutiny and must submit periodic reports and maintain scrupulous and accurate records of each case that is handled by the unit.

While the Pre-Natal Diagnostic Testing Act is seen as a solution to the problem of sex selective abortions, the magnitude of the problem urges a re-orientation to the problem itself. Juxtaposed to this is the need to make a clear distinction between the woman's right to abortion and the right of the female foetus against abortion. This question is further complicated by the fact that there is no clear gender line between those that demand "female foeticide services" and those that do not. It is women, often, older women in the family who make the most vociferous demands, and it is predominantly women in the medical profession who provide the services. The standpoint of most doctors on this issue echoes the argument of procreative autonomy that has been developed in US courts.[77] In tacit defence of sex selective abortions, medical professionals position this demand as a matter related to the procreative autonomy of "female foeticide service seekers."

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[76] This clause raises serious concerns of disability rights, because it premised on a norm of "ability" that is defined in exclusionary terms that are too wide and therefore attract the "arbitrariness" test under Article 21 of the Constitution of India. A detailed consideration of this aspect however, is beyond the scope of this essay.

[77] Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution, Cambridge, MA: Harvard University Press, 1996, pp. 72-116.

It is useful to explore the relevance of international law to an understanding of this specific practice, if only to bring home the gravity of its implications. The Rome Statute of the International Criminal Court, [which India has not ratified yet] in Article 7 defines "Crimes against Humanity" as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) *Murder;* (b) *Extermination;* ... (g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;* (h) *Persecution against any identifiable group or collectivity on* political, racial, national, ethnic, cultural, religious, *gender,* or other grounds that are universally recognized as impermissible under international law; (i) Enforced disappearance of persons; ... (k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.* "Extermination" according to the Rome Statute includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law *by reason of the identity of the group or collectivity.*

Extermination, it could be argued, through systematic murder of newborn female infants and through abortion of female fetuses [under clause (g) above, is part of the persecution of women as a class [clause (h) above].

Article 25 of the Rome Statute addresses the crucial question of individual criminal responsibility. Clause (3) states that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose...(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions."

Families that seek "female foeticide services," but more importantly doctors and medical practitioners [and all categories of employees in establishments with ultrasound or other diagnostic or fertility treatment facilities] who use the facilities to either commit or aid in the commission of "female foeticide," or, to use Satish Agnihotri's phrase "Female Foeticide Service Providers" will be liable for prosecution in far more serious ways

than contemplated by the current legislation, which imposes extremely mild punishment for the first offence and then steps it up gradually, the penalty structure itself defeating the purpose. The conspiracy of silence and non-reporting, especially by the medical fraternity, even when definite information of the commission of this offence is available is yet another dimension that must be addressed as also the collective responsibility of professional bodies like the Indian Medical Association for derogatory practices by members on a mass scale targeting an entire class of persons, practices that use the professional training and qualifications that qualify them for membership in these bodies. Clearly therefore the question of criminal responsibility and liability must be structured on the basis of an understanding of the gravity of the offence – not merely as a response to a "social evil".

National legislation on sex selective abortions, its interpretation by the judiciary and its implementation by governments must take cognizance of its occurrence in radically new terms in order to effectively combat it, but more importantly to put an end to impunity, which is the hallmark of this practice today.

II.5. The Right to Work

The 1997 Supreme Court judgement on Sexual Harassment in *Vishaka*[78] has been hailed by women's groups all over the country as a milestone in a long drawn out struggle for justice and equal rights for women. Bhanwari Devi, 50 years old, Dalit woman employed as a Saathin in a government programme to combat child marriage in Rajasthan was gang raped by five upper caste landlords for reporting on child marriages in the village in 1992. In her persistence in pursuing the case at enormous personal cost, Bhanwari came to epitomise the struggle of women against violence and injustice. In terms of formal justice, however, Bhanwari still waits, the men accused of sexually assaulting her acquitted and the State disbelieving her charges. Using the fact of Bhanwari's vulnerability deriving from the nature of her employment, women's groups petitioned the Supreme Court seeking legal redress against sexual harassment at the workplace.

But we must begin elsewhere. The judgement in the Rupan Deol Bajaj-KPS Gill case set the tone for a new jurisprudence on sexual harassment.[79] This case resulted in the norms of acceptable behaviour being firmly, reinscribed with the shift in the framing of the issue from frivolous eve=teasing to sexual harassment as a derogation of women's right to dignity. While the term "sexual harassment" entered usage two years later in 1997, the Bajaj case witnessed the radical application of the archaic "outraging of modesty" provision, preparing the ground for sexual harassment

[78] Visakha and Others v. State of Rajasthan and Others, (1997) 6 SCC 241.

[79] Mrs. Rupan Deol Bajaj and Another v Kanwar Pal Singh Gill and Another, 1996 AIR (SC) 309

provisions. A couple of years later, the Supreme Court judgement in the Visakha case formally altered the framework of this discourse.

The Visakha judgement was delivered

> "in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse [and] in exercise of the power available under Article 32 of the Constitution for the enforcement of fundamental rights [and] would be treated as the law declared by this Court under Article 141 of the Constitution."[80]

The guidelines on the issue of sexual harassment were framed from the standpoint of the situation of a working class Dalit woman's vulnerability vis-à-vis the dominant castes, the police and the state/ government. The purpose of the writ petition was to seek

> "the enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon."[81]

Till this point prosecution in sexual harassment cases relied on the legal provisions in the Indian Penal Code, specifically, Sections 209 [obscene acts and songs], 354 [assault or criminal force on a woman with the intent to outrage her modesty] and 509 [word, gesture or act intended to insult the modesty of a woman]. There have also been cases [although rare] where sexual harassment has been argued with reference to unfair labour practices in the Industrial Disputes Act, Rule 5, Schedule 5.

Locating gender equality within Article 14, and reiterating that "[t]he fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment" and that the "[r]ight to life means life with dignity",[82] the Visakha judgement in fact addresses the larger question of gender based discrimination, of which sexual harassment may or may not be a part. Reading the judgement from this angle immediately makes possible the opening out of all social spaces, without exception to the test of non-discrimination on grounds of gender.

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[80] Visakha and Others v. State of Rajasthan and Others, (1997) 6 SCC 241.

[81] Visakha and Others v. State of Rajasthan and Others (1997) 6 SCC 241.

[82] Visakha and Others v. State of Rajasthan and Others, (1997) 6 SCC 241.

IN SEARCH OF SOLUTIONS...

In looking at both violence and the operation of the law, what is striking is the ways in which struggles for human rights, civil liberties, women's rights, disability rights, queer rights, dalit and adivasi struggles especially have taught us to use institutions of justice, the courts especially, creatively, to wrest political rights in a democracy. The influence of these struggles is immediately apparent in jurisprudence as well, with courts having to reckon with subaltern constitutionalism, which "crystallizes [a multitudinous register of diverse] citizen practices of *reimaging* democracy, politics, and the fullness of democratic citizenship."[83]

There have been concerted citizens' struggles to reconstitute "courts." Through a deliberative process, India has over the past 30 years witnessed the opening out of the trial beyond the narrow confines of the courtroom — the Muktadar Commission of Enquiry to investigate into the custodial rape of Rameeza Bee in Andhra Pradesh in 1979 marks the early history of this struggle for justice; the Citizen's Tribunal that investigated the violence against Muslim people in Gujarat 23 years later is the most recent milestone. Between these two points there are the courts of law that have tried, convicted and acquitted persons accused of sexual assault as well as statutory commissions like the, Law Commission of India, National Human Rights Commission and the National Commission for Women that have intervened in specific episodes/issues straddling as it were the deliberative spaces of citizens' tribunals and the formal domains of courts.

Notwithstanding these significant shifts, the problem of violence against women is rendered more complex by the fact that institutional apparatuses — panchayats, policing, courts, prison administration and forensic science in India excludes women quite literally. There are hardly any women in community/caste panchayats, the representation of women among the judges of the Supreme Court is zero too, less than 4% of the elite police force consists of women, forensic science is no exception to this norm, and women officers figure only in prison facilities for women, if at all.[84] Within the judiciary, even long after Mathura, while judges did say that a greater number of women in the judiciary would make a difference in the judicial view of women's experience especially of sexual assault. As one judge wondered, perhaps women judges trying cases of sexual assault on

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[83] Upendra Baxi, "The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India," in C. Raj Kumar and K. Chockalingam, eds., Human Rights, Justice, and Constitutional Empowerment, New Delhi: Oxford University Press, 2007, p. 20.

[84] For a detailed analysis of cases relating to women in panchayats see Vasudha Dhagamwar, "'The shoe fitted me and I wore it...': Women and Traditional Justice Systems in India" in Kalpana Kannabiran, ed. The Violence of Normal Times: Essays on Women's Lived Realities, New Delhi: Women Unlimited in association with Kali for Women, 2005. For details on the representation of women in public and political life, see The Second and Third Alternative Report on CEDAW, Delhi: National Alliance of Women, 2006.

women would put the survivor at greater ease 'without allowing the truth to be sacrificed.'[85] Yet, numerical representation for women in the judiciary continues to be a silent issue. The discursive formations that emerge from this structure, not unexpectedly, tend to be exclusionary for women.

There are real difficulties in "dealing" with violence against women. The different layers in which violence is embedded and the indispensability of the painful exercise of peeling off each layer in order to "see" and cope with the impact at the individual level; the different layers to which the impact of violence penetrates; the different layers through which memory must plough, in order to capture the full meaning of the experience of violence - make survival and recovery a daunting task. The first way of dealing with abuse, they say, is to "speak out": disclosure as a one time, one shot blowing the lid off abuse, because the law will take charge the moment we speak. Disclosure is as multi-layered and multi=textured as the violence itself, and the "law" hangs above, barely touching the surface, and even that reluctantly. We learn that the law also "copes" with family violence, caste violence, sexual abuse and assault and larger processes of discrimination through dissociation, providing in the process little relief or opportunity for recuperation to survivors. The question then remains: How do we begin to make law "work" for women? How do we frame the question of redress in cultural contexts where biology interlocks with stereotype in specific ways, the violence in each arena being viewed in terms of "nature" and "deserts"?

On another level, across the world women have built movements for peace, rebuilt communities blown apart by weapons of war, communities torn apart by identity politics and fundamentalist mobilizations and nurtured those that have been scarred by the violence of conflict in unimaginable ways, returning them to 'normalcy' under the most difficult conditions. Women have worked incessantly and without respite to build alliances across borders, boundaries and identities, even while acknowledging the fact of diversity. Mothers' fronts across the sub=continent have consistently questioned the gains of war and juxtaposed them to the loss of kin, of homes, of land and livelihoods. These efforts by women to rebuild their lives in times of disturbance and conflict, are in a sense pitted against heightened patriarchal cultural sensibilities and try in very poignant ways to subvert the power of entrenched patriarchy - a far more painful project in the context of polarized conflict and its aftermath than in the context of 'normal times.' Despite the fact that women have mobilized against heavy odds to retrieve stability and rebuild communal life, official peace initiatives in periods of suspended conflict rarely invite women to negotiate peace. On the other side, fundamentalist movements appropriate women's bodies and sexuality in violent ways. On the third side, "secular spaces" of government, resistance, human rights, and peace

[85] State of Punjab, Appellant v. Gurmit Singh and Others, Respondents 1996 AIR (SC) 1393.

processes, scarcely move beyond rudimentary paternalism in their understanding of the women's question.

And yet women's resistance is not new. Through the 19th and 20th centuries, women in the Indian sub=continent have resisted forced widowhood, the denial of education, forced marriage, sexual violence within and outside the family, and moralistic definitions of the private and public which dis-abled possibilities for building solidarity and fragmented common concerns. Tarabai Shinde, writing in Marathi in 1882, strikes one of the earliest notes of revolt, a defining moment in the paradigm of women's insurgency, if we can call it that. It was not one but countless revolts, insurgencies, and revolutions – against husbands, fathers, families, communities and parties – *that form part of our tradition and culture*: Rukmabai, who, marriedwhile still a minor, resisted a court order directing her to return to her husband and courted arrest instead; Kandukuri Rajalakshmi who offered shelter to widows, arranged their re-marriages and assisted in childbirth when sexually abused widows arrived at her door pregnant; Duvvuri Subbamma who turned widowhood around and used the release from conjugality to spread the word of freedom and self-rule, going to jail several times, and when she was free, travelling on foot from one village to another carrying bundles of khadi on her head; Chityala Ailamma, poor with no formal education, a legend in the Telangana armed struggle in the 1940s, who resisted the usurpation of her land by landlords and violence by the police; or Sugra Humayun Mirza, a gifted poet who set up schools for girls, started an organisation of Muslim women, Anjuman-e-Khawateen and was the only non-Hindu woman in the Hindu Women's Association.[86]

Women have turned our world upside down ceaselessly. And it is a constant struggle for each new generation grappling with concerns that are constantly emerging, shifting, changing and taking new shape. We can scarcely forget that difference, diversity and pluralism provide the context for this struggle just as power, hegemony and violence in multifarious forms are pitted against the context and undermining it in a deep rooted antagonism.

The challenge today is in confronting and dismantling what I call sexual fundamentalism. Because after all is said and done, and "democratic" processes put in place, sexual fundamentalism remains – solid and unshakeable – and will remain unless it is addressed centrally. This endeavour must place at the centre the right of women to identity, freedoms and sexual choice, and the full recognition of all persons across the widest scale of diversity as the necessary precondition for the sustenance of democracy and human dignity.

[86] Volga et.al. Mahilavaranam/Womanscape: Women in Andhra Pradesh, Secunderabad: Asmita, 2001.

Note : This essay draws on several essays on different aspects of violence against women that I have written over a decade. It is also part of larger research on the relationship between non-discrimination and the right to life that I am currently engaged in at the National Law School of India University.

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Human Rights and Dalits
The need for a new deal

*R.S. Kalha**

As we celebrate our Republic Day, it is important to assess the impact of 'Human Rights' on the most vulnerable sections of our society, the Dalits. With increasing frequency reports are available that suggest that all is not well when it comes to the most marginalized communities in our country. Far too often the ill-treatment that they receive indicates that the legal and administrative remedies available are perhaps inadequate or are not working to their potential.

Soon after we achieved our independence, the founding fathers of our nation realized that the pernicious discriminatory practices exercised against the Dalits, could not be tolerated in a free India and that something imaginative would have to be done to exorcise these evil practices from the face of India. A three=pronged approach was envisaged. Firstly, an overall framework of rights was created in our Constitution [Arts. 15,17] that conferred equality of status and abolition of 'untouchability'. It was hoped that this would help 'liberate' Dalits from all disabilities that customary relationships had so imposed on them. In consonance with this constitutional directive, several programmes and policies were initiated to give concrete shape to the concept of equality. It was hoped that, perpetrators who violated the constitutionally mandated injunctions, would be speedily brought to justice. Second, reservations were instituted not only in elections to the Union Parliament [Art 330], but also to State Legislative Assemblies [Art 332], Panchayats [Art 243(D)] and Municipal Committees [Art 343(T)]. These were further reinforced by a system of reservations in Union and State services. The objective of providing for reservations was to narrow the gap that existed between the Dalits and other sections of society. It was further hoped that this would further help remove poverty and backwardness that existed, so that Dalits could once again become equal members of our society. Third, an attempt was made to wean away Dalits

* Former Member, National Human Rights Commission

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from such perniciously degrading practices as 'manual scavenging' by passing the 'Employment of manual Scavengers& Construction of Dry Latrines Prohibition Act 1993'.

As we celebrate the 60th year of our Republic, sadly the situation of the Dalits is still one where we cannot say with confidence that they have attained their rightful place in our society. While the intentions of the union and several state governments are good, in practice little seems to have changed on the ground. Atrocities against Dalits continue unabated. The policies and delivery systems that we expected that would deliver the results have been found to be wanting. The sincerity and dedication that was expected at various levels of the administrative set-up too is woefully inadequate. The state which is the principal instrument for the operationalization of these schemes cannot absolve itself of this responsibility, nor can it out-source this to outside agencies. The behavior pattern of the agents of the state, such as the police and the administrative machinery, particularly at the district and tehsil level, leaves much to be desired. This malady is much more acute in the rural areas as compared to the urban areas and is reflective of the lingering prejudices that still exist in our society.

Interestingly, official figures available indicate that although atrocities against Dalits do occur all over the country, the pattern is by no means uniform. There are some States that are the worst affected, with some districts being particularly crime prone. The level of school dropouts amongst the Dalits is also much higher than the national average, thus indicating that either the family is too poor to sustain sending their children to school or simply there are no facilities or they are denied this right. The result is that 'employability' factor, except in traditional occupations, amongst the Dalits is rather low.

Even in the case of the most degrading and pernicious practice of manual scavenging, the Supreme Court of India has taken the lead and set a target date by which all the States of the Union should be able to give an affirmative reply that this practice has been totally abolished. While some states have taken action, others show no inclination towards seriousness. Far too often the matter is left to lower-level functionaries to implement with little or no supervision at the senior bureaucratic or political level. The NHRC has taken the initiative to convene on an annual basis a meeting of all State & Union governments to assess the progress made. Whilst State governments do present, the NHRC has continually stressed the need for an impartial audit by out side agencies to review the progress made. This would ensure transparency. At the same time, NHRC has laid equal stress on the rehabilitation of affected persons. It is of little value to abolish manual

scavenging to see the person so released, suffering from hunger, malnutrition and no work. The State should in particular pay sustained attention to the proper rehabilitation, schooling and education of the children of manual scavengers. This is an absolute necessity, for at least the next generation would be able to undertake a profession other than the occupation of their parents.

Nevertheless, the fact that these continuing aberrations have to be rooted out if India is to make rapid progress is a given truth. What then can be done to remedy the situation?

One of the first things that the state would have to do is to examine the 'efficiency' factor of existing laws. Clearly official figures show their inadequacy in the fact that conviction rates under various statutes are pitifully low. It is possible that the standards of proof required by the courts are such that the investigative machinery is unable to cope. On the other hand, it cannot be ruled out that the investigation itself is shoddy simply because the effected persons are Dalits. Quite often recourse is taken to such methods to dilute the charges, so that upper caste accused get away scot- free. The Dalits are also not free from suffering intimidation and Dalit women are particularly vulnerable. Often rape and de-robing are resorted to in order to intimidate whole communities or to force them to withdraw complaints. The percentage of rape cases is inordinately high as compared to other atrocities. It is here that a supine administrative set-up simply looks the other way. Clearly there is a need to have a second look at various enactments so as to not only strengthen the various penal clauses, but also to see what amendments are required to ensure their effective implementation. In atrocity prone districts special measures are needed where personal responsibility of district officials needs to be fixed.

If we look at the levels of education, it is quite clear that the Dalit community lacks behind others and the figures available also indicate that they are much below the all-India average. This not only retards job prospects, but also prevents integration into the mainstream and upward mobility. In the new globalized world, mobility can be enhanced provided requisite educational qualifications are also attained. One such method could be a greater recourse to scholarships than hitherto to advanced educational institutions. Such scholarships should be all inclusive, with the recipient not liable for even a small amount. Special efforts could also be made at the middle and high school levels to attain a higher proficiency in the English language. This becomes important when jobs on graduation in the new sunrise industries such as IT are sought after. The high wages earned in such vocations would automatically raise the social and economic profiles of Dalits. The chances of integration would also become that much easier.

Finally, we need to galvanize State governments to take aggressive action. There is little to be gained from placing advertisements in the press when the reality is something else. A system of 'political audit' is necessary. Each year crime=prone districts must be identified and if there has been no tangible improvement, the officials concerned must be suitably chastised. On the other hand where there is improvement, there must be suitable rewards. Lack of seriousness on the part of State authorities is endemic and it is here that the Dalit movement needs to co-opt all right thinking persons of whatever caste to join them in helping them to attain their rightful place in society. In a democratic society the larger the number of activists the harder it becomes for State authorities to gloss over what should be their bounden duty to promote in the first place.

Children, Violence and Human Rights

*Professor B.B. Pande**

Few categories of human conduct evoke greater social concern than violence in any given society. It is for this reason that the societies are near unanimous in treating diverse forms of violence as evil, regression and a sign of decay. This applies more particularly to violence against the human body and certain cherished property interests. Because violence in such cases is not only the worst enemy of the individual will and freedoms, but also an anti-thesis of order itself. Keeping in view all these negative attributes of violence in mind, the theme of violence against children assumes greater significance and calls for special debate in the context of societies like ours, in which there is still a sparse understanding and consciousness about the rights of the children. The reasons that make violence against children markedly different and more significant are: (a) children's immaturity in encountering the contextual reality, (b) children's lower mental capacity to take decisions concerning their interest, (c) children's physical incapacity in defending themselves, (d) children's limited ability to complain, (e) children's incapacity to invoke the support of the formal system, and (f) poor children's additional disability due to parental unconcern and apathy.

(i) Conceptualization of Children and 'Childhood'

(a) Social Construction of 'Childhood'

The search for diverse justice standards for children takes us to the various historical perceptions of childhood itself. The earliest historical accounts in the Babylonian and Roman culture go to show that those societies sought to keep their youth and children under control and made them conform to the expectations and standards set by the society. The father exercised unlimited power over the family and children. He had the absolute authority to administer corporal punishment and could even sell his children as slaves. These early historical accounts are also supported

* Human Rights Chair Professor, NHRC

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by detailed study of the origins and evolution of the idea of childhood over centuries by Philippe Aires (Aires, Philippe, 1962). According to Aries the reasons for absence of any idea of "childhood" before the 15th century was the high fertility and high infant morality rate, which were largely responsible for not counting children as "being", before they crossed the age of infancy. Even after infancy there was little worth of a child. Thus, though in the beginning of the 15th century the person of a child was recognized, but merely as a source of pleasure and joy. By the beginning of the 17th century the second idea of childhood emerged when children were perceived as miniature adults who could be groomed and trained in the course of their growing process. According to Aries the second idea of childhood was shaped much more by teachers and moralists who were disturbed and concerned by the neglect and abuse of childhood during those days. The teachers and moralist saw in the child, a miniature adult with all the inclinations towards evils and potential for a fallen human nature, unless their malleable minds and souls were moulded and turned into righteous, God-fearing and law=abiding adults. The moralist overtones of the second idea of childhood led to a strong reaction from the children and youth of the newly emerging properous classes during the eighteenth century in Europe. However, by the end of the century, with the establishment of boarding schools and residential educational institutions, with rules and strict discipline, the teachers and moralist had won the battle. This was the beginning of the idea of a disciplined or 'socialised' children and youth. In this context Thomas J. Bernanrd's (Bernard, J. Thomas, 1992) following perceptive comment is relevant:

> Thus, the idea that the young should be shaped, molded, formed and created into the kind of adult you wanted was first applied to the children of the emerging capitalists. It was only later used to become the basis of the juvenile justice system, when it would be applied to the children of urban poor. (p. 54)

The current literature on the contemporary ideas of childhood is marked with an anxiety for the 'Disappearance of Childhood'. Neil Postman (Postman, Neil, 1994) in his thesis propounds the existence of a movement to recast the approach towards children on the lines of adult rights and entitlements. The evidence on the basis of which Postman arrives at this conclusion are the diminution of debates relating to children and the cold shouldering of children by the media, merging of tastes and styles of children with adults, changing attitudes to social institution's, life styles and moral and social values. Contrary to Postman's views M.D.A. Freeman holds that childhood, like gender, is a social artifact and the adult dominated society has an over wide say in defining it but that alone would not lead to the disappearance of childhood (Freeman M.D.A., 1996). Freeman proclaims "Childhood has not disappeared and it will not do so." Freeman draws

more useful social scientific conclusions from Postman's' analysis in the following conclusion "If childhood is a social construction then there are "childhood's" rather than a single, universal cross cultural phenomenon." This should lead us to accept the fact that the idea of childhood can be most meaningfully understood in a particular context along with other variables like class, caste, gender and culture.

The more profound, implication of realizing childhood as a social artifact is that in the structuring and re-restructuring of childhood by social institutions like law, culture, religion, economy, media, educational institutions etc. need to be more carefully examined. The existing construction of childhood is essentially a protectionist exercise which in the observations of Jenks leads to:

Routinely, children find their' daily lives shaped by statutes regulating the pacing and place of their experience. Compulsory schooling, for example, restricts their access to social space and gerontoratic prohibitions limit their political involvement, sexual activity, entertainment and consumption, children are further constrained not only by implicit socializing rules which work to set controls on behaviour and limits on the expression of unique intent but also by customary practices which, through the institution of childhood, articulate the rights and duties associated with being a child.

Therefore, as opined by Professor Freeman there is also a greater need to take into account the part played by children themselves in the construction of their own social lives, the lives of others and the societies in which they live. James and Prout reminds us - children should not be "just passive subject of social structural determinations."

(b) Appreciating Differential Capacities of Children

Law and social custom have long taken cognizance of a fairly widely shared belief that the children and young persons are not yet wholly formed, they are in the process of developing, therefore, their accountability ought to be different and inspired mainly with a view to promoting to the degree possible re-integration rather than permanent alienation from the society. Historically the child's diminished legal capacities are traced back to the writing of the thinkers of a enlightenment era like Locke, but there are researches that go in to establish that even in the earlier periods the tender age was taken into account for varying the rules of accountability. Locke described minors as those, who lacking a certain amount of reason and understanding, can neither be free as adults or as their equals. Children ought to be protected. Therefore, to give them as much freedom as adults would harm them. That explains Locke's reservations in conferring rights on children, thus: "To turn him loose to unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature, to be free; but to thrust him out amongst brutes and abandon him to a state as wretched, and as much beneath that of man as theirs."

Even the ardent classicists, who treated all human being as rational calculating creatures, acknowledged that children were to be exempt from the demands of utilitarian principles and subjected to different standards of moral evaluation. Jermy Bentham in *An Introduction to the Principles of Morals and Legislation* described infancy as a state during which an individual is not to be regarded as capable of calculating actions. Similarly, in his nineteenth century essay "On Liberty" John Stuart Mill wrote: "It is perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury."

Rawls in his treatise on justice (Rawls, John, 1971) seems to adopt a some what similar stance to that taken by the earlier thinkers on the lack of experience and less developed psychological and physical capabilities' of children. But his treatment of the subject goes much deeper because he related these diminished capabilities with degrees of autonomy the child can be said to enjoy and the demands it raises on the parents and the state to protect them against their lack of reason and incompetence. Though Rawls concedes to parental intervention in the lives of the children, but only till such time when their autonomous capabilities remain impaired. According to Rawls children from birth to the age of majority gradually develop their decision=making ability, therefore, as children become more competent, parental interference ought to diminish. Rawls argues that since the child is not in a position to make a autonomous decision "we try to get for him the things he (the child) presumably wants whatever else he wants". Thus, according to Rawls, children, therefore, have not the same liberty rights as adults, but require higher protection rights based on needs.

(ii) Cultural Legitimization of Violence Against Children

Viewing children in the cultural context explains to a large extent the continuing tendency of deployment of violence against them, not only in the societies of the past but in many societies in the present times as well. The cultural practices that condoned and legitimized violence against children were premised on a mindset that found nothing wrong in treating children as a property or commodity of the parents over which they were to exercise total control. Such a monopolistic relationship was described by an umbralla term patria potestas that enjoined power on the parents to do anything with their child, including pledging, selling and even sacrificing him for the family well being. In India too the identification and exposure provided by the British scholars to the evil practices of infanticide were an extreme instance of the exercise of patria potestas power. The heart rending account of infanticide prevalent in the eastern India describes how the first

child, both male and female, was subjected to various forms of sacrificial death to propriate forces of nature and bring prosparity to the family. For some it was a primitive barbarous practice, while for other it was a cherished tradition that had strong social sanction. I could see the extension of patria potestas power in the continued practice of parents bounding their children in fireworks and matchstick, glass, zari and carpet industries in the South and North India even today. Right till July 2001 the patria potestas power got manifested in the course of a live sale of children episode as follows:

> My visit to Varanasi to address a Vertical Interaction Course on Juvenile Justice was educative and revealing. I was held up at the station in the morning for two hours. From around 7 to 9 A.M. the railway station premises virtually turned into a 'mandi' for the sale of children aged between 6 and 14 years, particularly during the months of May and August when employment opportunities for the landless and poor dry down almost completely. The stark nacked or barely clad children who fetched Rs. 500/- to Rs. 2000/- were put on sale by the parents, accompanied by other family members and friends. The buyers of the children were mostly the nearby farm and factory owners, small and big shopkeepers and casual labour contractors. Thus, each 'mandi' day, two to three hundred children were sold and purchased almost openly in full public gaze. Such children for all practical purposes were lost for the family, because the parents were rarely in a position to pay back the principle and the compound interest rate that went adding through each passing day.

In India the advent of industrialization in the late nineteenth and the twentieth centuries did not totally reverse the culture of legitimization of violence against children. On the contrary, industrialization and urbanization further worsened the situation of children. Thus, the monopoly of parents did pass to the impersonal state, who exercised power over the lives of children as the ultimate guardian or parent of all the children. The exercise of such a function by the State is better known as *parens patria* power (State as the ultimate parent of every child). But this *parens patria* power, which was seemingly for the benefit of the children in reality proved to be a new kind of trap for further enslaving children, particularly of the poorer and destitute sections. That is the reason why one of the earliest child-centric legislation enacted by the British in the exercise of *parens patria* jurisdiction was the Apprentices Act, 1850 that conferred powers on the court to bind over children of the urban poor and destitutes to work as

apprentices, mostly without wages, in the newly set up industries in the British India. In this context the following observation of Bradford Kenny Peirce is very perceptive:

> European institutions had been constructed for young criminals, but no one had secured the power from the state of withdrawing, from the custody of weak and criminal parents children who are vagabonds in the streets and in peril of criminal life, although no criminal act had been committed. (at p. 32)

The same streak of *parens patria* underlies the official mind set rhat find nothing exceptional in the continued existence even today of the worst forms of child labour, child abuse and gross violations of children's right in custody almost everywhere. The queer Indian blend of *patria potesta* and *parens patria* exercise of power over children has its ramifications in some of the vital controversies relating to children in the present times too:

(a) The Debate Relating to Corporal Punishment

A recent news item (reported in Times of India, October, 2008) from somewhere in eastern U.P. involving a student of upper kindergarten is very revealing: "Inquiries revealed that Alok was tied and dragged, besides being forced to kneel down in front of the school gate for nearly two hours to teach him a lesson for not attending the school regularly". The State administration directed the education authorities to register an F.I.R. against the management of the school. But the grand father of the concerned child told the police that the child left home but never reached the school. On the issue of corporal punishment in schools and homes, many parents still strongly believe that time is not yet ripe to give up the sound policy of 'sparing the rod is a convenient device for spoiling the child'. But it is heartening that the judiciary in India has struck the right note in *Parents Forum For Meaningful Education V. Union of India*[1]. In this decision the Delhi High Court categorically struck down Rule 37 of the Delhi Education Act, that conferred powers on the school authorities to inflict corporal punishment to children in the interest of discipline and training of the children.

(b) The Debate Relating to "Surrender" and Relinquishment of Children:

Our society seems to be swinging from one extreme to another in matters relating to children, particularly of the poor and destitute sections. In 1860 the Section 317 of the Penal Code provided a strong measure for the care and protection of children that obligated the parents thus:

> Whoever being father or mother of a child under

[1] A.I.R. 2001 Delhi 212.

> the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child shall be punished, with imprisonment of either description for term which may extend to seven years ...

However, the Juvenile Justice Act, 1986 (S.14) and the Juvenile Justice (care and protection of children) Act, 2000 (S. 23) has turned the abandoning a child as a form of cruelty that is merely punishable up to six months imprisonment. The Act, 2000 in Section 41 has made it possible for the 'orphaned, abandoned, neglected or abused' children to be available for adoption as a measure of rehabilitation. The J.J. (Amendment) Act, 2006, equated "abandoned" with "surrendered", by adding "after the word "abandoned" the words "surrendered" shall be inserted. This accorded legitimization to voluntary relinquishment or surrender by parents, obviously to sustain the growing demand for adoption, particularly by the foreign aspirants. There certainly is a strong lobby that justifies surrender or relinquishment of children for adoption as the best measure in the interest of large section of children of the poor and resourceless parents. But, is the State not moving away from the British period stance of criminalization of abandonment of children to the present day legalizing of relinquishment and surrender of children? In this the best way to fulfill the *parens patria* obligation of the state? Article 18 of the Convention on the Rights of the Child, 1989 lays down that the primary responsibility of rearing up and upbringing of he children is that of the natural family. Why should the state not work earnestly in the direction of creating conditions that will enable the natural families to fulfill their primary responsibilities towards children (in terms of Article 19 of the CRC), rather than condoning parents' voluntary act of relinquishment or surrender of children?

(iii) Engendering A New Children's Right Culture

The U.N. Convention on the Rights of the Child, 1989 (CRC) and the U.N. General Assembly Special Session on Children in 2002 leading to the adoption of an Outcome Document titled: *A World Fit For Children* clearly displays an intent of the world community to accord a different and a better deal to the child population in their respective countries the world over. In a sense these developments mark the culmination of the mission of giving full and proper recognition to the child citizen, that had begun way back in 1924 with the League of Nation's Declaration about the rights of children followed by a similar U.N. Declaration in 1959. It is a happy augury that the Government of India has not only ratified the CRC in 1992 but in the last decade several significant child-centric measures have been undertaken such as enactment of a *National Plan of Action for Children 2005*, setting-up a National Commission for Protection of Child Rights etc. In the year 2005 the Government ratified the two Optional Protocols to be CRC, namely, the

Protocol on Sale of Children, Child Prostitution on Child Pornography and the Protocol Against the Involvement of Children in Armed Conflict.

All these developments are steps in the direction of evolving a comprehensive child right regime that would critique the traditional *patriae potestas* and *parens patria* philosophy and replace them with modern child right values. How would the child right regime be any different from the existing one? How would this new right regime relate to the international child right and human right standards? Answer to some of these vital issues has been ;provided by a recent Constitution Bench decision of the Supreme Court, namely *Pratap Singh Vs. State of Jharkhand*[2]. The Bench was constituted to resolve two basic questions relating to the reckoning date for determination of age of alleged offender as 'juvenile in conflict with law' and the applicability of the Act 2000 to pending cases initiated under the Act. 1986, but Justice B.S. Sinha in his separate and concurring judgment has displayed rare judicial craftsmanship in visualizing and drawing linkages between the international human rights law, U.N. conventional laws and standards, on the one hand, and the national laws like the Constitution of India and the statutory juvenile justice laws, on the other. Underscoring the cruciality of the U.N. Standard Minimum Rules for the administration of Juvenile Justice 1985 (Beijing Rules). Justice Sinha had observed:

> The Juvenile Justice Act in its present form, has been enacted in discharge of the obligation of our country to follow the United Nations Standard Minimum Rules ... The legislation relating to Juvenile Justice should be construed as a step for resolution of the problem of juvenile justice which was one of traffic human interest which cuts across national boundries. The said Act has not only to be read in terms of the rules but also the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for Protection of Juveniles[3]

Justice Sinha further develops the linkages between the Constitution and international law in these words:

> Constitution is a source and not an exercise of legislative power. The principles of international law whenever applicable operate as a statutory implication, but the legislature in the instant case held itself bound thereby and, thus, did not legislate in disregard of the constitutional provisions or international law as also in the context of Articles 20 and 21 of the Constitution.

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2 (2005) 3 SCC 551.

3 *Id.* 578

> The law has to be understood, therefore, in accordance with the international law, part III of our Constitution protects substantive as well as procedural rights. Implications which arise there from must effectively protected by the judiciary[4].

But despite Justice Sinha's initiative to place the Indian Juvenile Justice Jurisprudence in the international context, the child right dimensions have remained under explored. It may be useful in this context to refer to a recent House of Lord ruling R V G and R[5]. The House of Lords particularly referred to the implications of the U.K. ratifying the CRC. Ruling in this context Lord Steyn in the context of Article 40.1 of CRC observed in these words:

> This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system. For example, it would be plainly contrary to Article 40.1 for a State to set the age of criminal responsibility of children of, say, five years. Similarly, it is contrary to article 40.1 in a crime punishable by life imprisonment or detention during Her Majesty's pleasure, the age of the child in judging whether the mental element as been satisfied. It is true that the Convention became binding on the United Kingdom after Caldwell was decided. The House cannot ignore the norm created by the Convention[6].

In India too the new normative system generated by the CRC would need to be better understood and internalized not only by all the sections of the State functionaries dealing with children, but also the parents/ guardians of children and the community at large. As per the objectives of the CRC children's (a) right to survival, (b) right to protection, (c) right to participation, and (d) right to development would have to be ensured in every process right from the birth through the different stages of development down to the attainment of adulthood for every male and female child. This would mean paying greater attention to basic survival needs of food and nutrition, shelter, medical care, education and wholesome living environment. Similarly the children would have to be protected against all forms of exploitation, abuse and in dignified treatment and punishment. Furthermore, the society is obligated to accord to all children equal value as human beings and their opinion and best interest ought to be taken into account in all decisions concerning them. Finally, each child must have adequate opportunity to develop through education and skills development.

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4 Id. 579
5 (2003) UKHL 50 (H.L.)
6 Id 53

(iv) Implications of Recognition of the Children's Rights and Children's Human Rights

One significant fall-out of according recognition to the rights of children is that it provides a touchstone for evaluating the performance of the State and its functionaries at the policy and action level. Such performance evaluation can be both at the international as well as the national levels. At the international level the periodic review of the implementation of the CRC by the Committee on Rights of Child and other U.N. bodies and agencies constantly provide positive or negative performance reports and recommendation for the State parties. At the national level the monitoring performed by the Supreme Court and the various High Courts keeps the child administration in the right track. Equally significant monitoring function is performed by the National Human Rights Commission and State Human Right Commissions that can act either suo moto or on receiving a complaint in respect of violation of children's right any where within the country. The NHRC took up the cause of missing children and provided elaborate recommendation to effectively deal with the problem in 2007.

Yet another implication of recognizing the wide range of children rights under single convention is that it helps in breaking down the artificial hierarchies between the diverse kinds of rights such as political and civil right, on the one hand, and the economic social and cultural rights of the children, on the other. As a natural corollary of this it also leads to develop interconnectivity between one category of rights and another, thus, children whose survival rights remain unmet would ordinarily remain exploited, abused or violated, because fulfilling survival right is a kind of pre-condition for ensuring all other rights. The logic of inter-connectivity of rights helps in building interconnectivity between one kind of victimization of children and another kind of victimization, leading to ultimate victimization that can be described as violence against children. This makes all the agencies and functionaries responsible for food and nutrifunal needs shelter needs, health care needs, and primary education needs of children conjointly liable for each incident of violence against children somewhat in the following Paulo Freirean (Freire, Paulo, 1972) terms:

> Violence is initiated by these who oppress, who exploit, who fail to recognize others as people-not by those who are oppressed, exploited and unrecognized. It is not the unloved who cause disaffection, but those who cannot love because they love only themselves ... It is not those whose humanity is denied them who negate man, but those who denied that humanity (thus negating their own as well). Force is used not by those who have become weak under the preponderance of the

> strong but by the strong who have emasculated them. (p.32)

Therefore to combat violence against children in the true sense the condition of large percentage of child population remaining malnourished (according to a recent estimate as many as forty five percent children are reported to be malnourished) has to be addressed in right earnest, the conditions that impair the capacities of children to develop their potential such as lack of education, lack of skills development would have to be addressed in right earnest. Endeavoring for such a violence-free environment for all our children is our constructional commitment and a new thrust of the children's rights regime. There is no escape from this fundamental obligation.

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Custodial Violence and Judicial Response

*Prof.R.Venkata Rao**

Protective custody is the name given to the custody in certain places like police stations, correctional institutions, hospitals and hostels among others. In all these institutions, the relationship is fiduciary and it is unfortunate that there is abuse of these relations . Subjecting the inmates to torture and custodial violence is one of the manifestations of such abuse.

Daniel Webster always used to recall the story of a swallow and its young kitten. A swallow used to have a nest in the precincts of a place of protective custody. It used to keep its kitten in the nest and fly out to fetch food for its younger ones. One day when it came back with food for the younger ones, it found one of the younger ones eaten by a serpent. The mother swallow was crying in pain and then the elder swallows tried to console it by saying : "You are not the first swallow to have lost the younger ones to a serpent nor are you going to be the last, it is the curse of Nature that we should lose our younger ones to serpents". Then the mother swallow said: Yes, I know it is the law of nature, but I am crying only because this happened in the precincts of a place meant for protective custody, if there is no protection here where shall we go for protection ?

The concern of the swallow symbolically represents the concern of all of us when places of protective custody become places of violence and torture.

The Sixtieth Anniversary of the Universal Declaration of Human Rights is being celebrated this year with the theme JUSTICE AND DIGNITY OF ALL.. The Universal Declaration of Human Rights which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Art.5 that " No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment".

* Professor of Law & Dean, Faculty of Law, Andhra University,Visakhapatnam-530003,Andhra Pradesh. E-mail ID - Profrao@yahoo.com

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The Supreme Court of India like a true sentinel on the qui vive has been judiciously and admirably responding to the situation by giving a decent burial to the doctrine of Absolute Sovereign Immunity. The obsolete Eighteenth century doctrine of THE KING CAN DO NO WRONG has been interpreted as THE KING SHALL DO NO WRONG and in a catena of decisions the Supreme Court of India with all its majesty has been providing succour to the needy and has been providing balms to the wounded.

This paper will examine the contribution of the Supreme Court of India to the compensatory jurisprudence with particular reference to custodial violence.

Though Article 9 para 5 of the Covenant on Civil and Political Rights ensures an enforceable right to compensation in case of unlawful arrest or detention, India's ratification of the Covenant with reservations and the absence of any express right in the Indian Constitution to compensation for the violation of fundamental rights, have made the accountability of state in cases of unlawful arrest or detention or custodial violence difficult. Initially the judiciary was also lukewarm in its response When for the first time the question of state accountability for the infringement of fundamental rights under Art.21 was raised before the Supreme Court in Khatri v. State of Bihar[1], and in Veena Sethi v State of Bihar[2], the judiciary was inimical to the payment of compensation for breach of fundamental rights. Under Art.21.But continuous and unabated violation of human rights by the men in uniform has awakened the judiciary and brought into focus the need for a right to compensation against State. Rudul Sah State of Bihar[3] is a path-breaking decision in this regard. Rudul Sah was found to have been illegally detained without any statutory justification for a period of fourteen years after his acquittal of criminal charges at a Sessions trial. The Court felt that this constituted a flagrant infringement of Sah's fundamental rights under Art.21.As the state has deprived the man of fourteen invaluable years of life, the Court awarded a compensation of Rs. 35,000/- to Rudul Sah.The genial seeds of compensatory jurisprudence have been laid and the citadel has been broken. The Court observed :

> "Art.21 which guaranteed the right to life and liberty will be denuded of its significance if the powers of these courts were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented And due compliance with a mandate of Article 21 secured is to mulct its violators to pay monetary compensation.[4]"

1 A.I.R..1981 S.C. 928
2 A.I.R.. 1983 S.C.339
3 A.I.R. 1983 S.C.1086
4 Ibid p 1089

Similarly, in Sebastian M.Hongray v. Union of India[5], the Apex Court directed the Government to pay Rupees one lakh as exemplary costs towards interim protection to the wives of the two persons whom the Government failed to produce in spite of the writ of habeas Corpus being issued by the court. Treating it as willful disobedience to the writ and keeping in view the torure,agony and the mental oppression of the wives because of the breach of fundamental rights, the Court awarded the compensation.

Likewise in *Bheem Singh v. Jammu & Kashmir*[6], the Supreme Court directed the State to pay compensation to the appellant for the breach of fundamental rights under Article 21 and Article 22(2) respectively. In this case Chinnappa Reddy, J., speaking on behalf of the Court observed :

> "If personal liberty of a member of a Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals. Police officers who are the custodians of Law and Order should have the greatest respect for the personal liberty of citizens and should not flout the law by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not abduct."[7]

The Court directed the State of Jammu & Kashmir to pay Bheem Singh a sum of Rs. 50,000.

In the *Supreme Court Legal Aid Committee v. State of Bihar*[8] , the Court directed the state to pay a compensation of Rs. 20,000 to the person in custody when it was proved that the State acting through the Hawaldar was indifferent to providing medical treatment to the sick and injured person in its custody.

In *Lakshmi v. Sub-Inspector*[9], when a detainee was subject to tortuous treatment and third degree method of persecution, the Madras High Court awarded a compensation of Rs. 25,000 to the victim.

In *Ram Konda Reddy v. State of Andhra Pradesh*[10] , the Andhra Pradesh High Court gave a radical judgment by observing that the doctrine of sovereign immunity contained in Article 300 of the Constitution regarding tortuous liability cannot be said to be an exception to Article. 21. In this case, in spite of the apprehensions of the danger to their safety in jail and in spite of the request for safety measures , a father and his son were not provided adequate safety as a result of which outsiders transgressed into

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5 A.I.R.1984 S.C. 1026
6 A.I.R. 1986 S.C.494
7 Ibid p.499
8 (1990) 3 S.C.C.482
9 1991 Cri.Law.Journal 2269(Madras)
10 A.I.R.1989 A.P. 235

the custodial arena and caused the death of the father and injured the son. The court awarded a compensation of Rs.1,44,000 and rejected the plea of the State that it would be a burden on the public exchequer. The Court remarked that the award of compensation is essential for good government and for ensuring rule of law.

The Supreme Court in *PUDR Vs. State of Bihar*[11] ordered compensation of Rs.20,000 each to the dependents of the deceased and Rs.5,000 each to the injured persons in case of brutal police firing on poor peasants who were holding a peaceful meeting in Arwar of Bihar.

The Apex Court in the case of Saheli V. Commissioner of Police[12], awarded compensation of Rs. 25,000/- to Kamlesh Kumari whose son was tortured to death by a police inspector in an attempt to get her vacated from a house of the land lord where she was residing as a tenant. Both in PUDR and Saheli the Court allowed the state to recover the quantum of compensation from the salaries of the delinquent police officers.

In *M.C.Mehta Vs. Union of India*[13], the Supreme Court emphasized that its jurisdiction under Article 32 is both preventive and remedial and that the remedial relief may include the power to award compensation in appropriate cases for breach of fundamental rights. An appropriate case is one where the infringement of the fundamental right must be gross, patent, incontrovertible, ex-facie glaring and its magnitude must be such as to shock the conscience of the Court.[14]

In Neelabati Behera V. State of Orissa[15], the Supreme Court observing that public law remedies constitute important remedies and the anachronistic principles of acts of the sovereign do not apply in such violations awarded interim compensation to the mother of the victim. The Court observed;

> "It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the fact of

[11] A.I.R.1987 S.C.355
[12] (1990)1S.C.C 422
[13] A.I.R. 1987 S.C.1086
[14] Ibid p.1088
[15] (1993) 2 S.C.C.746

> his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exception. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

Thus the Supreme Court has judiciously intervened wherever there has been an omission, a commission, or indifference on the part of the State in the protection of fundamental rights.

The high watermark in the custodial jurisprudence was reached when the Supreme Court issued the guidelines regarding all cases of arrest or detention in the case of *D.K.Basu v. State of West Bengal*[16], While issuing the guidelines the Court observed :

> "Custodial death is perhaps one of the worst crimes in civilized society governed by the Rule of Law. The rights inherent in Articles 21 and 22 (1) of the Constitution require to be jealously and scrupulously protected. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby anarchy. No civilized nation can permit that to happen."

The Court issued that the following requirements to to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality

[16] A.I.R. 1997 S.C. 610

from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed , as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area of the concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of the right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests , be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory Director,Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred above, should be sent to the Magistrate for his record.

(10) *The arrestee may be permitted to meet his lawyer during* interrogation, though not throughout his interrogation.

(11) A police central room should be provided at all Districts and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing arrest, within 12 hours of effecting the arrest and at the police central room it should be displayed on a conspicuous notice board.

It is unfortunate that the power that be have not bestowed their attention fully on the guidelines.

In *D.K.Basu Vs. State of West. Bengal*, the Court also took cognizance of the difficulties of the police. It observed :

> "There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task , particularly in view of the deteriorating law and order situation, communal riots, political turmoil, students unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society. .It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease."

While turning new leaf of jurisprudence in accountability aspect for custodial violence, the Supreme Court cautioned that care must be taken to separate non-genuine claims. In *Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble*[17], and *Munshi Singh Gautam Vs. State of M.P.*[18], the Court observed :

[17] (2003) 7 S.C.C.749
[18] (2005) 9 S.C.C. 631

> "But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the Courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence"

In the case of *Sube Singh Vs. State of Haryana*[19], the Supreme Court examining the issue holistically has suggested measures for improving the present situation. The Court observed:

> "Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a practice. Lack of training in scientific investigation methods, lack of modern equipment, lack of adequate personnel and lack of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time-consuming and lengthy process. Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes. The expectation of quick results in high-profile or heinous crime builds enormous pressure on the police to somehow "catch" the "offender".

The need to have quick results tempts them to resort to third-degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to east the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for

[19] (2006) 3 S.C.C. 178

such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, Government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may."

What the Supreme Court has been trying to emphasize is that the days of mutual recrimination and fault finding are over and that it is everyone's responsibility to work in the direction of restoring the confidence in the criminal justice system as such.

The Court further adds :

"Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps , if taken, may prove to be effective preventive measures ;

(a) Police training should be reoriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

(b) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.

(c) Compliance with the eleven requirements in D.K.Basu should be ensured in all cases of arrest and detention.

(d) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(e) Computerization, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, mahazars, inquest proceedings, post-mortem reports and statements of witnesses, etc. and to bring in transparency in action.

(f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavor should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence-

building measures(CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation, etc. "

This to date has been the saga of the journey of the High Courts and the Highest Court in India in the province of custodial jurisprudence.

If measures are initiated for ratifying the UN Convention on the Prohibition of Torture and Cruel and Degrading Treatment, for making legal provisions regarding the requirements to be followed in all cases of arrest and detention(as stated in the case of D.K.Basu) and also for making the right to victim compensation a fundamental right as suggested by the National Commission to Review the Working of the Constitution, the leitmotif of the 60th Anniversary of the Universal Declaration of Human Rights-

JUSTICE AND DIGNITY FOR ALL will not be a distant abstraction.

Poverty Alleviation and Human Rights

*P.C. Sharma**

An impression of extreme poverty formed years ago during a train journey to the North-east India has remained firmly etched in my mind. When the train stopped at a wayside station passengers threw remains of what they were eating on the platform. A few children, all in tatters and looking starved, pounced upon the food scattered on the platform and satisfied their hunger with whatever they could lay their hands upon.

That picture and the shock it gave me was evocative of the abject poverty that pervades India in its towns and villages. Children, who should have been in school receiving education, love and affection, were eking out their existence from the left-overs of those endowed with pelf and plenty. Such images have not been an uncommon sight in this highly over-populated country. There are – and there always have been - several geographical entities where populations have been blighted by famine, poverty and pestilence for generations, making India, according to Human Development Report, 2005 the world's one of the most under-nourished countries.

India is home to 260 million people living below the poverty line and the world over 1 billion and more are living on less than $1 a day. In countries like Somalia and Haiti - just to name a few - food shortages have driven people to consume things which are, besides being serious health hazard, abominable to any civilized society. In Haiti, pregnant women are eating mud cakes believed to be a source of calcium. These mud cakes have been consumed by them for years being unmindful of the risk to their pregnancies and its unproven medical effect.

"Poverty goes hand and hand with malnutrition and disease."[1] Besides being the main violator of human rights, it poses the greatest challenge to development. It is also a major cause of unemployment, deprivation, poor wages, low income, lack of education, and worst of all, fatalism. To quote Prof. Parmanand:

* Member, NHRC

[1] "An Ideal for Which I am Prepared to Die" Speech byNelson Mandela. April 20, 1964

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> "The persistence of human deprivations amounts to a denial of economic and social rights ..... Poverty makes a person vulnerable and helpless victim deprived of social, cultural and political freedom. Poverty is not just 'low income' or 'low consumption' but a multiple deprivation causing premature death, chronic under-nourishment, illiteracy, and social exclusion. The realization of social and cultural rights, which are necessary for the survival of a person as a biological entity, therefore, is closely linked with the notion of human development, which means enlarging choices, expanding human freedoms and assuring human rights."

Nothing can mitigate poverty unless the material needs of the poor, including necessities of daily living, such as food, clothing, shelter or safe drinking water are ensured. Human rights approach to poverty reduction is essentially about empowerment of the destitute masses. It visualizes a society based on equality, equitable social system that prohibits both exploitation and discrimination. Above all, it includes a platform for vindicating human rights.

In recorded history, until 18th century, the State or the ruler did little to reduce poverty or ameliorate the appalling conditions in which the poor lived. The French Revolution was just the first jolt administered to the kings and feudal lords alike and pressed home the principles of equality, liberty and fraternity in a manner which was both dramatic and unforgettable in its intensity. Later, the Bolshevik Revolution in Russia put an end to a predatory Czar regime. These two revolutions shook the entire world and opened its eyes to a realty – a reality of the poor and impoverished masses. Utterly oblivious of human rights, regimes such as these had no vision or humane approach towards poverty ridden masses. These revolts were, no doubt, violent revolts against exploitation, monopoly and unbridled concentration of wealth and resources in the hands of a few. The fury of their revolutionary upsurge did engulf some innocent lives but the consequences set the world thinking that endemic poverty was an issue before humanity that could no longer be ignored and that it was crying out for a solution having a humane face – a solution based on equality, liberty and absence of discrimination.

In India, the masses lived on the munificence of the kings or the rulers anointed with divinity. They doled out charity to the hungry and the poor on special occasions like religious festivals and birthdays. Although steeped in religion and scriptures - all avowing equality and brotherhood - never did they think of any agrarian or other economic measures to alleviate

* Prof. Parmanand's essay on Hunger amidst Plenty

misery of the poor. Worse, entrenched in their exalted position, they assumed divine rights to appropriate all resources. The poor, drained of all spirit and any cohesive force, resigned themselves to a fate and belief that they were ordained to live a life of poverty. There is no dearth of passages in our scriptures and lore sanctifying poverty as a condition that need not be questioned or challenged.

It is a historical fact that the unique system of inequality in the Hindu society, in particular, and in India as a whole, in general, was sustained and perpetuated by 'religious and ritual' conceptions. In his essay on "The Scheduled Castes and the Law,"' Prof. Parmanand, of Law Faculty of Delhi University has said "The traditional model of social stratification in which one's caste position in a ritually determined status of hierarch summed up his total life - occupation, his education, his communal relations and other rights." In this kind of social organization, inequality was accepted a fundamental value and there was no 'rank-disequilibrium'.

It was not until 19th century and the first half of the 20th when humanity witnessed upheavals like revolutions, wars, freedom struggles as also reformist movements that brought poverty into the forefront of economic activities. First time it was thought that no economic policies or programmes can eradicate it unless these are just and fair and are capable of generating a social equilibrium by mitigating skewed distribution of income in society.

Acutely conscious of the repressive caste system that marginalized the poor by entrapping them in the grip of poverty, Mahatma Gandhi first raised his voice against untouchability in the Nagpur session of the Congress Party and led it to pass a resolution for complete abolition of untouchability and inequality. For the first time, empowering the long-suppressed masses and bestowing on them human dignity, became a national goal. By and by, upliftment of the poor – be they the scheduled castes, overburdened farmers or the artisans or impoverished landless labourer – became central to the agenda of the freedom struggle. This movement launched by the Mahatma became the harbinger of several economic programmes including agrarian reforms, social reforms – all aiming at eradicating the scourge of poverty through greater self-reliance and higher share in decision-making. The ultimate goal was Swaraj and Sarvodaya(upliftment and common good of all) that primarily included raising the standards of living, providing education, health care, employment opportunities to the impoverished and socially excluded masses.

Dr. Bhim Rao Ambedkar, who coined the term 'Dalit' for the countless untouchables and the victims of caste system in India, vehemently questioned the Indian social order, which was ridden with inequalities, discrimination and rank ostracism of the scheduled castes. As Chairman of the Drafting Committee of the Constitution, he convinced the Constituent Assembly that failure to address the appalling conditions of the downtrodden and failure to provide adequate safeguards to scheduled

castes would lead to serious social conflicts in independent India. It was his vision and untiring efforts that led to the provision for special privileges in the Constitution for the scheduled casts and the 'dalits'.

In America, Abraham Lincoln had signed the Emancipation Proclamation on January 1, 1863 seeking to put an end to slavery and poverty. He declared that ".....all persons held as slaves within the said designated states, and parts of states, are and henceforward shall be free and that the executive government of the United States, including the military and naval authorities thereof, will recognise and maintain the freedom of the said persons."* Martin Luther King fought for the civil and political rights of the American blacks. Nelson Mandela waged a life-long struggle against the policy of apartheid, 'poverty and lack of human dignity' of the blacks in South Africa. These were extraordinary human endeavours that contributed to the movement of social emancipation of the depressed and the marginalized all over the world.

At the international level, Article 25(1) of the Universal Declaration of Human Rights (UDHR) in 1948 gave a loud and forceful utterance to this Vox populi in 1948 when it stated "Everyone has the right to a standard of living adequate for health and well-being of himself and hi family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control".

This message of the UDHR was further taken forward by the Vienna Conference and the Copenhagen Declaration, declaring that, social, cultural and economic rights are parts of the basic human rights and reaffirmed the link between human rights and development.

In the Indian context this new international 'dharma' of equality, non-discrimination, and human rights found a powerful expression in our Constitution in 1951, which adopted fundamental rights, and Directive Principles as national goals of social transformation and economic upliftment. For the first time in India's history, the people of India "resolved..... to secure to all its citizens, justice – social economic and political – liberty of thought, expression, belief and worship; equality of status and opportunity; and to promote among them all, fraternity assuring dignity of the individual and the unity and integrity of the nation became a solemn national programme" . For the first time, a positive obligation has been cast on the state by Articles 21, 41, 46 and 47 of the Constitution to ensure protection of life and personal liberty, right to health and education for all citizens and, above all, ensuring distributive justice to weaker sections including scheduled castes and scheduled tribes. Further, the Constitution of India forbids the State - irrespective of any party that is in power - to

* "The Emancipation Proclamation, January, 1863 by the President of the United States of America."

indulge in any deviation from these goals. Article 13 ensures that laws inconsistent with or in derogation of the fundamental rights shall be held void and, thus, it accords paramountcy to fundamental rights enshrined in the Preamble to the Constitution. Concept of a welfare state and rights based approach, thus, emerged.

Education, social emancipation and economic development constitute the core mantra for poverty alleviation. But the magnitude of poverty in India is so huge that it demands State intervention. The strategies for poverty alleviation needs be a combination of rights-based approach and sound economics. ***"True economics is the economics of justice"****. Essentially, therefore, economic development must ensure even handed justice create better opportunities for the poor allowing them to participate in the growth process. And, at the same time, strengthen structures for social emancipation.

Ending age-old poverty and unequal social status among Indian masses is not an easy task. As per the estimates of the Planning Commission, 260 million people, i.e. approximately 26% of the country's population was living below the poverty line in 1999-2000. This poses a great threat to the harmony and stability of the society through a widening gap between the rich and the poor. Out of 260 million people below poverty line, 193 million i.e. 75% of total poor live in rural and backward areas which makes the syndrome of deprivation much more complex. The rest 67 million who live in rural urban continuum, are beset with relative deprivation syndrome.

Community development – started in 1952 – is of prime importance in all poverty alleviation programmes. Agrarian reforms which are grass-root initiatives going hand in hand with other economic programmes of poverty reduction are capable of yielding sound results, especially:

1. In terms of creating an income-generating assets base for self-employment of the rural poor.
2. By creating opportunities for wage employment for the poor, and
3. Area=oriented development activities in backward regions such as dry lands, drought-prone areas, tribal, hill and desert areas.

Programmes such as Antodaya and Rural Integrated Development Programmes are singularly notable for their human approach and economic thrust given to the national endeavour to provide sustainable livelihood to the poorest of the poor in rural areas. Schemes which include social mobilization of the poor – whether they live in urban or rural sectors – organize them into self-help groups for capacity building remain the core elements of these programmes.

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* "Unto this Last" by John Ruskin"

Efforts made so far have, indeed yielded significant results in lowering levels of poverty. At the beginning of the first Five Year Plan, almost half of the Indian population was living below the poverty line, 80% of which lived in rural areas. This has been reduced to 26% of the population in 1999-2000 and as per the estimates of the Planning Commission; this will further come down to 10% by 2012.

The economic policies and programmes launched by the State can be significantly supplemented by the efforts of the National Human Rights Institutions. They can serve as watch-dogs of economic upliftment and ensure that the marginalized people are not left behind. To use the appropriate words of Dr. Arjun Sengupta, the NHRIs' should "recognize the eradication of poverty a human rights entitlement". They should engage the state and Central Governments to respond to the needs of poverty alleviation; be they the farmers' suicides, starvation deaths, removal of untouchability, bonded labour etc.

The National Human Rights Commission of India made a historic intervention in the districts of Koraput, Bolangir and Kalahandi (also known as KBK districts) of the State of Orissa ravaged by drought, hunger, poverty and disease. It stands out as one of the most significant human endeavours made by an institution any where in the world to understand and reduce the sufferings of the poor. The case had its origin in the reports of starvation deaths in these districts brought to the notice of the Commission in 1996. The proceedings of the Commission stretched over a number of years, aided by the untiring efforts of its Special Rapporteur, succeeded in making the State realize its basic obligation under article 21 of the Constitution, that is, to enable the citizens to live a "life with human dignity". The hearings of the Commission covered wide ranging matters basic to human existence like rural water supply schemes; public health care, social security which included old age/widow/disability pension schemes, public distribution system and national family benefit schemes; water and soil conservation measures and rural development schemes. Other interventions made in connection with starvation deaths in Andhra Pradesh, famine in Bundelkhand are significant for the proactive and rights based approach pursued by the National human Rights Commission for reducing poverty. The results achieved have been both tangible and encouraging. The powerful lesson arising from these interventions was that it is the right-based action plans alone that can alleviate the conditions of the impoverished and the marginalized making them self-reliant, creating an economic muscle for this category of society and finally, inculcating in them the dignity of labour and awareness of their legitimate claim in the process of development. Justice S. Rajendra Babu, Chairperson of the National Human Rights Commission of India has very aptly summed up the right-based approach to poverty alleviation. I quote:

> "National and international strategies addressing poverty reduction need to take into account the human rights dimension of poverty and its remedies. The essential idea underlying the adoption of a human rights approach to poverty reduction is that -polices and institutions for poverty reduction should be based strictly on the norms and values set out in the international law of human rights. Whether explicit or implicit, norms and values shape policies and institutions. The human rights based approach offers an explicit normative framework - that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international polices, including poverty reduction strategies"

All the economic policies, legislative enactments and social restructuring that are essential tools for poverty reduction, removing inequalities and discrimination, are sure to yield positive gains if implemented with sensitivity and human approach. Rule of law is central to the implementation of all these measures. It must inspire all efforts of the State and the society to give succour and dignity to *"the last, the lowliest and least". Inept implementation, corrupt motives can subvert any well-intended programmes and policies, as indeed has been the case with regard to some of the very ambitious programmes. Finally, all those engaged in the task of reduction of poverty - be it the State or the civil society - ***should not think of resting,*** as the Father of the nation says, "***so long as there is one able bodied man or woman without food*** or work".

* "words of Rabindra Nath Tagore. "

Constitutionalism and the Protection of due Process Rights in the Experience of India

*Dr K.N. Chandrasekharan Pillai**

India became a republic on 26 January, 1950. Its massive Constitution came out of the discussions and debates charged with the serene ideas of individual freedom, rule of law and human rights. It was but natural that the Indian Constitution came to be inspired by the great ideals enshrined in the U.N. Charter and Declaration of Human Rights. The subsequent instruments such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights also came to be reflected in the Indian Constitution. While Part III deals with civil and political rights, Part IV deals with economic, social and cultural rights. Part III is made justiciable. Part IV is not justiciable. Part III rights are to be exercised by the people. Part IV rights could be enforced depending upon the economic strength of the state. Till then they constitute only guidelines for the state for governance.

Constitutionally speaking, India owes a great deal to the American Constitution. The very idea of Bill of Rights being included in the Constitution came from the USA. The conceptual ancestry and legislative history of many a provisions indicate their origin and development in Democratic Constitutions including those of Ireland, USA, France, etc. Similarly, the indebtedness of the Indian Constitution to the international documents on Human Rights cannot also be denied. This relationship of the Indian Constitution with liberal constitutions and documents stressing on importance of human rights keeps the Indian constitutional law alive and relevant. It shows the vitality to contain the changes. It helps the legal system to be under constant constitutionalization. Though there is no explicit provision for judicial review in the constitution the legal fraternity accepts it as a basic feature of the Indian Constitution. And it is the principal instrument for constitutionalization.

* Director, Indian Law Institute.

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As already mentioned the Indian Constitution does have a bill of rights. Article 20 is the fountainhead of many a fundamental principle of law signifying acceptance of rule of law. It is not accidental that they are similar to the provisions in the international instruments.

Article 20 of the Indian Constitution enacts

Protection in respect of conviction for offence:

(1) No person shall be convicted of any offence except for the violation of the law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Article 21 - **Protection of life and personal liberty**: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22 in material part enacts thus:-

Article 22 - ***Protection against arrest and detention in certain cases***

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond said period without the authority of a magistrate.

It is interesting to see how far the provisions in international documents tally with those in the Indian Constitution. Article 3 of the Universal Declaration of Human Rights lays down that 'everyone has the right to life, liberty and security of person'. Article 5 lays down that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 6 categorically confers right to an effective remedy by the competent national tribunals for violation of fundamental rights enshrined in the constitution of each state. Article 9 ensures that no one shall be arbitrarily arrested or detained.

Articles 10 and 11 spell out the fundamental principles of Criminal Law. Article 10 lays down thus:-

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 11 declares:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. No doubt, these declarations have reappeared in the Indian constitution as rights in Part III making some scholars to mix up fundamental rights with human rights. Some of these rights came to be reasserted in the international covenant on civil and political Rights in 1966 which became effective in 1976.

Article 6 of the International Covenant on Civil and Political Rights in material part lays down that every human being has the inherent right to life. Article 7 declares thus: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishments. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. Articles 9 and 10 constitute a code with reference to procedure in effecting arrest of a person. Paragraph 5 of Article 9 declares that 'anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation'. Article 11 further lays down that 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 14 spells out that the rights of the accused which one may find in the constitution of every democratic country would be protected. Presumption of innocence, provision for enabling defendant for preparation of his defence, provision for speedy trial, right to counsel, provision for legal aid, protection against self-incrimination, right to appeal, right to compensation for illegal imprisonment, protection against double jeopardy etc., do find place in the covenant. Article 15 cabins the principle of legality, viz., the rule against ex post facto laws and prohibition of punishment higher than what was prescribed at the time of commission.

The purpose of recapitulating the convention and covenant is to show the way in which the Indian Constitution has been in operation. As already indicated it is a dynamic document with vibrant ideas. The intellectual environment of its birth, the spiritual relationship it had with the American

tradition and the amenability of the provisions for judicial expansion etc. provided an invigorating atmosphere congenial for the development of constitutionalisation process. If one looks into the history of Indian Courts' constitutionalisation of statutory provisions one may notice that it has taken place at different stages. Prior to 1978 the practice has been to invoke a provision and simply give meaning to the language of the provision. It was so because India has had a tradition of statutory interpretation followed by the British courts. It also had had a huge mass of preconstitutional statute law. In particular the three major statutes dealing with Criminal Justice Administration, viz., the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act are preconstitutional. They had enough precedents created not only by the Indian Courts but by the English Courts especially the Privy Council. Coupled with this situation the common law moorings of the Indian Judges must have made them to be complacent with the traditional mould of being 'declarators of law' rather than 'makers of law'. They seemed to have the tendency of looking at the English practice and approach in dealing with even new issues. If one looks into the case law pertaining to period prior to 1977-78 one may not find many cases in which the statute law was examined in the light of the philosophy of the Constitution.

The post-emergency strident posture and frequent references of American decisions made the Indian judiciary to turn a new leaf in the decisional jurisprudence in the country. It was in 1978 after the Emergency that the Supreme Court in *Maneka Gandhi* vs. *Union of India*[1] turned around and overruled the reasoning in *A.K. Gopalan*[2]. In *A.K. Gopalan*, the Court took the view that each fundamental right in Part III of the Constitution is independent. This was overturned in *Maneka* by ruling that the Part III rights are inter related and that they could be construed accordingly.

Maneka could have been decided on the basis of the construction of the provisions in the Indian Passport Act. But Justice Krishna Iyer constitutionalized the issue by way of identifying right to travel in Article 21 and insisting for a fair and just procedure to answer the requirement of reasonableness under Article 14. The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation.

Maneka became a landmark not because it was a deviation from the earlier path but because of an array of decisions that sprout from it. These

1 [1978]1 SCC 248.
2 AIR 1950 SC 27.

decisions conferred various rights on the citizens and it is neither necessary nor feasible to examine all these decisions[3]

Constitutionalization was resorted to by many judges but the efforts of the dynamic judge, Justice V.R. Krishna Iyer were mainly responsible for the acceptance of the process by the Indian legal fraternity. Though eclectic every judgment written by Justice Iyer was classic in its organisation of ideas, rhythmic in its language, clear in its vision, effective in serving his mission and in tact as a discourse on the lis before him. In fact the contributions made by Justice P.N. Bhagwati, Chandrachud, Chinnappa Reddy, D.A. Desai etc. cannot also be forgotten. However, the power of Justice Iyer's pen and the consistent and persistent adherence of the judges mentioned above led the Indian jurisprudence to the embracing of constitutionalization particularly in the field of affording the due process rights to the Indian litigants.

The benefits of constitutionalization should be noted. It gives the judges maximum freedom for interpretation. It enables them to enter into the constitutional philosophy in relation to the issue agitated before them. A lot of material could be brought in the discussions. International documents, if any, relevant to the case could also be analysed and relied on in resolving the issue. This process thus helps the Court to add new dimensions to the discipline of law.

Justice Iyer looked into the American Constitution and the case law produced by the American jurisdictions to buttress his views. He made no secret of the influence the Constitution should have on interpretation of statutes. He admitted:-

> "It is fair to mention that the humanistic imperatives of the Indian Constitution, as paramount to the punitive strategy of the penal code, have hardly been explored by Courts, in this field of life or death at the hands of the law. The main focus of our judgement is on this poignant gap in 'human rights jurisprudence' with the limits of the Penal Code, impregnated by the Constitution....."[4]

The profound influence the American Constitutional interpretation had on the interpretation of our Constitution is admitted by the Supreme Court in *Deena* v. *Union of India*[5] It was a case in which the legality of hanging as the mode of carrying out death sentence was gone into. The Court asserted:

3 See *Mukti Morcha* v. *Union of India*, (1984)3 SCC 161 saying Art.21 draws strength from Part IV of the Constitution, *Suk Das* v. *Union Territory of Arunachal Pradesh*, (1986)2 SCC 401 laying down that right nto legal aid is constitutional right, *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, (1980)1 SCC 98 declaring that right to speedy trial is part of Art.21, *State of Maharashtra* v. *Ravi Kant S.Patil*, (1991)2 SCC 373 declaring right against handcuffing etc. etc.)

4 *Rajendra Prasad* v. State of U.P., [1979]3 SCC 646

5 [1983]4 SCC 645; [1983]SCC (Cri0 879 at 923.

> "Though Art.21 was the focal point of this case, almost everyone of the learned counsel appearing on behalf of the petitioners drew inspiration from the Eighth Amendment to the U.S. Constitution which provides that 'Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted."[6]

The enthusiasm and the feeling of freedom from judicial restraints made the judges to resort to judicial legislation. Justice Krishna Iyer in *Sunil Batra*[7] declared that 'due process' clause of American Constitution was applicable to the Indian constitutional jurisprudence. His observations are pertinent:-

> "True, our Constitution has no 'due process' clause or the VIII Amendment, but in this branch of law, after Cooper (*Cooper* v. *Union of India*, (1970) 1 SCC 248 and *Maneka Gandhi* (1978) 1 SCC 248 the consequence is the same. For what is positively outrageous, scandalisingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Art.14 and 19 and if inflicted with procedural unfairness, falls foul of Art.21"[8]

Indeed, the Supreme Court could import 'due process' rights through the instrumentality of constitutionalization but the development was neither uniform nor unique. This becomes evident if one looks into the synthesis of certain rights from Article 21. As an institution the Supreme Court did not follow constitutionalization in every case even during 1978-79. In some cases where there was vacuum it commanded to its aid provisions in the Constitution. In certain other cases where statutory provisions existed some judges did not consider Constitution. For example, while Justice Bhagwati in *Hussainara Khatoon* cases[9] declared that there is right to speedy trial in India emanating from Article 21, Justice Krishna Iyer known for his urge for constitutionalisation pegged his decision in *Nimeon Sangma* v. *Home Secretary, Meghalaya*[10] on to the provisions in Criminal Procedure Code. In other words, when Bhagwati looked at the delay in trial as violation of constitution, Justice Krishna Iyer considered it as a violation of the statute.

It is interesting to see that the speedy trial right under Article 21 could not have the respectability of 'due process' rights emerging from *Sunil Batra*. Its sustainability as a constitutional right is doubtful inasmuch as in many cases speedy trial right is not given effect to.

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[6] *Ibid.* at para 88 at 923.
[7] 1979 SCC (Cri) 155.
[8] *Ibid.* at p. 179.
[9] [1980]1 SCC 93, 98 and 108.
[10] 1980 SCC (Cri) 328.

Right to legal aid was however, synthesized and elevated as a constitutional right. In *Suk Das* v. *Union Territory of Arunachal Pradesh*[11] it had been ruled by Justice Bhagwati that it is a constitutional right violation of which may result in vitiating the trial.

The strident posture adopted by the Court after *Maneka* decision resulted in its frequent forays into the less luminous territory of prison bringing light of hope for the meek segments of humanity living there. Traditionally it was believed and accepted that prison is an area exclusively left for the Executive. The judiciary after passing the sentence used to send the convict to the prison and forget about him inasmuch as it was for the executive to administer the prison. The failure of prison administration, the human rights violations that took place in the prison every now and then, lack of transparency etc. made the Court to assert that it has the responsibility and authority to look into what was happening in the prison. Decisions of the Supreme Court broke the traditions, lifted the age-old embargo of *locus standi* and started entertaining even letters as writ petitions to deal with issues that never come up before the courts in regular cases. The Court found that its writ jurisdiction could be exercised to provide relief to the prisoners. The Court later relating the development of law in America observed:-

> "The content of our constitutional liberties being no less, the dynamics of *habeas* writs there developed help the judicial process here. Indeed, the potential of Art.21, 19 and 14, after *Maneka Gandhi* has been unfolded by this Court in *M.H. Hoskot* (*M.H. Hoskot* v. *State of Maharashtra,* (1978) 3 SCC 544 and *Batra,* 1979 SCC (Cri.) 155 today human rights jurisprudence in India has a constitutional status and sweep, thanks to Art.21 so that this magna carta may well toll the knell of human bondage beyond civilised limits."[12]

The Supreme Court categorically ruled that imprisonment of a person does not extinguish all his rights. His locomotion may be restricted but his right to life, right to work etc. may not be affected.

The Court's strong desire to extend the human rights to the prison made it observe thus:

> "The state shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the U.N. especially, those relating to work and wages, treatment with dignity, community, contact and correctional strategies"[13]

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[11] [1986]2 SCC 401.
[12] 1980 SCC (Cri) 777 at 791.
[13] *Ibid.* at 811.

In fact, it is the Supreme Court Justice Krishna Iyer in particular who spearheaded the movement for humanising the prison system. Looking back it should be said to the credit of Justice Iyer that the prison jurisprudence became a reality only because of his steadfastness for breathing life into the dungeons.

The tempo of constitutionalisation took the Court to the extent of internationalising the human rights part of the Indian Constitution. It was in *Joly George Varghese* v. *Bank of Cochin*[14] that the Supreme Court invoked the provisions in the International Covenant on Civil and Political Rights prohibiting imprisonment of a person for failure to pay back his debts. The petitioner in this case was to be imprisoned for having deliberately avoided payment of his debt to the Bank. Though the case was remanded to the Lower Court for decision, Justice Iyer produced a thesis on the vexed question of applying international human rights norms to the municipal laws. There was no legislation dealing with the issue. Justice Iyer, therefore, related Article 21 to the case and argued that the covenant was applicable in India.

The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of Union List in VII Schedule of the Constitution. Enactment of a new law under these entries read with Article 253 is necessary when treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the state. If the rights of the citizens or others which are justifiable are not affected no law is needed to give effect to this agreement or treaty. Until, the municipal law is changed to accommodate the covenant, what binds the Court is the former and not the latter. The Court explained the position thus:

> "Equality meaningful is the import of Art.21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and worth of the human person enshrined in Art.21 read with Art.14 and Art.19 oblige the state not to except under a law which is just, fair and reasonable"[15]

This approach continues to have sway in the Indian human rights jurisprudence. The decisions in *Nilabati Behera*[16], *Visakha v. State of Rajastan*[17] and *Chairman Railway Board* v. *Chandrima Das*[18] stand proof to this.

The Indian judiciary developed what is called a public law remedy for police torture. It was in *Nilabati Behera* that the Court put the remedy on firm footings.

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[14] AIR 1980 SC 470.
[15] Ibid. at 474.
[16] [1993]6 SCC 746.
[17] [1997]6 SCC 241.
[18] [2000]2 SCC 465.

> "It may be mentioned straightaway that award of compensation in a proceeding under Art.32 by this Court or by the High Court under Art.226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."[19]

This reasoning was reinforced in *Visakha* wherein the Court observed thus:-

> "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all facets of gender equality including prevention of sexual harassment or abuse, independence of judiciary forms a part of our constitutional scheme. 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. It is how an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."[20]

The Court was further firm in its conviction when it decided *People's Union for Civil Liberties* v. *Union of India*[21] wherever it justified its stand though it was told that the Government of India signed the covenant with the exception of not undertaking the obligation to pay compensation for violation of rights. The Court observed:-

> "The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, C.J. himself. The ratification of these conventions and covenants is done in most of the countries by the Executive acting alone and that the prerogative of making law is that of Parliament alone, unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 covenant. Indeed, it appears that at the time of ratification of covenant in 1979, the Government of India, had made a specific reservation to the effect that the Indian Legal system does not recognise a right to compensation for

[19] Supra n.16 at 539.
[20] Supra n.17 at 250.
[21] 1997 SCC (Cri) 434.

> victims of unlawful arrest or detention. This reservation, has of course, been held to be of little relevance now in view of the decision in *Nilabati Behera* and *D.K. Basu*. Assuming that, it has, the question may yet arise whether such approval can be equated to legislation and invests the covenant with the sanctity of a law made by Parliament. As pointed out by this Court in *S.R. Bommai* v. *Union of India* (1994)3 SCC 1, every action of Parliament cannot be equated with legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions, all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such." [22]

In short, the similarity of the provisions in the Constitution of India with those in the American Constitution, the common law moorings of the Indian jurisprudence and the activist judiciary made the Indian judiciary to resort to constitutionalisation firstly as a mimetic exercise and later as an essential process which is congenial to a constitutional democracy. This process has in fact helped the Indian system to add new dimensions to the human rights jurisprudence at international level.

Comparatively speaking there are various provisions in the Chinese Constitution which could, if interpreted freely, lead to expanding individual freedom. For example, Articles 37,38,39,41 etc. could prove to be more effective than Article 21 of the Indian Constitution.

Art.37 provides: No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a People's Court and arrest must be made by a public security organ. Unlawful detention or deprivation or restriction of citizen's freedom of the person by other means is prohibited and unlawful search of the person by citizen is prohibited.

Article 38 Personal Dignity: The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.

Article 39 House: The home of citizens of PRC is inviolable unlawful search of or intrusion into a citizen's house is prohibited.

[22] Ibid. at 443.

Article 41 Freedom of Speech:

(1) Citizens of the PRC have the right to criticise and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against or exposures of, any state organ or functioning, for violation of the law or dereliction of duty but fabrication or distortion of facts for the purpose of libel or frame-up is prohibited.

(2) The state organ concerned must deal with complaints, charge or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposure, or retaliate against the citizens making them.

(3) Citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with law.

It seems that Articles 38 and 39 can provide wide scope for the Chinese citizen for enjoying human rights if the Chinese judiciary resorts to constitutionalisation of Chinese Criminal Procedure.

The citizen's rights to question any authority of the State organ contained in Article 41 coupled with the powers of the procuratorate might help the system to protect and promote human rights of the Chinese people.

I. Background to the Regional Workshops on Disability being organized by NHRC

The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 by the UN General Assembly. The Government of India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1st October 2007.

Role of NHRIs in monitoring CRPD:-

Article 33 of that Convention explains the role of National Human Rights Institutions (NHRIs) in promoting and protecting the rights of people with disabilities.

Article 33

"National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process."

With a view to create awareness and sensitize various stakeholders regarding the various provisions of CRPD and their roles in the light of the Article 33 of the convention and also with a view to monitor rights of PWDs,

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the Commission is organizing five regional workshops on Disability. They will focus in particular on right to education, employment, access and services for persons with Disability.

Objectives of the regional workshops

1. To assess whether existing programmes and policies for persons with Disabilities are having the desired impact and to identify gaps in implementation, if any, and to suggest appropriate strategies to deal with them.
2. The Commission proposes to sensitize all stakeholders regarding provisions of CRPD.
3. The Commission proposes to take up four areas, viz., Education, Employment, Access and Services to ascertain and monitor Statewise progress (both physical and financial) and new initiatives taken in these areas.
4. Evolve strategies, in partnership with SHRCs, and NGOs, with a view to monitor Education, Employment, Access and Services to PWDs.

The Commission is organizing five regional workshops as per the following details:

S.N.	Region	Place of Workshop and date	Collaborating Institutions
1.	Northern Region (Jammu and Kashmir, Punjab, Haryana, Himachal Pradesh, Delhi, Uttar Pradesh, Uttrakhand, Chandigarh)	Dehradun 16-17th May, 2008	This workshop was organized at National Institute of Visually Handicapped, Dehradun.
2.	Eastern Region (Bihar, Jharkhand, West Bengal, Orissa, Chattisgarh)	Kolkata 22-23rd August, 2008	This Workshop was organized at West Bengal National University of Juridical Sciences, Kolkata.
3.	Western Region (Rajasthan, Gujarat, Maharashtra, Madhya Pradesh, Goa, Daman & Diu, Dadra & Nagar Haveli)	Pune 4-5th September 2008	This Workshop was organized at ILS Law College, Pune in partnership with Maharashtra Human Rights Commission and Government of Maharashtra
4.	Southern Region (Karnataka, Andhra Pradesh, Tamil Nadu, Kerala, Pondicherry, Andaman & Nicobar)	Bangalore 17-18th November, 2008	This Workshop was organized at National Law School of India University, Bangalore in partnership with Government of Karnataka and the Karnataka State Human Rights Commission.
5.	Northeastern Region (Assam, Meghalaya, Tripura, Manipur Nagaland, Arunachal Pradesh, Mizoram, Sikkim)	Imphal 15-16th December, 2008	Manipur State Human Rights Commission and Government of Manipur.

II(i). NHRC Recommendations on Relief and Rehabilitation of Displaced Persons

Brief background

Displacement impacts the lives of several thousands of people in our country. It takes place due to various factors, including conflicts, natural disasters, development projects. Since its inception, the Commission has been concerned about of the plight of people displaced by natural disasters and developmental projects and the protection of their human rights. The importance of this issue assumes significance in light of gaps in the legal framework to deal with the rights of the displaced persons.

The Commission has been receiving complaints about inadequate response of the authorities with regard to the relief and rehabilitation of such persons. In particular, it is imperative that vulnerable sections amongst them like women, children, older persons etc. should not be neglected. Thus, there is a need to integrate human rights concerns into the relief and rehabilitation process to ensure that relief and rehabilitation is provided to the displaced persons without any discrimination.

Recently, the Government of India has taken some laudable measures in the realm of displacement, most notably by enacting the Disaster Management Act (DMA), 2005 to provide for institutional mechanism to deal with disasters and the revised National Rehabilitation and Resettlement Policy which came into effect in 2007. In addition, two bills viz. the Land Acquisition (Amendment) Bill, 2007 and the Rehabilitation and Resettlement Bill, 2007 have been introduced in the Parliament.

With a view to examine these draft legislations from the human rights perspective and to evolve suitable recommendations, the National Human Rights Commission organized the National Conference on "***Relief and Rehabilitation of Displaced Persons***" during 24th - 25th March, 2008 at New Delhi in which all stake holders participated.

The following important recommendations and suggestions have emerged at the National Conference on Relief and Rehabilitation of Displaced Persons organized by the National Human Rights Commission on 24-25 March 2008 in New Delhi.[1]

[1] Certain comments received from NGOs on the draft recommendations have been incorporated while finalizing these recommendations.

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I. General Recommendations

1. Pre-displacement, displacement, relief and rehabilitation should be viewed from a rights based perspective rather than as an administrative/governance issue that focuses on needs of beneficiaries. For instance, the lexicon of welfare/charity ("gratuitous relief" "beneficiary") should be jettisoned for language that respects human rights of the displaced or to-be-displaced people. In all instances of displacement, there should be minimum non-negotiable human rights standards that should be adhered to for all and especially for vulnerable and marginalized groups such as women, children, elderly and disabled.

2. As part of relief and rehabilitation, authorities provide food, potable water, clothing, shelter, basic health care, education etc. It is important to note that access to these basic minimum services is not a matter of welfare or charity but is a human right. Basic minimum standards for such facilities /services should be defined.

3. There is a need for Central and State Governments to re-examine and amend laws, policies, plans, regulations and practices to mainstream and integrate human rights concerns on issues related to pre-displacement, displacement, relief and rehabilitation. For instance, human rights principles should inform the relief manuals of various states.

4. Authorities concerned with pre-displacement, displacement and post-displacement activities should be sensitized about human rights through capacity building.

5. All affected and displaced persons have the right to be treated with dignity. In particular, no arbitrary decision, without reasoning should be taken in the matters that affect their source of food, shelter and livelihood. Furthermore, before any such decision is taken, they should have right to be heard/consulted. They should also have the right to appeal against such decisions in appropriate forums.

6. All affected and displaced persons have the right to be treated without any discrimination in matters relating to rescue, relief and rehabilitation. In respect of vulnerable groups among them such as women, disabled, elderly persons and children, the appropriate authority shall take special measures to protect their rights. Displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

7. All affected persons and displaced persons have the right to information regarding all aspects related to immediate humanitarian assistance, relief and rehabilitation. This includes, but is not limited to the following:

   a. Adequate measures to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
   b. Proper publicity by the State Government so as to enable the affected people to become aware of their entitlements in the form of relief and compensation;

8. All displaced persons, in particular displaced children, have the right to receive education, which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion. Education facilities should be made available as soon as conditions permit. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.

9. All displaced persons have the right to an adequate standard of living. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide displaced persons with and ensure access to:

   a. Essential food and potable water;
   b. Basic shelter and housing;
   c. Appropriate clothing; and
   d. Essential medical services and sanitation.

   (Explanation:- The term "adequate" means that these services are (i) available, (ii) accessible, (iii) acceptable, and (iv) adaptable: (i) Availability means that these goods and services are made available to the affected population in sufficient quantity and quality; (ii) Accessibility requires that these goods and services (a) are granted without discrimination to all in need, (b) are within safe reach and can be physically accessed by everyone, including vulnerable and marginalized groups, and (c) are known to the beneficiaries; (iii) Acceptability refers to the need to provide goods and services that are culturally appropriate and sensitive to gender and age; (iv) Adaptability requires that these goods and services be provided in ways flexible enough to adapt to the change of needs in the different phases of emergency relief, reconstruction. During the immediate emergency phase, food, water and sanitation, shelter, clothing, and health services are considered adequate if they ensure survival to all in need of them.

II Recommendations on development induced displacement

10. **The basic principles in the National Relief and Rehabilitation Policy [NRRP] must be incorporated in the Rehabilitation and Resettlement Bill, 2007 (R&R Bill).** {For instance, the five year residence limit (Sections 3(n), 3(d), 3(iii), 21(2)(vi) 35(2) of R&R Bill) is higher than the one in the NRRP, which only specifies three year residence (see Sections 6.4(vi), 3(o),7.3, 3.1(d), 3.1(b)(iii) of NRRP). Given that inter-state and intra-state migration for work occurs at a large scale in India and that the beneficiaries of these provisions are among the most poor and vulnerable sections of our society, it would be appropriate to lower the limit of number of years to three.}

11. There should be a mechanism to ensure equitable sharing of project benefits with the displaced people. This may be in terms of providing direct or indirect employment or reservation of a quota of shares etc.

12. The conditional availability of certain resettlement provisions in the Relief and Resettlement Bill are a matter of concern (S.36(1) reads "Each affected family owning agricultural land in the affected area and whose entire land has been acquired or lost, [...] shall be allotted, [...] agricultural land or cultivable wasteland[...] **if Government land is available in the resettlement area..**". S.41(i) provides, "In case of a project involving land acquisition on behalf of a requiring body – (i) the requiring body shall give preference to the affected families in providing employment in the project, at least one person per family, **subject to the availability of vacancies and suitability of the affected person for the employment**;[...]". S. 49(4) says, "Each affected family of Scheduled Tribe followed by Scheduled Caste categories shall be given preference in allotment of land-for-land, **if Government land is available in the resettlement area**.)Alternatives should be spelt out if these conditions are not met.

13. The Bill should be in line with other existing legislations such as those related to lands of tribal peoples or forest lands.

14. Time limit should be defined for various stages in the process for acquisition of the land. Besides, where land has been acquired and has not been used for the intended purpose or any other public purpose, then instead of auctioning the land, option should be given to the original owner to take it back on laid down terms. (Section 22 of the Land Acquisition Bill (LA Bill))

15. There shall be no arbitrary displacement of individuals from their home or place of habitual residence by state authorities. In particular, public interest should justify any large-scale development project. In all cases of large-scale development projects, authorities should hold public consultation with people likely to be displaced.

16. The concept of "eminent domain" should be in line with constitutional obligations and the proposed amendments to the land acquisition act and the relief and resettlement bill should provide for more scope for consultation/participation of affected people both in the acquisition as well as relief and rehabilitation process. (According to Section 6(2) of the R&R Bill, "The public hearing undertaken in the project affected area for the environmental impact assessment shall also cover issues relating to social impact assessment." The Bill does not envisage public hearing for social impact assessment where no environment impact assessment is required. Public hearing should be held during all instances of social impact assessment.)

17. Under the Rehabilitation and Resettlement Bill, 2007, a multiplicity of authorities are sought to be created. In several cases, modalities relating to their operation are "as may be prescribed" by the Government. It is impetrative to define their roles so that they are complementary and there is synergy in their functions. (Sections 9, 11,12,13,14,16 and 19 of the R&R Bill envisage creation of various administrative authorities.)

18. The guiding principle in cases of development related displacement should be minimal displacement.

19. Where agricultural land is sought to be acquired, it should be mandatory that area of wasteland equal to double the area acquired will have to be acquired and reclaimed for public purpose or at least funds for the same should be deposited in a special fund to be created for the purpose of rehabilitation of displaced persons or in the Central Relief and Rehabilitation fund.

20. People who are displaced due to development projects include not only property owners but also others such as tenants, farm labourers or others whose livelihood may be dependent on the land even though they may not have legal title to it. Therefore protection of their rights must be ensured. (Reading Section 3(b)(ii), 3(c) and Section 20(i) of R&R Bill it appears agricultural or non-agricultural labourer, landless person, rural artisan, small trader or self-employed person will be covered under this Act only in cases where there is likely to be involuntary displacement of four hundred or more families en masse in plain areas, or two hundred or more families en masse in tribal or hilly areas, DDP blocks or areas mentioned in the Fifth Schedule or Sixth Schedule to the Constitution. An explicit provision to this effect should be provided in the R&R Bill to guarantee the rights of this category of people. LA Bill also should reflect the interest of people who do not have legal title to the land.)

21. It shall be mandatory for all local bodies to formulate land use plans and building rules so as to minimize and regulate conversion of agricultural lands for other uses. No non-agricultural activity should

normally be allowed in areas marked for agriculture unless there are overriding and compelling reasons in public interest.

22. It has been the experience that where infrastructure projects like highways, roads are planned, the land values of the adjoining areas go up. Appropriate legislation should be put in place to charge additional duty/tax for such enhanced value, at least at the time of the subsequent transfers of the land and sums so collected should be transferred to the Central Relief and Rehabilitation Fund or any special fund created for the purpose of rehabilitation of displaced persons.

23. Social impact assessment and understanding local aspirations are best captured through continuous dialogue with local people who are affected and NGOs. Hence while carrying out social or environment impact assessment, local people especially those who are likely to be displaced and/or some expert NGOs may be consulted.

24. Norms of social impact assessment should be laid down and at least three alternatives should be examined in the same or different areas. (Section 4 of the R&R Bill should be appropriately amended to reflect this.)

25. Where there is multiple displacement, it is necessary to compensate the displaced people appropriately e.g. by enhancing the solatium amount provided for in the bill or otherwise.

26. Regarding service of notice under LA Act, Section 45(3) provides "When such person cannot be found, the service may be made on any adult male member of his family residing with him, and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells [...]. The reference to "adult male member' is in violation of gender equality and autonomy of women. The term "adult male member' may be replaced with "adult member".

III Recommendations on displacement on account of natural and man made disasters including conflicts

27. The Rehabilitation and Resettlement Bill, 2007 must explicitly cover persons displaced due to violence as also due to natural or other man-made disasters. The NRRP as well as the R&R Bill, 2007 have to be comprehensive. The reference to any "involuntary displacement due to any other reason" is very vague. It does not specifically cover conflict induced and disaster induced displacement. Also the definition of disaster has to be widened taking into account the environmental vagaries in different parts of out country. For instance, soil erosion

does not fall within the category of natural disaster. (According to Section 2 of the R&R Bill "The provisions of this Act shall apply to the rehabilitation and resettlement of persons affected by acquisition of land under the Land Acquisition Act, 1894 or any other Act of the Union or a State for the time being in force; or involuntary displacement of people due to any other reason.)

28. In disaster related displacement, rehabilitation is the biggest challenge. There is a need to address as to how one rehabilitates displaced persons in locations similar to their former residence. In instances relating to displacement on account of conflicts, there is a need to focus on what assurances would displaced persons require in order to repatriate to former place of residence voluntarily?

29. People displaced on account of conflicts or natural disasters should be able to return to their former places of residence voluntarily in safety and dignity. Authorities should ensure that their property is protected against destruction and arbitrary and illegal appropriation when they are displaced. When they return to their places of habitual residence, they shall not be discriminated against. Authorities shall assist the returnees to recover, to the extent possible, their property that they left behind or were dispossessed of upon their displacement. Where it is not possible to recover property and possession, then authorities shall be responsible for providing just reparation to them.

30. Temporary settlement should not be long drawn and there should be a time frame for the completion of relief and resettlement of people displaced on account of conflict and natural disasters.

31. In the case of conflict, natural or human-made disasters, there is a need for a larger vision, which emphasizes the "prevention" aspect of displacement.

32. The Central Relief Fund (CRF) should be renamed as Central Relief and Rehabilitation Fund (CRRF) and funds should be set aside for rehabilitation of displaced individuals.

33. All affected and displaced persons have the right to security for their physical well being and their property. Security agencies functioning under the administrative control of the States / Central Government must be geared towards preventing looting and other anti-social activities, and instilling a sense of security amongst the affected and displaced persons.

34. All affected and displaced persons have the right to immediate humanitarian assistance. In particular, they have right to food, shelter,

healthcare (including mental health care) and education. To ensure smooth rescue, relief and rehabilitation, lists of persons dead or missing as also property damaged fully or partially etc should be prepared in a transparent manner at the earliest and authenticated by appropriate authority. Such lists should be given wide publicity so that people can easily have access to the same. Special attention should be given to the vulnerable groups, e.g. disabled persons, women, children and elderly in this regard.

35. All affected persons have right to information about their missing relatives, friends, colleagues, etc. Authorities concerned should put in place appropriate arrangements to collect information about missing persons and keep their kin/relatives informed about progress in the matter. Similar efforts should be made and arrangements put in place about identification of dead and dissemination of information about them, and handing over their mortal remains to their kin after following all procedures. Till then, the mortal remains shall be preserved properly. If the dead are not identified within reasonable time, their last rites may be performed after obtaining appropriate orders and with full respect for dignity as per customs of religion to which she/he is believed to belong based on prima facie evidence.

36. The concerned authorities after reasonable verification shall issue to affected and displaced persons all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates, death certificates and marriage certificates. Any lack of access to such legal documents or not having such legal documents shall not disentitle them for recompense.

II(ii). Recommendations of the NHRC on Manual Scavenging and Sanitation

The National Human Rights Commission has been set up for 'better' protection and promotion of human rights.

The Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 seek to abolish manual scavenging. This Act was notified by the Central Government on 24th January, 1997. The National Human Rights Commission has been periodically reviewing the steps taken by the State and Central Governments for speedy implementation of provisions of this Act.

On 12th August, 2002, the Chairperson wrote a letter to the Prime Minister of India to consider the desirability of making an announcement on Independence Day so that a general awareness is created among the people and concerned authorities to put an end to the degrading practice of manual scavenging forthwith. In pursuance, the Prime Minister, vide letter dated 21 August, 2002 informed that the Commission's request has been included as a part of the 15 point initiative on the Independence Day. In keeping with the Prime Minister's announcement, the Planning Commission formulated a National Action Plan for total Eradication of Manual Scavenging. The salient features of the Plan are: -

i. Identification of manual scavengers
ii. The Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 should be adopted by all the States where manual scavenging exists
iii. Involvement of NGOs
iv. Ministry of Finance should issue necessary instructions to nationalized banks for providing loans
v. Incentives for implementation

II. Rationale for the National Workshop:

Despite legislative provisions and the intervention of the Honorable Supreme Court, manual scavenging still persists and is a serious cause of concern. NGOs, media and NHRC's own field based visits have brought out the continued practice in some pockets of the country.

The NHRC therefore organized the National Workshop on Manual Scavenging and Sanitation at New Delhi on 28th August 2008 to discuss

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issues related to effective implementation of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act and Schemes. There is a need for greater coordination of efforts of various agencies, conducting surveys for identification, streamlining rehabilitation, monitoring, resource convergence, involvement of NGOs, awareness generation and to evolve appropriate strategies to address this grave human rights violation.

III Recommendations

National Human Rights Commission organized a National Workshop on Manual Scavenging and Sanitation in New Delhi on 28th August, 2008 as a part of programmes to commemorate 60th Anniversary of Universal Declaration of Human Rights. Based on deliberations in the workshop, the following recommendations are made by the Commission.

1. Though surveys on manual scavenging have been conducted, several anomalies have been found. Therefore, periodic comprehensive surveys, at least once in three years, should be conducted in collaboration with credible NGOs. It should cover dry latrines, manual scavengers and alternative livelihood options for rehabilitation.

2. As per the information available with the Ministry of Housing and Urban Poverty Alleviation, Government of India, there are dry latrines in UP, Bihar, J&K and Assam. Therefore, these four States should take all necessary measures for the complete conversion and demolition of dry latrines and rehabilitation of manual scavengers in their respective states. Based on a comprehensive survey, all other States should also take necessary steps.

3. Jammu & Kashmir and Delhi must quicken the pace of adoption of the Act which should be done at the earliest.

4. The definition of manual scavengers is different from sanitary workers and all authorities may restrict to the definition of manual scavenging as given in the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

5. The presence of too many agencies is often delaying the elimination of the practice of manual scavenging and the rehabilitation work. Therefore, District Magistrates should be made the nodal agency and joint instructions from the three Central Ministries concerned with manual scavenging should be issued to the States/ Union Territories and the District Magistrates to take necessary steps for coordination and convergence of efforts. At State level also, there should be a coordinating body to monitor framing of appropriate rules and regulations, survey as envisaged in recommendation 1, conversion or demolition of dry latrines, rehabilitation of manual scavengers, prosecution of defaulters etc..

6. The issue of lack of space and scarcity of water in some pockets in some States has to be addressed by adopting appropriate technology and methodologies.

7. The municipal and Panchayat bye laws of the States should have provisions not to allow the construction of any new house with dry latrine or without a water shield latrine or sanitary latrines with appropriate technology and measures should be taken so that dry latrines made in the past can be demolished and new water shield latrines or sanitary latrines with appropriate technology be constructed. There should be a time bound limit for conversion of dry latrines into wet latrines and construction of new latrines. It should be one of the criteria for deciding grants to municipal bodies and there should be some measures to take penal action against municipalities not fulfilling their obligations in this regard.

8. The Ministry of Social Justice and Empowerment may evolve modalities for payment of immediate relief of Rs.10,000 to manual scavengers as in the case of bonded labour, pending their rehabilitation.

9. The scholarship to the children of manual scavengers should not be stopped even after their parents have been liberated from manual scavenging and rehabilitated.

10. It should be ensured that the identified manual scavenger families who are entitled to get the BPL cards are issued the BPL cards.

11. Banks must simplify their procedure for giving loans to manual scavengers for their rehabilitation.

12. State governments must issue advertisements in leading newspapers about cases of manual scavengers and dry latrines and also publish the same on the notice boards of the Panchayat/Municipal bodies. The list of identified manual scavengers should be displayed on website and at important public places for inspection by public at large and must be given wide publicity. Any person who is left out can approach the notified authority. After identification, the District Magistrate should issue a certificate to the manual scavenger based on which all concerned agencies should extend benefits to which he or she may be eligible.

13. The State Human Rights Commissions should start monitoring elimination of manual scavenging and consequent rehabilitation of manual scavengers in the States.

II(iii) Recommendations of NHRC on the Right to Education

The 86th Constitutional Amendment Act, 2002, mandates that 'the state shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine'. But this right is a still born right, as neither the required notification under section 1(2) of the 86th Constitutional Amendment Act, 2002 has been published in the Official Gazette by the Central Government, nor the manner in which this right is proposed to be enforced has been clarified through appropriate law as envisaged in the amendment.

In order to discuss the issues related to right to education, the National Human Rights Commission organized a two day "National Seminar on Right to Education" on 11th & 12th September. Based on detailed deliberations in the seminar, the following recommendations are made by the Commission.

1. In order to achieve some basic uniform standards, the Central Government should enact appropriate legislation at the earliest, as considerable time has already elapsed since the adoption of the 86th Constitutional Amendment Act, 2002 by the Parliament. However, as free education upon some level is already being provided in almost all the States, the State Governments need not wait for the Central Act in order to take measures for facilitating enforcement of this right.
2. Right to free and compulsory education should encompass all children until they complete elementary education i.e. class VIII instead of only the age criteria.
3. The terms like equitable quality of education, free and compulsory education, norms and standards, need to be defined or elucidated.
4. Adequate focus should be given to crafts and vocational training.
5. Central, State and local governments must assume the responsibility of ensuring right to education. Local government bodies should strive to ensure participation and involvement of parents, local management committees, communities, non-governmental organizations, etc. in this regard.
6. Role and responsibility of each level of government/administration must be clearly defined in ensuring enforcement of the right to education.

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7. The Government should make necessary provisions for early childhood care, education and development for the children of the age group of 0 to 6.

8. Minimum standards for all aspects of quality of education, including infrastructure, curriculum, teachers training, education and other pedagogic dimensions must be prescribed in consultation with professional bodies.

9. Universal access to quality education has to be treated as non-negotiable. Provision for free textbooks, uniforms and mid-day meal should be made universal.

10. There is a need to eventually convert short term interventions like Sarva Shiksha Abhiyan (Universal Elementary Education Programme) into formal system of education.

11. The scheme of para-teachers need to be abolished altogether and fully qualified and trained teachers need to be recruited. For this purpose there is need to expand and strengthen the teacher education/training institutions.

12. There is a need for substantial hike in the financial allocation to education. The allocations need to be periodically reviewed and enhanced to meet the requirements. Expenditure on education should not be treated merely as expenditure but as an investment.

13. The educational objectives must be made realistic and achievable. There is a need for a strict time frame for implementation of the right to education.

14. "Education for all" implies that education is extended to all children in conducive environment without discrimination and disparities in gender, socio-economic groups and other vulnerable sections of society are eliminated.

15. While education should follow common norms, it should also to be adapted to local situations. Every child should be taught in the first language/mother tongue at least for the first two years, during which the child should be helped to learn in the prescribed medium of instructions in the State. The Three Language Policy should be strictly implemented.

16. Effective regulatory and evaluation mechanisms should be put in place to ensure implementation and quality assurance in school education system.

17. Private unaided schools should also enrol the children of poorer sections.

18. Continuous assessment should become the norm, both for teachers and children in school including SSA.

19. The existing norm of teacher-pupil ratio of 1:40 in primary schools and 1:35 in upper-primary schools should be maintained throughout. However, as a long term goal, efforts should be made to reach a ratio of 1:20/25.

20. The longterm goal of education policy should be towards developing a uniform common school system. Strength of India is having high percentage of young population: The challenge is with us to transform them into an asset.

II(iv) Recommendations of NHRC on Detention

Arrest involves restriction of liberty of a person arrested. Nevertheless, the Constitution of India as well as International Human Rights law recognizes the power of the State to arrest any person as a part of its primary role of maintaining law and order and national security.

Article 21 of the Constitution of India asserts that 'No person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 Clause (1) and (2) confer four rights upon a person who has been arrested. Firstly, he shall not be detained in custody without being informed of the grounds of his arrest. Secondly, he shall have the right to consult and to be represented by a lawyer. Thirdly, he has a right to be produced before the nearest Magistrate within 24 hours of his arrest and fourthly, he is not to be detained in custody beyond the period of 24 hours without the authority of the Court.

Article 3 of the Universal Declaration of Human Rights (UDHR) proclaims that 'Everyone has the right to life, liberty and security of person.' Article 5 of UDHR further says that ' No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Article 9 of UDHR asserts that 'No one shall be subjected to arbitrary arrest, detention or exile.' Article 10 of the International Covenant on Civil and Political Rights stipulates that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

The National Human Rights Commission has always held the view that mere imprisonment does not take away the Fundamental Rights of a person, and especially once in the custody, the person becomes the responsibility of the State and the State is bound to ensure that the basic rights guaranteed to him in the Constitution are protected.

Under Section 12(c) of the Protection of Human Rights Act, 1993, the National Human Rights Commission has the statutory responsibility to "visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government." In pursuance of this mandate, the Chairperson, Members, Special Rapporteurs and officers of the Commission have been visiting various places of detention across the country. Based on these visits, the

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Commission has made detailed recommendations to authorities, which are also monitored periodically.

Besides redressing individual complaints of rights violations, the Commission has also recommended systemic reforms. The Commission has laid down stringent reporting requirements for reporting of custodial deaths/ rapes, issued guidelines on arrests, mentally ill persons in prisons, medical examination of prisoners, speedy trial of undertrial prisoners, premature release of prisoners.

The UN Secretary General launched a year-long campaign to commemorate the 60th Anniversary of the Universal Declaration of Human Rights on 10 December 2007. The theme of the campaign is 'dignity and justice for all of us'. In this framework, the Office of the High Commissioner for Human Rights [OHCHR] has chosen to pay special attention to the situation of persons deprived of their liberty in prisons and other places of detention.

The Office of United Nations High Commissioner for Human Rights has designated the week of 6-12 October, 2008 as Dignity and Justice for Detainees Week. Accordingly, the National Human Rights Commission of India organised a Workshop on Detention' on 11-12 October 2008 at New Delhi. The objectives of the workshop were:

- to share best practices amongst States/Union Territories
- to identify gaps if any in the implementation of constitutional and statutory safeguards for the protection of rights of detainees and to suggest remedial measures
- to evolve suitable recommendations to all authorities for better protection and promotion of human rights of detainees.

II. Workshop on Detention:

The workshop was divided into four thematic sessions covering detention in prisons & police custody, preventive detention, detention in juvenile justice homes and mental health issues of detainees. It was inaugurated by Baroness Vivien Stern, Hony. President, Penal Reforms International, United Kingdom. The former Attorney General of India, Mr. Soli Sorabjee was the Guest of Honour at the Inaugural Session. The panelists for the workshop were eminent legal luminaries, academics, senior government officials, experts in the field of detention, mental health issues of detainees, juvenile justice system and NGOs.

The participants of the workshop included Directors General of Police, Directors General or Inspectors General of Prisons, Nodal Officers on Human Rights from States, Directors of Police Training Institutes, Secretaries of Welfare Departments from various States, Forensic Science Laboratories, Senior Central/State Government representatives, Special Rapporteurs of NHRC and representatives of selected NGOs.

III. RECOMMENDATIONS

In the two-day workshop on Detention, a range of issues were discussed including the responsibilities of the State Governments to ensure basic human rights of the detainees in police custody and in prisons etc.

DETENTION IN PRISONS AND POLICE CUSTODY:

1. It is important to understand that a person in custody is under the care of the State and it is the responsibility of the State to ensure protection of his or her basic human rights. It should not be confused as advocacy for rights of criminals and terrorists.

2. The Convention against Torture inter alia seeks to prohibit torture in custody. Though India has signed the Convention against torture, it has not yet ratified it. The Central Government must take immediate steps in this regard.

3. India may have a low rate of just 32 persons being in jail per every 100,000 population but a high proportion among them are undertrial prisoners languishing in jails. To overcome the situation, speedy trial should be ensured through the following measures :

   a) Establishment of more courts and filling the vacant posts in judiciary.
   b) Expedite the process of recording of evidence and examination of the police officers and medical practitioners who are witnesses in certain cases as transferable nature of their services compounds any delay in this regard.
   c) In addition, provisions for keeping undertrial prisoners and convicts separately should be strictly enforced.

4. Section 436-A of the Cr.P.C provides for the release of a person in custody on personal bond, in case he has been in custody for more than half the period of the sentence he would have undergone in case found guilty. However inspite of this, the number of undertrial prisoners is still very high. Strategies and modalities should be worked out to ensure that the undertrial prisoners get expeditious relief under this provision.

5. As per Section 62(5) of the Representation of People's Act, a person confined in a prison or a lawful custody of the police except those under preventive detention under any law is not allowed to vote although except for convicts, they are eligible to contest election. The provisions related to right to vote in the Representation of People's Act be suitably amended to ensure this right for undertrial prisoners.

6. There is a need for implementing prison reforms including a Model Prison Code. This should inter alia cover vocational training of prisoners and providing them opportunity to work which besides

keeping them engaged can also be a source of supplementary earning for them as well as a source of revenue for prison administration.

7. There is a need to pay special attention to orientation and training of prison staff to change their mindset from custodial to correctional approach. More training institutions should be set up to for such staff. Mere sensitization of police or prison officials is not enough. The prisoners are equally under stress and therefore sensitization programmes should also focus on prisoners as target group.

8. Suitable strategies and modalities should be worked out for ensuring the protection of rights of children between the age group of 0 to 6 years of mothers in prisons and for implementation of Supreme Court judgment in *R.D. Upadhyay vs. State of Andhra Pradesh.*

9. In case of deaths in custody, as per the present practice, the Police Administration is required to send the report within 24 hours of its occurrence to NHRC. In accordance with the amendment made to Cr.P.C. (Section 176 (1) of Cr.P.C.) an inquiry by a judicial magistrate is made. There is a need for scrupulous implementation of procedure established under Section 176 (1) of Cr.P.C. In addition, forensic experts and laboratories must be involved as their expertise and scientific manner of investigation can assist in providing accurate and reliable evidence.

10. It was also suggested that the penalty inflicted on a delinquent police official responsible for torture should be in proportion to the degree of torture by such officials rather than a mere reprimand or transfer.

11. Government should take steps to separate the investigation wing from law and order wing, as decided in the case of Prakash Singh vs Union of India (2006 (8) S.C.C.1).

12. The UN Minimum Standard Rules for the Treatment of Prisoners should be enforced and monitored from the Human Rights perspective.

13. There is a need to make the prison more transparent and open to the civil society.

14. All sorts of unlawful detentions should be severely dealt with.

PREVENTIVE DETENTION

15. The difference between "preventive" and "punitive" detention must be clearly understood. Preventive detention is aimed at preventing the possibility of an activity by a person which may be detrimental to public order or national security. Preventive detention should not be resorted as a substitute for the normal procedure established by law. There is a need to sensitize the authorities concerned that it should be resorted to as an exception in rare cases.

16. Certain safeguards are provided under law to the detenue under preventive detention. These include detailed recording of facts leading to satisfaction of authority, conveying the grounds of detention to the detenue, right to make representation to State or Central Govt. or to advisory board etc. These norms for detention should be strictly followed and all authorities should be sensitized about observance of these safeguards. People also should also be sensitized about various personal liberties.

17. Preventive detention laws need to keep a balance between human rights of liberty on the one hand and security of the nation or maintenance of public order.

18. In case the detenue is found unlawfully detained, there is a need to have provision for interim relief/ compensation.

DETENTION IN JUVENILE JUSTICE HOMES

19. UN Minimum Standards for Treatment of Juveniles [Beijing Rules] should be strictly adhered to.

20. All the States must formulate rules under the Juvenile Justice Act, 2006 and constitute necessary institutions as required under the law. Constraints if any in implementing the provisions must be removed either by amendment to the law or by adopting a suitable strategy.

21. Juvenile Justice System should be distinct from criminal justice system in adjudication and terminology.

22. Effective implementation of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, requires need based analysis on part of the State Governments to streamline their approach.

23. Juvenile Justice should move up in the list of priorities for the State Governments to ensure that the financial, administrative and infrastructural needs are met, keeping in view the best interests of the child.

24. The authorities must comprehend the distinction between children in conflict with law and those in need of care and protection. The specific welfare needs of both the categories must be addressed.

25. The adjudicatory bodies (JJB) should ensure that the enquiries are completed within the stipulated time of 4 months as laid down in the Act.

26. Adequate number of qualified and trained personnel should be recruited under the JJ system. In cases of alleged abuse, strict action should be initiated against officers and staff responsible and pending such action, they should be immediately transferred.

27. Rehabilitation and repatriation of the children should be the ultimate aim. Institutional care must include proper educational facilities and vocational training in order to ensure sustainable options for child after he/she is sent back.

28. Health care needs of all the children must be looked after. The specific requirements of children ailing from diseases like HIV, scabies, mental disability must be addressed.

29. Basic standards of hygiene and nutrition should be adhered to in the Juvenile Justice/ observation homes.

30. It must be ensured that regular inspections of the homes be undertaken by the Inspection committees that have been set up under the Act.

Mental Health Issues of Detainees

31. World over, on an average 32% of all prisoners require psychological help. If one includes substance abuse, the figure goes beyond 60%. Hence there is a need for focused attention on mental health. There is a need for early identification of mental illness among prisoners and for taking consequent steps.

32. There is little documentation of the problems of psychiatrically ill prisoners, problem of escorts for referrals/ discharge, inadequate follow up and care while in custody, no follow-up of psychiatric treatment after discharge from custody. Arrangements be made for periodic visits of Psychiatrists.

33. In view of little formal training of prison staff in mental health, there is a need for corrective measures.

34. A psychiatrist be posted in jail hospitals. If the same is not possible due to shortage of psychiatrists, arrangements should be made for visits of psychiatrist on a periodic basis, atleast once a week.

35. Normally prisoners having mental problems should be kept separately, preferably shifted to mental hospitals. However, due to overall shortage of trained manpower in mental health care both in district hospitals or mental hospitals, this may not become possible. Thus there is a need to augment the Mental Health Care system, both in terms of manpower and infrastructure. Some general recommendations in this regard are as follows:

    (a) There is a need to move from custodial care to community mental health care approach and also integrate mental health care with general health care system through District Mental health programme.
    (b) The diet scale of persons in mental hospitals needs to be fixed based on ' minimum calorie terms' rather than monetary terms to offset inflation.

(c) Mental health care audit of all institutions of child care may be taken up by NHRC.

(d) There is no formal after care services available. The Ministry of Social Justice and Empowerment may set up facilities for mentally ill who are treated but have nowhere to go.

(e) There is a tendency to leave the mentally ill people in mental hospitals even in cases where the treatment can be done as outpatient. This mindset to treat the mental hospitals as a defacto detention place for mentally ill must change. For this social awareness programmes must be taken up.

III(a) Important intervention of NHRC in relation to some thrust areas

Right to Health

With a view to discuss the availability of trained manpower in remote parts of the country, a meeting with the Medical Council of India, Indian Nursing Council and Ministry of Health & Family Welfare, Govt. of India was held on 30 August, 2007 in the Commission. After extensive deliberations, the Commission recommended to the Government to make necessary changes in the Indian Medical Council Act to have one year compulsory rural attachment of the MBBS students before their registration. To increase intake of students for Psychiatry courses, the Commission has recommended to the Medical Council of India to relax its norms. With a view to improve the emergency medical services in the country, the Medical Council of India approved a course in M.D.(emergency medicine) on the recommendations of the Commission.

The Indian Nursing Council, on the recommendation of the Commission, approved the syllabus of Nursing, Midwifery to ensure effective service to the population. The Commission has also taken up among others, the issues of unsafe drugs and medical devices, silicosis and availability of anti rabies vaccines.

Mental Health

The Commission held the National Seminar on Human Rights and Mental Health in April, 2008 at National Law School of India University, Bangalore, which was followed up by National Conference of Health Secretaries and Mental Health Authorities of all States in May, 2008 at National Institute of Mental Health and Neurosciences, Bangalore. The Commission reviewed implementation of its earlier recommendations on quality assurance in mental health. This exercise was followed by a publication on Mental Health Care and Human Rights, which was released by the Commission in October, 2008.

Trafficking

The Commission is working relentlessly to help in prevention and combating of human trafficking. Special attention is being given to the plight of women and children being exposed to such a heinous crime. At the request of the UNHCHR as well as recommendation of the APF of NHRIs, the

Commission nominated one of its members as a focal point on Human Rights of women, including human trafficking. The Commission in collaboration with the National Commission for Women has assisted the Ministry of Women and Child Development in the Government of India in formulating an integrated Plan of Action to Prevent and Combat Trafficking with special focus on women and children.

Food Security

The Commission has consistently maintained that the Right to Food is inherent to living a life with dignity. The Commission has expressed the view that the Right to Food includes nutrition at an appropriate level. The Commission is of the view that mortality alone should not be considered as the effect of starvation but destitution and the continuum of distress should be viewed as indicators demonstrating the prevalence of starvation. There is thus an accompanying need for a paradigm shift in public policies and relief codes in this respect.

The Commission has constituted a Core Group on Right to Food with experts in the field. In last meeting of the Core Group, it was observed that Panchayats, being burdened with so many other responsibilities may not be in a position to pay focused attention to this aspect in all the areas in their jurisdiction. Hence a need for the constitution of watch committees at various levels in States was felt. The purpose of these independent committees is to see implementation of the related schemes, availability of food grains and their proper distribution and report to the concerned authorities in the State or to the SHRC/NHRC directly in some select cases, as the case may be.

Custodial Justice

Under Section 12(c) of the Protection of Human Rights Act, 1993, the National Human Rights Commission has the statutory responsibility to "visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government." In pursuance, the Chairperson, Members, Special Rapporteurs and officers of the Commission have been visiting various places of detention across the country. Based on these visits, the Commission has made detailed recommendations to authorities, which are also monitored on a continuing basis.

On 25th October 2007, the Chairperson, NHRC, Justice S. Rajendra Babu addressed letters to Chief Ministers of all States and Union Territories as well as to Chief Justices of all High Courts with regard to expeditious trial,

overcrowding in prisons and more efficient prison management. The Commission also organized a Workshop on Detention in New Delhi on 11-12 October 2008 at which specific and detailed recommendations have been made to all authorities concerned.

III(b) Violation of human rights by Naxalites and Salwa Judum in Chhatisgarh.

On a remit from the Hon'ble Supreme Court of India in connection with the Writ Petition (Civil) No. 250/07 - Nandini Sundar & Others Vs. State of Chhattisgarh and a Writ Petition (Criminal) No. 119/07 - Kartam Joga & Others Vs. State of Chhattisgarh, the NHRC sent a Fact Finding Committee to Chhattisgarh to verify/examine the allegations relating to violation of human rights by Naxalites and Salwa Judum and the living conditions in the refugee settlement colonies.

As per the report of the Fact Finding Committee, a large number of civilians have been displaced since Salwa Judum started - some of them are at present staying in the various camps in Bijapur and Dantewada districts, while the others have been forced to go to Andhra Pradesh. However, Salwa Judum cannot be held solely responsible for these displacements. Moreover, the State Government of Chhattisgarh cannot be said to have deliberately or actively pursued a policy of displacement of civilians. These displacements are fallout of the decision of some of the tribals to take on the Naxalites.

Selective killings by Naxalites of Salwa Judum leaders and activists and attacks by the Naxalites on Salwa Judum rallies were responsible to a large extent for changing the complexion of the movement from a non-violent one to an armed resistance.

The State Government cannot be said to have sponsored Salwa Judum but it certainly has extended support to it by way of providing security to the processions and meetings of Salwa Judum and also to the inmates of the temporary relief camps. The State Government has also provided relief and other services to the displaced villagers staying in the temporary relief camps.

The allegation of the petitioners that Naxalite violence has increased after Salwa Judum and further aggravated the problem, which shows that this experiment has failed, is a very narrow view of this complicated problem. The tribals cannot be denied the right to defend themselves against the atrocities perpetrated by the Naxalites, especially when the State itself is not able to provide effective protection. Of course, the State is duty bound to check violation of law by any person or group.

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While the Naxalites have been involved in the violations of human rights, there have been instances where the Salwa Judum activists, SPOs, and the security forces have also been involved in the violation of human rights. The violations on the part of the latter being more serious as the State must act within the four corners of the law even in the face of grave provocation.

Based on the above conclusions of the Fact Finding Team, the NHRC forwarded the following recommendations to the Hon'ble Supreme Court of India.

- The temporary relief camps are at present inhabited mainly by those who cannot return to their villages – the SPOs, their relatives, and the Salwa Judum activists who are the prime targets of Naxalites. The authorities should continue to provide them adequate security cover in the camps and, in the long run, create conditions for the safe return of all the displaced families, including those who have been forced to go out of Chhattisgarh. Efforts should also be made to commence the work of rehabilitation of all the displaced families under the accepted national and international norms.
- The State Government should ensure that there is free registration of FIRs on receipt of information of cognizable offences according to the provisions of law. The State Government ought to encourage the villagers to report any grievances. The investigation in all cases should be completed expeditiously. Any cases registered against police or security forces should be investigated by an independent agency like CB/CID.
- Those who have lost their houses/belongings in arson/looting, should be given compensation, irrespective of the perpetrators.
- The State authorities should prepare a village-wise list of all those who have gone missing and the circumstances in which they have disappeared. Efforts should be made to gather credible evidence regarding their present status.
- The State authorities should desist from housing the security forces in the school/ashram buildings meant for the education of children. Provisions should be made for alternative accommodation for the security forces so that they do not encroach upon the facilities meant for the children.
- A proper transfer policy for the police forces and indeed all the other public servants posted in South Bastar should be chalked out and implemented properly, so that the same set of people are not made to serve in the highly stressful conditions.

- The security force personnel who are deployed in the area, especially for the protection of Camps, should be sensitized about human rights in order to minimize the violations of these rights at their hands.
- The state authorities may be well advised to adopt uniform policies, as far as possible, with regard to distribution of rations and provision of other facilities in the relief camps in both Dantewada and Bijapur districts. Certain specific recommendations in this regard have been made at appropriate places in the report. These pertain to medical facilities, health, and hygiene. The authorities need to pay special attention to these areas and to ensure that adequate supply of medicines is available in the camps and sufficient number of medical and para-medical staff are posted for visiting the camps.
- There are complaints of some malpractices against those who are engaged in the distribution of relief material and, likewise, some of the beneficiaries are alleged to be collecting relief undeservedly. Mechanisms should be devised to check malpractices in the distribution of rations and other relief materials.
- Rather than merely a security-centric approach to tackle the problem of Naxalism, the State authorities would be well advised to adopt a multi-pronged strategy to deal with the problem.

III(c) Nandigram case in West Bengal.

With regard to the issue of 'Violence and Human Rights', the NHRC has been steadfast in the view that it is the primary and inescapable responsibility of the State to protect the right of life, liberty, equality and dignity of all those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts or through abetment or negligence. The State is responsible not only for the acts of its own agents, but also for the acts of non-state players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.

Reacting to the incidents of violence that took place in Nandigram, West Bengal in the months of October/November 2007, the NHRC observed that since the State Government does not appear to have discharged its primary obligation in preventing the attack by CPI (M) cadres on 6th November, 2007, it should bear the responsibility for the loss of life and property following the attack. The Commission suggested that the next of kin of the dead in these incidents and also the injured persons should be compensated in the same manner as directed by the High Court of Calcutta for the victims of the incidents of 14th March, 2007. The Commission also noted that the compensation that the State Government proposes to make for damaged houses appears to be quite inadequate. The Commission, therefore, recommended enhanced compensation for fully and partially damaged houses. Since the Enquiry Team of the Commission reported that after the incidents of 6th November, 2007 several houses of BUPC supporters have been occupied by CPI (M) cadres and they are now claiming to be owners of those houses and demanding compensation, the Commission decided to appoint a Committee to suggest compensation regarding damage that occurred and to ensure that the monetary relief does not fall in wrong hands and it reaches the genuine persons.

With regard to the unfortunate incidents of Nandigram, the Commission also stated that neither CPI (M) nor BUPC can escape their share of responsibility. In this context, the Commission felt it necessary to make the following observations:-

i) The police and the bureaucracy should keep themselves aloof from political influence. Alignment with the party in power results in erosion of public trust which leads to avoidable misery.

ii) The party in power should always be alive to its constitutional obligation to rule without favour and prejudice. It should never encourage or connive with the illegal activities of its supporters.

iii) The opposition has a right to highlight the failures of the Government and to educate the people about the policies which it considers harmful. While it may take recourse to peaceful agitation, it should in no case encourage people to indulge in unlawful activities.

iv) There should be a continuous dialogue between the party in power and the opposition and such dialogue should always be motivated by a concern for the good of the people at large.

v) The press has a pivotal role to play in a democratic set up, therefore, it should always adopt a balanced and unbiased approach in reporting the events. In the case of Nandigram the Press did a commendable job by highlighting the atrocities on people but it failed in its duty to emphasise that the blockage of a large area of Nandigram by the agitators was unconstitutional.

vi) Whether agricultural land should be acquired or not for industry or projects like SEZ is a moot question. Agriculture being the only source of livelihood for the farmers, compensation in terms of money for acquisition of their land may not be adequate. In the process of rehabilitation of such displaced people as a result of acquisition of land, the Government should take the local people into confidence and it should also ensure alternative means of livelihood and shelter for the displaced. Whether in addition to monetary compensation, any other land can be given to relocate or can be linked to the project for which the land is acquired by allocating adequate number of shares and providing employment to at least one member of each affected family and similar other measures may be considered. The agriculturists may not be in a position to appropriately or wisely invest the money received by way of compensation. Necessary steps may have to be taken by the Government to appoint advisors for making right investment.

III(d) Proceedings on violent incidents in Nandigram, West Bengal dated 08.02.2008.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE
NEW DELHI

Name of the complainant : Shri Sanjay Parikh

Case No. : 725/25/12/07-08

Linked File

872/25/2006-2007

Date : 8th February, 2008

CORAM

Justice Shri S. Rajendra Babu, Chairperson

Shri R.S.Kalha, Member

Shri P.C. Sharma, Member

PROCEEDINGS

The Government of West Bengal proposed to set up a Special Economic Zone (SEZ) and a chemical hub in an area covering around 10,000 acres in Nandigram Block-1 and for that purpose it proposed to acquire land. On 28th December, 2006 Haldia Development Authority circulated an informal notice showing the likely location of the project. The local people resented the proposal for acquisition of land. Violent clashes broke out between the supporters of the party in power, i.e. CPI (M) and the Bhoomi Uchhed Pratirodh Committee (BUPC) - an organization to channelise the protest against the proposed land acquisition. From the middle of January 2007, a large area covering 5 Gram Panchayats of Nandigram Block 1 was isolated and police and other Government agencies were prevented by the supporters of BUPC from entering the area. About 2000 people, believed to be supporters of CPI(M), were driven out and they took shelter in the adjoining area across the canal within the jurisdiction of PS Khejuri. On 14th March, 2007, the State Government tried to reestablish its writ in the area by force. The attempt

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of the police force to enter the area was violently resisted by supporters of BUPC at two places and the police opened fire at the mobs. 14 persons were killed in firing and 300 people including 52 policemen sustained injuries.

The police firing on 14th March, 2007 was widely condemned in the media and the Commission took suo motu cognizance of reports published in the "Asian Age" and 'Indian Express'. Case No.872/25/2006-07 was registered. The Chief Secretary, Government of West Bengal and DGP of the State were asked to submit factual reports. Accordingly, a report dated 29th March, 2004 was received from the Chief Secretary, Government of West Bengal.

The High Court of Calcutta also took notice of the incident and held that the action of police to open fire was unconstitutional. It directed CBI to take up investigation of police firing and related cases. It also directed the State Government to pay Rs. Five lakhs each as compensation to the families of the dead, Rs. One lakh each to the injured persons and Rs. Two lakhs each to the rape victims.

On 19th March, 2007, the District Magistrate of East Medinipur issued a notification to the effect that the State Government will not acquire any land for industry in Nandigram. In spite of the notification BUPC did not withdraw the agitation. The police was still not allowed to enter the area. Sporadic incidents of violence continued to occur in the following months till October, 2007.

On 27th October, 2007, the State Government sent a requisition to the Central Government for deployment of CRPF in Nandigram and adjoining areas for 3 months. On 5th November, 2007, the Central Government sent a reply that it was not possible to provide CRPF in view of the pending Assembly elections in several other states.

On 6th-7th November, 2007, the CPI (M) cadres overran the blockade with the help of outsiders and criminal elements. Several road blockades were organised by CPI(M) supporters and access of outsiders to Nandigram was stopped by them. During the period from 6th November to 12th November 7 persons were killed, 32 persons including 16 police personnel sustained injuries and several houses were fully or partially destroyed. A large number of villagers (nearly 2500), believed to be supporters of BUPC were driven out and the CPI (M) supporters who were displaced earlier returned home. On 11th November, 2007, the Government of India ordered deployment of 6 companies of CRPF. On 12th November in the evening CRPF personnel made a flag march in the area and normalcy was slowly restored.

Regarding the incidents which occurred from 6th November, 2007 onwards Shri Sanjay Parikh has submitted a petition. He also forwarded to the Commission a message received from Smt. Medha Patekar and requested for urgent intervention. The Commission took cognizance of the petition

and case No.725/25/2007-08 was registered. Chief Secretary, Govt. of West Bengal was directed to submit a factual report within10 days. A team of the Investigation Division was deputed to visit the disturbed areas in Nandigram and study the situation. Secretary, Ministry of Home Affairs, Govt. of India was also requested to take such steps as may be necessary to retrieve the situation in Nandigram.

Chief Secretary, Government of West Bengal submitted a report dated 3rd December, 2007. The report reveals that 560 houses were completely damaged and 399 houses were partially damaged in the incidents which occurred from 6th November, 2007 to 12th November, 2007. It further states that the State Government has decided to pay Rs. 10,000/- for each fully damaged house, Rs.5,000/- for each partially damaged house and Rs. 1,000/- per affected family for utensils and household goods. It has also been stated in the report that sanction for ex-gratia payment in accordance with the orders of the High Court, is currently under process.

The investigation team of the Commission visited Nandigram in very difficult circumstances and when the situation was very tense. Communication with the local people was also difficult being still under the trauma of riots and violence. The team after overcoming these difficulties set out on their task and has done commendable job.

According to the report of our Investigation team, the entire episode can be considered in three phases:-

First Phase

3rd January, 2007 to 14th March, 2007

During this phase, the State Police started losing control over law and order situation in the area of Nandigram. The people lost trust in the police and they feared that the police would help the State agencies to take forcible possession of their land. The villagers were instigated by different political parties to fight against the Government policy. Under the umbrella of BUPC, the people laid a seige over a large area covering 5 Gram Panchayats in Nandigram Block-1 and did not allow the police and some other state agencies to enter the area as they seemed to have lost trust in either of them. On 14th March, 2007 the police force tried to enter the area and when it was resisted by the local people it opened fire resulting in the death of 14 persons and injuries to several others.

Second Phase

15th March to 5th November, 2007

This was a period of comparative lull. As a matter of fact it may be described as the period of calm before the storm. During this period the local administration issued a notification on 19th March, 2007 declaring

that the State Government will not acquire any land in Nandigram for industries. Still the agitation by BUPC continued. Not only the blockade of the area covering 5 Gram Panchayats in Nandigram Block-1 continued but BUPC was able to extend its influence to other areas in Nandigram Block-2. This period was also utilised by CPI(M) supporters for stock piling of arms and ammunition and mobilization of man power including anti-social elements across the canal in the area of PS Khejuri. The State police remained a mute spectator throughout.

Third Phase

On 6th November 2007, the CPI(M) supporters overran the blockade and tried to "recapture" Nandigram. The police outpost at Tehkhali was withdrawn late at night on 6th November, 2007 and thus the attack by CPI(M) supporters was facilitated. The investigation team of the Commission has reported that the location of the Tehkhali outpost was of strategic importance as it was the dividing line between the CPI (M) dominated area and the BUPC controlled area. The Investigation team has reported that the approach of the police was totally partisan during this period. The team also found a CPI (M) flag hoisted at the police bunker at Tehkhali.

Since the State Government does not appear to have discharged its primary obligation in preventing the attack by CPI (M) cadres on 6th November, 2007, it should bear the responsibility for the loss of life and property following the attack. It is suggested that the next of kin of the dead in these incidents and also the injured persons should be compensated in the same manner as directed by the High Court of Calcutta for the victims of the incidents of 14th March, 2007. The compensation that the State Government proposes to make for damaged houses appears to be quite inadequate. The Commission considers recommending enhanced compensation for fully and partially damaged houses. The Enquiry Team of the Commission has reported that after the incidents of 6th November, 2007 several houses of BUPC supporters have been occupied by CPI(M) cadres and they are now claiming to be owners of those houses and demanding compensation. The Commission considers it necessary to appoint a Committee to suggest compensation regarding damage that occurred and to ensure that the monetary relief does not fall in wrong hands and it reaches the genuine persons. The Committee shall consist of Shri A.K. Jain, Secretary General, Shri D. Sarangi, Special Rapporteur and Shri A.K. Garg, Registrar.

For the unfortunate incidents of Nandigram neither CPI (M) nor BUPC can escape their share of responsibility. In this context it is necessary to make a few general observations:-

(i) The police and the bureaucracy should keep themselves aloof from political influence. Alignment with the party in power results in erosion of public trust which leads to avoidable misery.

(ii) The party in power should always be alive to its constitutional obligation to rule without favour and prejudice. It should never encourage or connive with the illegal activities of its supporters.

(iii) The opposition has a right to highlight the failures of the Government and to educate the people about the policies which it considers harmful. While it may take recourse to peaceful agitation, it should in no case encourage people to indulge in unlawful activities.

(iv) There should be a continuous dialogue between the party in power and the opposition and such dialogue should always be motivated by a concern for the good of the people at large.

(v) The press has a pivotal role to play in a democratic set up, therefore, it should always adopt a balanced and unbiased approach in reporting the events. In the case of Nandigram the Press did a commendable job by highlighting the atrocities on people but it failed in its duty to emphasise that the blockade of a large area of Nandigram by the agitators was unconstitutional.

(vi) Whether agricultural land should be acquired or not for industry or projects like SEZ is a moot question. Agriculture being the only source of livelihood for the farmers, compensation in terms of money for acquisition of their land may not be adequate. In the process of rehabilitation of such displaced people as a result of acquisition of land, the Government should take the local people into confidence and it should also ensure alternative means of livelihood and shelter for the displaced. Whether in addition to monetary compensation, any other land can be given to relocate or can be linked to the project for which the land is acquired by allocating adequate number of shares and providing employment to at least one member of each affected family and similar other measures may be considered. The agriculturists may not be in a position to appropriately or wisely invest the money received by way of compensation. Necessary steps may have to be taken by the Government to appoint advisors for making right investment.

(Justice S. Rajendra Babu)
Chairperson

(R.S.Kalha)
Member

(P.C. Sharma)
Member

III(e) Proceedings on violent incidents in Nandigram, West Bengal dated 09.04.2008.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE
NEW DELHI

Name of the complainant : Shri Sanjay Parikh

Case No. : 725/25/12/07-08

Linked File

872/25/2006-2007

Date : 9th April, 2008

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Justice Shri Y. Bhaskar Rao, Member
Shri R.S.Kalha, Member
Shri P.C. Sharma, Member

PROCEEDINGS

The Committee which was appointed by the Commission on 8th February, 2008 *"to suggest compensation regarding damage that occurred and to ensure that the monetary relief does not fall in wrong hands"*, has submitted its report.

The report has been examined. It is approved with the modification that in addition to the recommendations suggested by the Committee, the following recommendations shall also be made to the State Government:-

"(xi) SP, East Midnapore shall ensure that appropriate action is taken on all the complaints received at the police stations in the District. If the allegations made in the complaint disclose a cognizable offence, the provisions of Section 154 Cr. P.C. should be complied with, and,

(xii) All persons who have been arrested in connection with police cases regarding incidents of clashes and riots should be provided legal aid, if required."

(Justice S. Rajendra Babu)
Chairperson

(Justice Y. Bhaskar Rao)
Member

(R.S.Kalha)
Member

(P.C. Sharma)
Member

III(f) NHRC sends its 12-point recommendations to the Chief Secretary, West Bengal on Nandigram violence: Press release dated 9th May, 2008

New Delhi, May 09, 2008 The National Human Rights Commission has sought the comments of West Bengal Chief Secretary on its 12 point recommendations on the violence in Nandigram. The recommendations were given by a three-member committee of the Commission, which visited Nandigram. The NHRC Committee comprising Shri A.K. Jain, Secretary General, Shri Damodar Sarangi, Special Rapporteur and Shri A.K. Garg, Registrar, was appointed on February 8, 2008 to suggest compensation regarding the damage that occurred and to ensure that the monetary relief reaches the genuine persons. The Committee was constituted after an inquiry team of the Commission submitted a report, after visiting the violence hit areas

The NHRC Committee's recommendations are:

- " Instructions may be issued to State Government to publish complete list of persons whose houses were damaged in the incidents from March 14 to November 2007 related to SEZ issue in Nandigram area, giving details like address, nature of construction (Pucca/Kutcha), extent of damage (fully/partially), exgratia amount paid or proposed to be paid, etc.
- " List of applications received so far in this regard and status thereof may also be published.
- " The above list may be published in at least two local Bengali papers having wide circulation in the area.
- " A date may be indicated in the publication by which time anyone who likes to make an application or submits a representation can do so. Three weeks or one month's time from the date of publication in the newspapers is considered reasonable for receipt of applications. Receipt should be given to the individuals making application.
- " The lists may also be displayed on the notice boards in Gram Panchayat and Block offices and copies may be given to the district level representatives of all recognized political parties in the State. Copies may also be given to representatives of Bhoomi Uchhed Pratirodh Committee (BUPC). Receipts must be obtained.

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- " All fresh applications or representations must be duly enquired into and decision taken subject to confirmation by the NHRC.
- " The Committee considers that for damaged houses/shops, following amounts of ex-gratia is reasonable. Pucca houses - Rs. 20,000/- for fully damaged and Rs. 10,000/- for partially damaged. Kutcha houses - Rs. 12,000/- for fully damaged and Rs. 6,000/- partially damaged. Shops at the same rate as kutcha houses.
- " On the lines of ex-gratia to the next of kin(NOK) of the persons who died in incidents of March 14, 2007, payment may also be made to the NOK of those who died in other incidents related to the issue.
- " State Government should immediately take a decision about payment of ex-gratia amount to injured persons and inform the Commission.
- " The information sought in the letter of Secretary General dated February 8, 2008, may be furnished immediately.
- " SP, East Midnapore shall ensure that appropriate action is taken on all the complaints received at the police stations in the District. If the allegations made in the complaint disclose cognizable offence, the provisions of Section 154 Cr. P.C. should be complied with, and,
- " All persons who have been arrested in connection with police cases regarding incidents of clashes and riots should be provided legal aid, if required.

The NHRC Committee visited West Bengal on April 3 and 4, 2008. It held discussions with District Magistrate East Midnapore, SP East Midnapore, ADM Haldia, SDO and SDPO Haldia, BDO Nandigram I and II Blocks and other officials.

It also interacted with the victims and met Shri Ashok Behra (CPM), Sabapati Panchayat Samiti of Nandigram block and Mohd. Yasin, Chairperson, Standing Committee of Panchayat Samiti on Education. The Committee also met the Joint Secretary of the BUPC.

Besides, the Committee saw damaged houses. It met the Chief Secretary, West Bengal on the second day. The Chief Secretary was informed that there was lack of transparency in the matter of publication of list of damaged houses and most of the affected persons and even the representative of BUPC who met the committee mentioned that they were not aware of such lists.

III(g) Interim proceedings on violent incidents on 6th November, 2007 in Nandigram, West Bengal dated 21.07.2008.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE
NEW DELHI

Name of the complainant : Shri Sanjay Parikh

Case No. : 725/25/12/07-08

Linked File

872/25/2006-2007
124/25/12/08-09

Date : 21st July, 2008

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Justice Shri G.P. Mathur, Member
Shri R.S.Kalha, Member
Shri P.C. Sharma, Member

PROCEEDINGS

The Commission had deputed a Fact-Finding Team to inquire into the circumstances which led to the unfortunate incidents of loot and arson in Nandigram in the year 2007.

On consideration of the report submitted by the Fact-Finding Team, the Commission found that the State Government of West Bengal had failed to discharge its primary obligation to prevent the attack by CPI (M) Cadres on 6th November, 2007 and, therefore, it should bear the responsibility for the loss of life and property following the attack.

A Committee headed by Secretary General of the Commission was appointed to suggest compensation regarding damage that occurred and to ensure that monetary relief does not fall in wrong hands. The Committee

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visited Nandigram. It noted that all the affected persons had not got the opportunity to file claim. Therefore, the Committee proposed that a fresh notice may be published in two local Bengali papers to invite applications/ representations. The Committee also noted that the compensation given by the State Government for damaged houses was not adequate and, therefore, it proposed some enhancement in monetary relief. The Committee also proposed that the next of kin of those who were killed in the incidents of November 2007 should be given monetary relief on the same lines as directed by the High Court in the case of those who had lost their lives in the incidents of March 2007.

The above-mentioned proposals of the Committee were approved by the Commission in its sitting on 9th April, 2008. Accordingly, the recommendations of the Commission were conveyed to the State Government.

The State Government has, vide its communication dated 6th May, 2008, declined to implement the recommendations relating to inviting fresh applications, enhanced compensation for damaged houses and monetary relief for the next of kin of those who were killed after 15th March, 2007.

SG shall write a D.O. letter to Chief Secretary, Government of West Bengal explaining the reasons why the recommendations were made and calling upon him to comply with the same. The State Government shall submit compliance report within ***eight weeks***.

(Justice S. Rajendra Babu)
Chairperson

(Justice G.P. Mathur)
Member

(R.S.Kalha)
Member

(P.C. Sharma)
Member

III(h) Interim proceedings on use of children as showpieces during VIP visits: UP dated 10th September, 2007.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE, NEW DELHI

Name of the complainant	:	Ms. Nivedita Sharma
Case No.	:	23464/24/2005-2006
Date	:	10th September, 2007

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Dr. Justice Shivaraj V. Patil, Member
Justice Shri Y. Bhaskar Rao, Member
Shri R.S.Kalha, Member
Shri P.C. Sharma, Member

PROCEEDINGS

Vide proceedings dated 28th May, 2007, the Commission had recommended to the State of Uttar Pradesh to pay an amount of Rs. 5,000/- each to the 49 children who became unwell after waiting for the chief guest in scorching sun for a long time on 2nd October, 2005 in Kanpur. The compliance report and proof of payment have not been received so far.

Chief Secretary, UP be summoned to appear in person on *17th December, 2007 at 11.00 A.M.* along with compliance report and proof of payment.

Should, however, the compliance report and proof of payment be received on or before *10th December, 2007* the personal appearance of Chief Secretary shall stand dispensed with and the case will be closed.

(Justice S. Rajendra Babu)
Chairperson

(Justice Shivaraj V. Patil)
Member

(Justice Y. Bhaskar Rao)
Member

(R.S.Kalha)
Member

(P.C. Sharma)
Member

III(i) Interim proceedings on use of children as showpieces during VIP visit: UP dated 28th May, 2007.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE, NEW DELHI

Name of the complainant	:	Ms. Nivedita Sharma
Case No.	:	23464/24/2005-2006
Date	:	28th May, 2007

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Dr. Justice Shivaraj V. Patil, Member
Justice Shri Y. Bhaskar Rao, Member
Shri R.S.Kalha, Member
Shri P.C. Sharma, Member

PROCEEDINGS

This case reflects the total insensitivity of the local administration of Kanpur which kept 10,000 tiny tots waiting under the scorching sun from 6.00 A.M. to 1.00 P.M. without food and water. This was done by the administration to please political masters who were to arrive to preside over the Gandhi Jayanti Celebrations on 2nd October, 2005.

Report dated 5th February, 2006 of ADM, Kanpur shows that 10,000 children had gathered in the open ground and some of them became unwell at 10.45 A.M. As many as 49 children had to be sent to hospital. Even then the administration did not awake and the children were kept waiting for the Chief Guest to arrive.

Vide proceedings dated 19th February, 2007, the Commission issued notice u/s 18(3) of the Protection of Human Rights Act, 1993 to the State of UP requiring the Chief Secretary to show-cause why "interim relief" should not be recommended to be paid to the 49 children who became unwell due to the callous attitude of the local administration.

The State Government has not so far responded to the show-cause notice. Only a copy of letter addressed by Secretary, Home to DC, Kanpur has been forwarded to the Commission. Since, the Government of UP has

not come out with any plea, the Commission presumes that it has nothing to say against the grant of *'interim relief'* to the affected children.

The Commission strongly condemns the practice of using tiny children as show-pieces during a VIP's visit. The administration must appreciate that children are valuable assets of the nation and they must be handled with care and affection. Forcing children to sit in scorching sun for six long hours is a blatant violation of their human right and the Commission strongly feels that the Government must be made to pay some token monetary relief to the affected children so that such incidents do not recur in future.

Therefore, the Commission recommends to the State of UP to pay an amount of Rs.5,000/- each to all the 49 children who had to be taken to hospital after becoming unwell on 2nd October, 2005.

Chief Secretary, U.P. is directed to submit compliance report along with proof of payment within ***eight weeks***.

(Justice S. Rajendra Babu)
Chairperson

(Justice Shivaraj V. Patil)
Member

(Justice Y. Bhaskar Rao)
Member

(R.S.Kalha)
Member

(P.C. Sharma)
Member

III(j) Interim proceedings in case of grievous hurt to a child through negligence: West Bengal dated 21st April, 2008.

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE, NEW DELHI

Name of the complainant	:	Shri Surjit Das
Case No.	:	589/25/2002-2003
Date	:	21st April, 2008

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Justice Shri G.P. Mathur, Member
Shri R. S. Kalha, Member

PROCEEDINGS

As per the complaint received from Shri Surjit Das r/o Kandara, District Burdwan, West Bengal, his son Master Subham Das, aged about 4 ½ years, accompanied by his wife Smt. Mitali Das, mother-in-law Smt. Pratima Das and brother-in-law Shri Saroj Das went to Raniganj Town for shopping on 19.1.2000. When they were standing in front of a stationery store near SBI Raniganj all of a sudden there was firing from the gun of the Security Guard of North Searsole Colliery of Eastern Coal Field Ltd. and Master Subham Das sustained bullet injuries and was grievously hurt. A case u/ 326 IPC and u/s 25/27 Arms Act was registered against the security guard Ashish Singh. Master Subham Das was taken to the hospital of Raniganj and then to another hospital. Some pellets could be removed from his body after operation but some pellets still remained lodged in his body which could not be removed in spite of best efforts made by the doctors.

The Commission called for the report of the Secretary, Ministry of Coal and Mines, Union of India. As per his report a cash escort team of North Searsole Colliery had gone to SBI Raniganj on 19.1.2000 to collect cash for payment of wages. Ashish Singh was the security guard of the team and was carrying a .12 Bore Double Barrel Gun. The gun went off accidentally and its splinters after hitting the ground reflected and hit the body of Master

Subham Das. The security guard was arrested and departmental enquiry was also ordered against him.

The Commission vide order dated 30th July 2004 held that this was a case of sheer negligence on the part of the security guard and there was violation of human right of the victim. A show-cause notice u/s 18(3) of the Protection of Human Rights Act, 1993 was ordered to be issued to the Secretary, Ministry of Coal, Government of India. The State was further directed to get the child medically examined from a Board of Doctors of B.C.Roy Memorial Hospital for Children, Calcutta and to bear all the medical expenses of the treatment of the child.

Pursuant to these directions of the Commission, Dy. Secretary, Ministry of Coal and Mines, Government of India, responded vide communication dated 12.10.2004 opposing the grant of interim relief to the victim. Medical Superintendent of Dr. B.C. Roy Memorial Hospital for Children, Kolkatta also informed the Commission vide letter dated 12.10.2004 that a Medical Board had been constituted as per the directions given by the Commission.

The child was examined by the Board of Doctors at B.C.Roy Memorial Hospital for Children, Kolkata, and as per the report received numerous pellets are still lodged inside the body of the child and certain more investigations are required to be done. At the time of the examination the child was asymptomatic but he might have symptoms at any time of his life which would require multiple surgeries. However, the Medical Board expressed its inability to calculate the future expenses that might be required for the treatment of the child. After considering this report the Commission observed that the incident in question had brought a life-long agony to the child which could become symptomatic at any time in his life and that it was imperative that adequate monetary provision for the child be made.

Keeping in view all the facts and circumstances of the case, the Commission vide order dated 28th December, 2007 recommended to the Ministry of Coal and Mines, Government of India, to deposit an amount of Rs. ten lakhs in the name of Master Subham Das under the guardianship of his father Surjit Das in a nationalized bank and further ordered as under:

> "The money will remain deposited in the bank till the child attains the age of majority. The father of the child may make withdrawals from the bank account from time to time as and when the need arises after obtaining prior permission from the Commission. Secretary, Ministry of Coal and Mines, Government of India shall submit compliance report within <u>eight weeks.</u>"

Under Secretary to the Government of India, Ministry of Coal, New Delhi, vide his communication dated 29.3.2008 has informed the Commission that the amount of Rs. ten lakhs has been deposited in A/c No. 30351603143 in the name of Subham Das in the SBI, Durgapur, on 22.3.2008

in compliance with the recommendations made by the Commission. It has been further stated that the account shall be strictly operated as per the directions given by the Commission. It is further stated that an amount of Rs.37,700/- incurred on the treatment of Master Subham Das has already been paid and another bill for Rs. 31,841.01 has since been received which is under consideration. A letter issued by the SBI, Durgapur, confirming the deposit of Rs.ten lakhs in the name of Master Subham Das has also been annexed with the letter. In view of this communication the recommendations made by the Commission in this case stand complied with. However, a six-monthly periodical report be called from the Secretary, Ministry of Coal, New Delhi and the case should be kept alive.

(Justice S. Rajendra Babu)
Chairperson

(Justice G.P. Mathur)
Member

(R. S. Kalha)
Member

III(k) Interim proceedings in the case of sting operation by Aaj Tak, 'Operation Kalank' : Gujarat dated 20th August, 2008

NATIONAL HUMAN RIGHTS COMMISSION
FARIDKOT HOUSE, NEW DELHI

Name of the complainant	:	Suo motu
Case No.	:	426/6/18/2007-2008
Date	:	20th August, 2008

CORAM

Justice Shri S.Rajendra Babu, Chairperson
Justice Shri G.P.Mathur, Member
Justice Shri B.C.Patel, Member
Shri R.S.Kalha, Member
Shri P.C.Sharma, Member

PROCEEDINGS

The Commission had sought the concurrence of the Government of India to utilize the services of CBI for investigating the authenticity of the tapes of the sting operation telecast by *'Aaj Tak'* under the caption ***'Operation Kalank'*** on 25.10.2007 and the revelations made therein. The Government of India has conveyed its concurrence for requisitioning of the services of CBI as per the provision of section 14(1) of the Protections of Human Rights Act, 1993 vide its communication dated 25.6.2008.

Director, CBI be now asked to conduct an investigation regarding authenticity of the tapes of the sting operation telecast by *'Aaj Tak'* under the caption ***"Operation Kalank"*** on 25.10.2007 and the revelations made

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therein. The enquiry report be submitted to the Commission within *twelve weeks*.

(Justice S.Rajendra Babu)
Chairperson

(Justice G.P.Mathur)
Member

(Justice B.C.Patel)
Member

(R.S.Kalha)
Member

(P.C.Sharma)
Member

(i) Universal Periodic Review — The India Report

Preface

1. The India Report under the Universal Periodic Review mechanism of the United Nations Human Rights Council seeks to provide an overview of how pluralism and respect for diversity inform all aspects of the polity and society in the world's largest democracy. Along with the freedom struggle which was for the realisation of the human rights of the people of India to live in freedom and dignity, a process of social reform was also underway to bring women and disadvantaged sections of society into the mainstream. Both these processes converged and found expression in the Indian Constitution which came into effect in 1950, less than three years after gaining independence. The forward looking Constitution embodies the very essence of the freedom struggle and is reflective of the ethos of pluralism and tolerance engendered by a multi-religious, multicultural, multi-lingual and multi-ethnic society.

2. The commitment to pluralism and tolerance continues and informs all aspects of the Indian Constitution. The Indian Constitution is one of the longest in the world and drew inspiration not only from the richness of our experience of assimilating many religions and cultures over the millennia, but also the leading democratic constitutions of the modern world and from the fledgling United Nations.

3. India, with a population of around 350 million at the time of independence in 1947, faced stupendous challenges. There were nearly 600 Princely States in addition to those areas known as British India which had to be integrated. The Indian economy was primarily an agrarian economy which was deficient in industries and dependent on imports for its basic needs. The literacy rate was around 18 per cent. In the first few decades, priority was given to building human and industrial capacity in keeping with the needs and priorities of the nation. This was the setting against which India began its journey as a democracy to ensure the basic political, economic, social and cultural rights of her people.

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4. We are proud to say that in those early days of our independence several bold measures were enshrined in the Constitution that have enabled India to flourish as a democracy for nearly six decades and preserve its humanist traditions in the face of several challenges. The basic political, social and economic rights found pride of place in the Constitution and became the beacon guiding the political leadership of various hues and colour for over half a century.

Methodology

5. In the preparation of the India Report under the Universal Periodic Review, the General Guidelines for the preparation of information outlined in decision 6/102 of the Human Rights Council meeting held on 27 September 2007 as a follow-up to Human Rights Council resolution 5/1 have been followed broadly.

6. All concerned Ministries and Departments of the Government of India have contributed in the preparation of the report along with other stakeholders including the national and state human rights institutes and the nongovernmental organisations working in the field of human rights and related aspects. Several meetings were held involving the Ministry of Home Affairs, the Ministry of Social Justice and Empowerment, the Ministry of Minority Affairs, the Ministry of Consumer Affairs, Food and Public Distribution, the Ministry of Health and Family Welfare, the Ministry of Housing and Urban Poverty Alleviation, the Ministry of Human Resource Development, the Ministry of Labour and Employment, the Ministry of Law and Justice, the Ministry of Panchayati Raj, the Ministry of Rural Development, the Ministry of Statistics and Programme Implementation, the Ministry of Tribal Affairs, and the Ministry of Women and Child Development. Several consultations were held with the National Human Rights Commission.

7. A broad consultation process was also held with the stakeholders consisting of several non-governmental organizations involved in human rights related activities along with Ministries in the Government of India. A liberal exchange of views, suggestions and information regarding protection and implementation of human rights took place, which helped in evolving the contours of the national report.

8. All these information collated subsequent to the rigorous and long process of consultations between the Ministries, the national human rights institutes and the non-governmental organisations were drafted together. A national report has thus evolved, which reflects the broad consultation process that was undertaken.

The Report

9. India is home to over one billion people. Indian society is the culmination of centuries of assimilation of diverse peoples and ethnic groups. India has an inclusive, open, multi-cultural, multi-ethnic, multi-lingual society marked by unparalleled pluralism.

10. India is the seventh largest country in the world covering an area of 3.3 million sq. km. It is a subcontinent by itself extending from the snow-covered Himalayas to the tropical rain forests of the south. India accounts for 2.4% of the world surface area but supports and sustains 16.7% of the world population. India has 18 major languages. More than 1650 dialects are spoken across the country.

11. Twenty-eight States and seven Union Territories constitute India into a federal polity. There are 604 Districts and 638,596 villages in India. With over 3 million elected local representatives in the Panchayats, which are units of local self-government at the village level, India is not only the largest but also the most representative democracy in the world. India is also the only country to ensure that out of the 3 million elected office bearers, more than 1 million are women. The electorate for the 2004 National Elections exceeded 668 million, voting in 800,000 polling stations spread across varying geographic and climatic zones.

12. Human rights in India are to be viewed in the backdrop of this diverse social and cultural ethos, the country's development imperatives and also the fact that for over two decades it has faced the scourge of terrorism which is aided and abetted from outside. For all the challenges, pressures, and dilemmas, India's approach towards protection and promotion of human rights has been characterised by a holistic, multi-pronged effort.

13. The framework for this effort derives from the Constitution of India, which provides for a sovereign, secular, democratic and socialist polity and confers the right to vote on every citizen of India above the age of 18 years. Universally recognised human rights and fundamental freedoms are guaranteed without discrimination to all citizens of India, which had taken an active part in the drafting of the Universal Declaration of Human Rights.

14. The Fundamental Rights and the Directive Principles of State Policy enshrined in the Indian Constitution represent the Indian people's declaration of their unflinching commitment to core human values, rights and responsibilities. The Indian Constitution and the various rights-centric statutes not only provide for the policy and institutional framework for human rights protection, but also facilitate the concerned institutions in discharging their responsibilities.

15. The Constitution offers all citizens, individually and collectively basic freedoms which are justiciable and inviolable in the form of six broad categories of Fundamental Rights:
    - right to equality including equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and equality of opportunity in matters of employment;
    - right to freedom of speech and expression; assembly; association or union; movement; residence; and right to practice any profession or occupation;
    - right against exploitation, prohibiting all forms of forced labour, child labour and traffic in human beings;
    - right to freedom of conscience and free profession, practice and propagation of religion;
    - right of any section of citizens to conserve their culture, language or script and right of minorities to establish and administer educational institutions of their choice; and
    - right to constitutional remedies for enforcement of Fundamental Rights.

    The bulwark of all Fundamental Rights is found in Article 21 which provides that no person shall be deprived of his life or liberty except in accordance with procedure established by Law.

16. The Constitution lays down certain Directive Principles of State Policy which though not justiciable, are 'fundamental in governance of the country' and it is the duty of the State to apply these principles in making laws.
    - Equal justice and free legal aid.
    - Organization of village panchayats (local governments).
    - Right to work, to education and to public assistance in certain cases.
    - Provision for just and humane conditions of work and maternity relief.
    - Living wage for workers.
    - Participation of workers in management of industries.
    - Uniform civil code for the citizens.
    - Provision for free and compulsory education for children.
    - Promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections.
    - Duty of the state to raise the level of nutrition and the standard of living and to improve public health.
    - Organization of agriculture and animal husbandry.

- Protection and improvement of environment and safeguarding of forests and wild life.
- Protection of monuments and places and objects of national importance.
- Separation of judiciary from executive.
- Promotion of international peace and security.

17. The institutional safeguards for the rights enshrined in the Constitution include an independent judiciary and the separation of judicial and executive functions. Legislation in India is subject to review by courts as regards its constitutionality, and the exercise of executive power is subject to different forms of judicial review. In the event of infringement of an individual's fundamental rights, the highest court in the land, the Supreme Court, can be moved.

18. The Supreme Court has, in its concern for human rights, also developed a highly advanced public interest litigation regime. The judicial initiatives taken in this regard in the 1980s have now become the basis to seek redressal in situations of grave human rights violation. Any individual or group of persons highlighting a question of public importance, for the purposes of invoking its writ jurisdiction, can approach the Supreme Court and also the High Courts in the states. In the process, a wealth of jurisprudence has evolved on issues like prisoners' rights, bonded labour, right to clean environment and custodial violence. The Supreme Court has also recognised the justiciability of some vital economic and social rights, by interpreting the 'right to life' as meaning the right to a life with dignity.

19. As far as administrative structures are concerned, separate departments have been created both at the Centre and in the States for women and child development, social justice, health, education, labour, with a strong focus on the rights of citizens. A number of essential services like education, health and public distribution system of food have been kept in the public sector to ensure its reach across all sections of the population.

20. A number of Ombudsman type institutions have been created for the purpose of serving as 'watchdogs'. The National Human Rights Commission (NHRC) was established in 1993. The status and conditions of service of Chairperson of the NHRC is the same as that of the Chief Justice of India, and of Members of the Commission are those of Judges of the Supreme Court. Thus, the independence of the NHRC is expected to be the same as that of the Supreme Court of India. The Chairperson and Members are appointed on the recommendations of a High Level Committee, which is politically balanced. The Commission has its own independent Investigation Wing which is answerable to the Commission alone.

21. The National Human Rights Commission is playing a major role in the drawing of a National Action Plan for Human Rights, which will cover issues such as the right to health, education, food security, housing, custodial justice and trafficking in women and children. Specific benchmarks along with assessment indicators are being evolved to enable the preparation of a clear-cut road map.

22. Several National Commissions have also been created for women, minorities, Scheduled Castes, and Scheduled Tribes, whose Chairpersons are deemed Members of the National Human Rights Commission. The Government has also set up the National Commission for the Protection of Children's Rights, the National Commission for Denotified, Nomadic & Semi-nomadic Tribes, and the National Commission for Backward Classes and a Chief Commissioner for Persons with Disabilities. In addition, 18 States in India have constituted State Human Rights Commissions while a few more are in the pipeline. Many States have also constituted State Commissions for Scheduled Castes, Scheduled Tribes, Women and Minorities.

23. The Government has adopted a National Action Plan for Human Rights Education to promote awareness about human rights among all sections of the society. Specific target groups such as schools, colleges and universities, have been identified. Government officials, armed forces, prison officials and law officers are also sensitised to the protection of human rights. Human rights courses have been introduced as a part of the training at the SVP National Police Academy, Hyderabad, and at the Police Training Colleges. With a view to further sensitise the Indian Army, officers of the rank of Colonel are appointed in various headquarters to monitor cases relating to human rights. Training on human rights is beginning to have a beneficial effect and the standard operating procedures have been refined and improved. This is reflected in a decline of complaints of human rights violations from areas of insurgency.

24. Besides the institutional and administrative framework set up by the Government to extend and protect human rights, India has a strong tradition of non-governmental and voluntary action. An estimated 25,000 indigenous nongovernmental organisations (NGOs) operate in India. India also has a strong tradition of community-based people's organisations.

25. The media in India radio, television and print, exercise full freedom of expression and coverage of events and issues. The main radio and television channels of India, the All India Radio (AIR) and the Doordarshan (DD) are governed by an independent body of eminent persons who constitute the Prasar Bharati Board. A large number of private 24-hour news as well as entertainment channels also beam their programmes across the country freely through satellite.

Newspapers and magazines in India are independent and largely privately owned. Over 5,600 newspapers, 150 of them major publications, are published daily in over 100 languages. Nearly 40,000 periodicals, some specialising in different subjects but most of general interest, are also published.

26. India is home to almost all religions of the world and secularism is a fundamental tenet of the Indian Constitution and political system. Every religious denomination has the right to establish and maintain institutions for religious, educational and charitable purposes, to manage their own affairs in matters of religion, to own and acquire property and to administer such property in accordance with law. No religious instruction can be imparted in any educational institution wholly maintained out of State funds and no person attending any educational institution recognised by the State or receiving aid out of State funds can be compelled to take part in any religious instruction without his or her consent. All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Citizens residing in India have the right to conserve their distinct language, script or culture.

27. The Minorities Commission set up in 1978 became a statutory body in 1993 and was renamed as the National Commission for Minorities. The Commission is vested with broad statutory powers for the effective implementation of safeguards provided under the Constitution for the protection of interests of minorities and for making recommendations in this regard to the Central and State Governments. The Commission looks into the welfare of minorities, and has the powers to examine specific complaints regarding the deprivation of rights and safeguards of minorities. It is both a monitoring and standard setting body with powers to receive complaints.

28. The Government of India on 23 October 1993 notified five religious communities viz. Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) as minority communities. The National Minorities Development and Finance Corporation (NMDFC) was incorporated in 1994 with the objective of promoting economic activities amongst the backward sections of notified minorities. To achieve its objective, the Corporation provides concessional finance for selfemployment activities to eligible beneficiaries, belonging to the minority communities, having a family income below double the poverty line.

29. A new Ministry of Minority Affairs was created on 29th January, 2006 to ensure a more focused approach towards issues relating to the minorities and to facilitate the formulation of overall policy and planning, coordination, evaluation and review of the regulatory framework and development programmes for the benefit of the minority communities. The Prime Minister's New 15 Point Programme for the

Welfare of Minorities was announced in June 2006. An important aim of the new programme is to ensure that the benefits of various Government schemes for the underprivileged reach the disadvantaged sections of the minority communities.

30. India has embarked on a programme of affirmative action which is, perhaps, without parallel in scale and dimension in human history. Part III of the Indian Constitution dealing with Fundamental Rights, contains powerful provisions to combat all forms of discrimination, notably those forms that were based on caste. These provisions of the Constitution, which are justiciable, include, inter alia, equality before the law or the equal protection of laws, nondiscrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, special provision for the advancement of any socially and educationally backward class of citizens as well as Scheduled Castes and Scheduled Tribes, affirmative action through the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State, and abolition of "Untouchability".

31. To effectuate the guarantees enshrined in these Constitutional provisions, an impressive range of legislative measures have been enacted to end discrimination against Scheduled Castes and Scheduled Tribes. Article 17 of the Constitution of India abolished the practice of untouchability and in furtherance of the provision thereof the Protection of Civil Rights Act (PCR Act) was enacted in 1955. The Act provides for punishment for untouchability. Several schemes and programmes are being implemented for socio-economic and educational development of Scheduled Castes and Scheduled Tribes.

32. Political representation is guaranteed for Scheduled Castes and Scheduled Tribes through the proportionate reservation of seats in elected legislative bodies, from Parliament to village councils. To overcome the cumulative results of past discrimination, the government instituted a program of "compensatory discrimination" that reserved 15 per cent for Scheduled Castes and 7.5 per cent of all Central Government jobs for members of Scheduled Tribes. Comparable reservations were provided for state-level employment, and reservations were extended to college and university admissions. In addition, special provisions for Scheduled Castes and Scheduled Tribes have been provided in housing, poverty alleviation programmes, hostel schemes.

33. India presents a varied tribal population throughout its length and breadth. The Constitution of India incorporates several special provisions for the promotion of educational and economic interest of Scheduled Tribes and their protection from social injustice and all forms of exploitation. The Fifth Schedule empowers the Governor of a state to suspend any act of Parliament or State Legislature if he thinks

it is not in the interest of the Scheduled Tribes. This he can do even with retrospective effect. A similar aspect is not found anywhere else in the constitution. The Sixth schedule enables an autonomous district level body to be formed where there are a large percentage of tribal groups. This unique scheme has been formulated especially for some States in the northeastern region.

34. The Tribal Sub Plan (TSP) Strategy has been adopted for all round development of tribal areas throughout the country to ensure allocation of fund for tribal areas. A separate Ministry of Tribal Affairs was constituted in 1999 with the objective of more focused attention on integrated socio-economic development of the most under privileged section of Indian society, the Scheduled Tribes in a coordinated and planned manner. The National Level Tribal Development Finance Corporation was constituted for economic development of Scheduled Tribes.

35. The recognized rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibility and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance, thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers.

36. To address the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers, including those who were forced to relocate their dwelling due to State development interventions, the Parliament enacted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. It recognises and vests the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; it also seeks to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

COMMITMENT TO INTERNATIONAL HUMAN RIGHTS CONVENTIONS

37. Section 2(d) of the Protection of Human Rights Act, 1993 defines "human rights" as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. This definition is in conformity with international standards and the accepted interpretation of human rights.

38. India actively participated in the drafting and adoption of the Universal Declaration of Human Rights, 1948. Dr. Hansa Mehta, a Gandhian social worker, who had led the Indian delegation, had made important contributions in the drafting of the Declaration, especially by highlighting the need for reflecting gender equality. India is a signatory to the six core human rights covenants and is fully committed to the rights proclaimed in the Universal Declaration. It has signed and ratified international Human Rights Conventions which inter alia include the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of all forms of Racial Discrimination, Convention on the Elimination of all forms of Discrimination against Women, and the Convention on the Rights of the Child. In 2005, it ratified the two Optional Protocols to the Convention on the Rights of the Child and more recently, it ratified the Convention on the Rights of Persons with Disability. It has also signed the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on Enforced Disappearances signaling its intention to respect the provisions of these treaties and is taking steps towards their ratification.

39. India has played an active role in the human rights machinery of the United Nations. It was among the very few select countries who were members of the former Commission of Human Rights throughout over 60 years of its existence. India remains committed to make the new Human Rights Council a strong, effective and efficient body capable of promoting and protecting human rights and fundamental freedoms for all. In this regard, we have extended cooperation to the mechanisms of the Human Rights Council. We also support the High Commissioner's office (OHCHR) in its efforts towards promotion and protection of human rights including through annual financial contributions.

40. While presenting its candidature to the Human Rights Council for a three-year term in December 2006, India made several voluntary pledges and commitments which, inter alia, include maintaining the independence, autonomy as well as genuine powers of investigation of national human rights bodies, setting up of a National Commission for the Protection of Child's Rights, working for the world-wide promotion and protection of human rights, based on the principles of cooperation and genuine dialogue, supporting the adoption of the Convention on the Rights of Persons with Disabilities. Most of these voluntary pledges and commitments made by India have been fulfilled and the rest are being carried out in earnest. RIGHT TO LIFE AND LIBERTY.

41. The right to life and liberty is the most fundamental of all human rights. This basic right forms the bedrock of human rights jurisprudence. The Constitution confers on every person the fundamental right to life and personal liberty, couched in the terms of Art. 21 under Part III. In an attempt to implement the civil liberties laid down in the ICCPR, the Supreme Court has liberally interpreted life and liberty and included a repository of rights under Art. 21. As aforementioned, the Apex Court has interpreted the right to life as denoting a right to a life with dignity, which includes the rights to health, education, clean environment, speedy trial, privacy etc. RIGHT TO DEVELOPMENT

42. Prime Minister Dr Manmohan Singh in an address to the Joint Session of the US Congress on 19 July 2005 said that "Democracy is one part of our national endeavour. Development is the other. Openness will not gain popular support if an open society is not a prosperous society. This is especially so in developing countries, where a large number of people have legitimate material expectations which must be met. That is why we must transform India's economy, to raise the standard of living of all our people and in the process eliminate poverty.

India's aspirations in the respect are not different from those of other developing countries. But we are unique in one respect. There is no other country of a billion people, with our tremendous cultural, linguistic and religious diversity, that has tried to modernise its society and transform its economy within the framework of a functioning democracy. To attempt this at our modest levels of per capita income is a major challenge."

43. India has recorded growth of around 9% in the past several years. India now has the fourth largest GDP in the world in terms of purchasing power. There is a confident, competitive private sector, endowed with remarkable entrepreneurial energy. The infrastructure of law and commercial accounting is conducive to modern business, and there is dynamism in many areas of advanced technology.

44. This is the result of decades of sustained effort to build institutions that provide the underpinnings of economic development. The dynamism of recent years is also the result of economic reforms. The economic policy changes have liberated Indian enterprise from government control and made the economy much more open to global flows of trade, capital and technology.

RIGHT TO INFORMATION

45. To increase transparency in the functioning of Government at all levels and accountability in public life, the Government brought forward a historic legislation, the Right to Information Act, 2005. The Act has wide reach, covering the Central and State Governments, Panchayati

Raj institutions, local bodies, as well as recipients of Government grants. It has given citizens access to information with minimum exemptions. Even security agencies are subject to disclosure now in cases of allegations of corruption or violation of human rights. It has also imposed obligations on Government agencies to disclose information on their own, thus reducing the cost of access. An independent appeal mechanism in the form of Central and State Information Commissioners, coupled with extensive disclosure obligations and stringent penalties, have given teeth to the right and have made it a powerful instrument for good governance.

CIVIL AND POLITICAL RIGHTS

46. In the same speech at the US Congress on 19 July 2005, Prime Minister Dr Manmohan Singh said that "The real test of a democracy is not in what is said in the Constitution, but in how it functions on the ground. All Indians can be proud of what we have achieved in this area and our experience is also relevant beyond our boundaries. Free and fair elections are the foundation of a democracy. Over the past six decades, governments in India, at both the national and State level, have regularly sought the mandate of the people through elections.

Our elections are conducted under the supervision of a statutory independent Election Commission, which has earned respect for its fairness and transparency, both at home and abroad. The independent judiciary has been a zealous defender of our Constitution and a credible guarantor of the Rule of Law. The Press is a key institution in any democracy and our media has a well-earned reputation for being free and fearless. Our minorities, and we have many, participate actively in all walks of national life - political, commercial and cultural. Civil society organisations are thriving and are vigilant in protecting human rights. They are also watchful of threats to the environment. Our Army has remained a professional force, subject throughout to civilian control.

Recently, the Constitution was amended to ensure constitutionally mandated elections to village and municipal councils. This process has produced no less than 3 million elected representatives in the country, with 1 million positions reserved for women. This has brought democracy closer to the people and also empowered women and promoted gender balance."

47. Lack of adequate resources and insufficient national capacity in developing countries handicaps the ability of the state to secure for its people the full enjoyment of the fruits of civil and political rights. In India, democracy and the values and principles that go with it, facilitate fight against poverty and the development of the country, and are seen

as the only durable and sustainable framework within which the welfare of the people can be ensured.

48. The safeguards provided by the institutions of a democratic society, including an independent judiciary, a free press, an alert and vibrant civil society unafraid to question the government's actions and highlight its perceived failures, democracies are far less likely to tolerate abuses of human rights than societies which are closed, authoritarian and devoid of a system of checks and balances.

49. Terrorism aided and abetted from outside has emerged as a serious challenge for India. Terrorists are the biggest violators of the most basic of human rights, the Right to Life. The very same liberties and freedoms which democracies guarantee also tragically make them the most vulnerable to misuse and assault. Terrorism as a political instrument challenges the most fundamental and precious values of democracy by forcing a diminution of openness, tolerance, rights and freedom and negating the fundamental values of a democratic society. Terror must be seen as a principal threat to democracy and as well to development. No cause, no religion, no ideology, no so-called struggle justifies terrorism.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

50. The Government is committed to providing an environment for inclusive and accelerated growth and social progress within the framework of a secular and liberal democracy. Through a combination of offering entitlements, ensuring empowerment and stepping up public investment, the Government has sought to make the growth process more inclusive. All the major initiatives of the Government, in agriculture and rural development, in industry and urban development, in infrastructure and services, in education and health care and in every other facet of life, are aimed at promoting "inclusive growth". Inclusive growth also means empowering the disadvantaged. The Government has sought to achieve this through a variety of legislative interventions for empowering women, tribals and scheduled castes, the minorities and other backward classes.

51. The Government believes that rural India should be seen as a growth engine and is determined to channel public investment in the area of rural infrastructure so as to unleash its growth potential. To upgrade rural infrastructure, the Government has conceived Bharat Nirman, a four year time-bound business plan for achieving identified goals in six selected areas i.e. irrigation, rural water supply, rural housing, rural roads, rural telephony and rural electrification.

52. A path-breaking initiative to provide legal guarantee to work and to transform 'the geography of poverty' is the National Rural Employment Guarantee Act, 2005 which recognises the right to work as a

fundamental legal right. The Act envisages securing the livelihood of people in rural areas by guaranteeing 100 days of employment in a financial year to a rural household. It provides that employment be given within 15 days of application for work and if not so provided, daily unemployment allowance in cash has to be paid. It provides a social safety net for vulnerable households, and an opportunity to combine growth with equity. A social safety net of this dimension has not been undertaken ever before anywhere in the world. This programme was launched on 2 February 2006. Over 14 million households have benefited under the Rural Employment Guarantee Scheme operational in 130 districts. One third of jobs were reserved for women, who currently represent 40 per cent of beneficiaries. This scheme is being expanded to cover the entire country from 1 April 2008.

53. Even prior to India's accession to the Covenant on Economic, Social and Cultural Rights the importance of economic, social, and cultural rights was recognised in our Constitution which contained a separate section on the Directive Principles of State Policy. At the broadest level, they call upon the state to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which social, economic and political justice would inform all the institutions of national life. Over the years, in a series of landmark judgements, the Indian Supreme Court has ruled that the "Directive Principles" must be "read into" the Fundamental Rights, as the two sets of rights are complementary to each other. The Supreme Court also ruled that the right to life, enshrined in the Constitution, includes within it the right to live with human dignity and all that goes with it, including the necessities of life, such as adequate nutrition, clothing, shelter and basic education. The 86th Constitution Amendment Act, which makes free and compulsory education for children between the age group of 6 to 14 years a fundamental right, is a historic step towards the realisation of the universal right to education in India.

54. Intrinsic to the dignity and worth of the human person is the enjoyment of the right to health. Indeed, in the Indian context, the right to life has been expanded, through liberal judicial interpretation, to encompass the right to health and to make the latter a guaranteed fundamental right. The National Rural Health Mission (NRHM) was launched on 12 April 2005 to provide accessible, affordable and accountable quality health services to the poorest households in the remotest rural regions. The thrust of the NRHM is on establishing a fully functional, community owned, decentralised health delivery system with inter-sectoral convergence at all levels, so as to ensure simultaneous action on a wide range of determinants of health like water, sanitation, education, nutrition, social and gender equality. Immunisation programme is one of the key interventions under the NRHM for

protection of children from preventable life threatening conditions. A major exercise is underway to meet the health challenges of the urban population with a focus on urban poor living in slums, through the launch of the National Urban Health Mission. The Health Insurance Scheme for Workers in the Unorganised Sector is scheduled to be implemented from 1 April 2008.

WOMEN'S RIGHTS

55. India ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Our national commitment to women's rights, however, dates back to the time when independent India adopted its Constitution adopted in 1950. The Constitution was path-breaking, not only by the standards of the newly independent countries, but also of many of the developed countries, in its focus on the emancipation of women and removal of all forms of discrimination against them. The guaranteeing of equal rights and privileges for women by the Constitution marked the first step in the journey towards the transformation of the status of women in India.

56. Our approach to women's rights has rested on the belief that the progress of any society is dependent on its ability to protect and promote the rights of its women. As a result of concerted efforts and a comprehensive policy framework over the last five decades there have been significant advances in the socioeconomic indicators for women. These include a considerable rise in life expectancy at birth, increase in mean age at marriage, and decline in the female death rate. Most importantly, there has been an increase in the female literacy rate from just under 30% in 1981 to over 54% in 2001, and for the first time, the absolute number of female illiterates has shown a decline in the 2001 Census. Other indicators such as the Gross Enrolment Ratio for girls at primary and middle levels, number of women in higher education, and the female work participation have also shown a marked positive trend.

57. Empowerment of women is critical for the socio-economic progress of any country. The 73rd and 74th Constitutional Amendments were enacted in 1993 to provide for reservation of seats for women in the democratic institutions at the village and local levels, and have laid a strong foundation for the participation of women at the decision making levels. In addition, several programmes have been put in place for the empowerment of women through mobilisation, organisation and awareness generation, so as to enhance the self-confidence of women within the household and community and grant them access to resources from various available and new sources. The Joint Parliamentary Committee on Empowerment of Women, apart from monitoring the application of gender equality principles in all

legislation, works to ensure that legislation in India is gender responsive.

58. The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and entitlements of women in the country. The National Commission is responsible for the study and monitoring of constitutional and other laws relating to women, review of existing legislation and investigating complaints concerning the rights of women. In order to discharge its functions, the Commission has the powers of a civil court to take evidence and issue summons. The chairperson of the National Commission for Women is deemed to be a member of the National Human Rights Commission for the discharge of certain human rights functions. Ever since its existence the Commission has produced legal literacy manuals to educate women in their basic rights.

59. Education is the key to advancement of women. The spread of liberal education and values has unleashed forces for social reform and created awareness about the need for increased participation of women in the educational, social, economic and political life of India. The care of the girl child in the areas of health and nutrition, education and economic potential constitutes a major focus of state policy.

60. Comprehensive efforts have also been underway to secure gender justice by substantially increasing coverage of programmes for affirmative action, campaigns for equal rights to women in property, credit facilitation, income generating opportunities, provision of support services like day care facilities, crèches, and hostels for working women, etc. Specific provisions for women from the vulnerable sections of society have been made in the Prevention of Atrocities Act of 1989 and the Prevention of Atrocities Rules of 1995. States and Union Territories have been asked to formulate specific schemes under the Special Component Plan for the development of women from the vulnerable sections in the field of education, housing, drinking water supply facilities and also ownership rights on assets.

61. The Government of India adopted a National Policy for Empowerment of Women in 2001 to guide the approach to the empowerment of women in the Tenth Plan period from 2002 to 2007. An allocation of over 3 billion US dollars has been made for this period for the Department of Women and Child Development, the largest for any single department in the Government of India, for the implementation of the Plan.

62. In addition to the role of the State and the constitutional provisions that exist, the judiciary has played a key role in the advancement of gender justice in India, including through the mechanism of public interest litigation which has taken deep roots in the country. The Supreme Court of India has delivered landmark pronouncements on

matters such as the need for equal property rights for women, particularly in case of inheritance and sexual harassment at the workplace. In addition, civil society groups have played a key role in raising awareness about women's rights.

RIGHTS OF THE CHILD

63. India has the largest child population in the world. This brings with it huge responsibilities to protect their rights and prevent exploitation in all its forms, as well as unlimited opportunities to create a better future for the coming generations of young Indians. It is in recognition of this that in addition to having acceded to the Convention on the Rights of the Child, India has also acceded to both the Optional Protocols to the Convention.

64. India's commitment to the rights of the child is enshrined in our Constitution. One of the Directive Principles of State Policy contained in the Constitution states that the State shall ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, unquote. In order to direct greater focus on issues relating to children, an independent Ministry of Women and Child Development has been created. The Common Minimum Programme of the Government pledges that the government will protect the rights of children, strive for the elimination of child labour, ensure facilities for schooling and extend special care to the girl child.

65. India has one of the most comprehensive legal regimes for the protection of children. Among the several laws in place is the Juvenile Justice Care and Protection of Children Act 2000 which aims at providing proper care protection and treatment by catering to the development needs of children, and adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under the Act. The Act provides several safeguards for juveniles in conflict with law and for children in need of care and protection.

66. To eradicate child labour, a multi-pronged strategy is being followed involving strong enforcement of the Act with simultaneous efforts towards rehabilitation of working children and their families through linkages with the poverty eradication and income generation programmes of the Government. Government had initiated the National Child Labour Project (NCLP) Scheme in 1988 to rehabilitate working children in 13 child labour endemic districts of the country which has been extended to 250 districts in the country. Considering the magnitude and the nature of the problem, Government is following a

sequential approach of first covering the children in hazardous occupations and then moving on to non-hazardous occupations. Under the NCLP Scheme, children are withdrawn from work and put into special schools where they are provided with bridging education, vocational training, mid-day meal, stipend, health-care facilities etc. About 0.5 million children have already been mainstreamed to regular education under the NCLP Scheme.

67. In order to ameliorate the condition of working children, the Government has decided to prohibit employment of children from 10 October 2006 as domestic servants or servant or in roadside eateries, restaurants, hotels, motels, teashops, resorts, spas or other recreational centres. Another important project for rehabilitation of child labour is the Indus Project, jointly launched in 2003 by Ministry of Labour & Employment, Government of India, and the US Department of Labour. It is being implemented in 21 districts of 5 States of Delhi, Madhya Pradesh, Maharashtra, Tamil Nadu and Uttar Pradesh.

68. The comprehensive and holistic National Plan of Action for Children, 2005 set time-bound targets for achievement in terms of reduction of infant and child mortality and HIV prevalence in infants, universal access to drinking water and basic sanitation, and the elimination of child marriages as well as the incidence of disabilities due to polio. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 has been amended in 2003 to provide for the prohibition of sex selection, before or after conception, and more stringent enforcement. A Bill has been tabled for amending the Prevention of Child Marriage Act. It includes a salutary provision for declaration of a child marriage as void at the option of the child who contracted such marriage.

69. The Commissions for the Protection of Child Rights Act, 2005 has constituted the National Commission for the Protection of Child Rights. This statutory mechanism seeks to oversee and review the implementation of the National Policy for Children and recommend remedial action in instances of violation of child rights.

70. In addition, a National Charter for Children has been recently adopted which is a statement of intent embodying the Government's agenda for Children. The National Charter emphasises India's commitment to children's rights to survival, health and nutrition, standard of living, play and leisure, early childhood care, education, protection of the girl child, equality, life and liberty, name and nationality, freedom of expression, freedom of association and peaceful assembly, the right to a family and the right to be protected from economic exploitation. The document also defines commitments to children in difficult circumstances, children with disabilities, children from marginalised and disadvantaged communities and child victims.

RIGHTS OF OLDER PERSONS

71. Demographic ageing is a global phenomenon. With a comparatively young population, India is still poised to become home to the second largest number of older persons in the world. Projection studies indicate that the number of 60+ in India will increase to 100 million in 2013 and to 198 million in 2030. The National Policy for Older Persons (NPOP) was announced in January, 1999, with the primary objective to encourage individuals to make provision for their own as well as their spouse's old age; to encourage families to take care of their older family members; to provide care and protection to the vulnerable elderly people, to provide health care facility to the elderly; and to create awareness regarding elderly persons to develop themselves into fully independent citizens.

72. The Government has constituted a National Council for Older Persons (NCOP) to advise and aid the Government on policies and programmes for older persons and also to provide feedback to the Government on the implementation of the National Policy on Older Persons as well as on specific programme initiatives for older persons.

73. The National Old Age Pension Scheme was introduced in 1995 as a response to the deprivation and insecurities faced by our elderly. This scheme was extended to all citizens above the age of 65 years and living below the poverty line in November 2007 as the Indira Gandhi Old Age Pension scheme. This scheme is a demand driven social security programme and is not restricted by budget allocations.

74. The Scheme of Integrated Programme for Older Persons is aimed to empower and improve the quality of life of older persons. Under the scheme, financial assistance up to 90% of the project cost is provided to nongovernmental organisations for establishing and maintaining old age homes, day care centres, mobile medicare units and to provide non-institutional services to older persons.

75. India is a signatory to the Madrid International Plan of Action on Ageing 2002. Government has also enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 to provide for more effective provisions including constitution of Tribunals for the maintenance and welfare of parents and senior citizens.

RIGHTS OF PERSONS WITH DISABILITIES

76. The Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 was enacted much before the UN Convention on the Rights of Persons with Disabilities was adopted. It is a rights-based legislation and contains a range of measures for the prevention and early detection of disabilities, education, employment

and non-discrimination. The Government has ratified the United Nations Convention on the Rights of Persons with Disabilities.

77. Recently, the National Policy for Persons with Disabilities and a scheme for providing 100,000 jobs every year to persons with disabilities have been approved by the Government. Besides, the Government has constituted a Group of Ministers with the mandate of generating awareness and monitoring all the activities undertaken by the Central Government to promote equal opportunities for the differently abled persons. There is also a strong legal framework for empowerment of Persons with Disabilities.

(ii) NHRC, India Paper for Universal Periodic Review

"Sarve Bhavantu Sukhinah, Sarve Bhavantu Niramaya,
Sarve Bhadrani Psahayantu, Maa Kashchid Dukh Bhaag Bhavet."
[O Lord! Let all beings be happy and healthy. I wish well being to all.
Let none suffer from any misery]

1. This has been the cornerstone of promotion and protection of human rights in the Indian society and, therefore, rightly the motto of Commission is also *"Sarve Bhavantu Sukhinah"*.

2. Following Human Rights violations faced by many countries under colonial rule in the nineteenth and twentieth centuries and also chastened by egregious violations during two World Wars in the last century, the international community resolved to protect and promote Human Rights in the Universal Declaration of Human Rights. In 1949, the Indian people adopted the Constitution, which guaranteed Fundamental Rights to its citizens. In order to 'better' protect human rights, the Parliament passed the Protection of Human Rights Act in 1993 for constitution of a National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts. The National Human Rights Commission accordingly came into existence on 12th October, 1993. The State Human Rights Commissions have also been set up in 18 States.

3. The strength of NHRC, India is its complete autonomy. The selection process of its Chairperson and Members itself is inclusive of both the ruling and opposition parties. The Commission has also complete freedom to select and appoint its staff and officials. The Commission, due to its accessibility and positive actions, has gained credibility amongst the people, which is its major strength.

4. Though the Commission is a recommendatory body, the reports of the Commission are placed in the Parliament with the action taken report by the Government. Thus, there is an inbuilt accountability of the Government for implementation of the recommendations to the extent acceptable. In case the Government disagrees, it furnishes reasons thereof in the action taken report. The experience has been that 95% recommendations have been generally complied with.

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5. In last 14 years, the Commission received a large number of complaints relating to various human rights issues. The Commission also takes suo motu cognizance in some cases on the basis of media reports etc. The number of complaints registered and disposed off during last 3 years is as follows:

Year	Fresh cases as well as cases brought forward from previous years	Cases disposed off
1 April 2004-31 March 05	1,35,209	85,661
1 April 2005-31 March 06	1,23,992	80,923
1 April 2006-31 March 07	1,14,114	93,421

6. The Commission's role is complementary to that of judiciary. The Supreme Court has referred a number of important matters to the Commission for monitoring while the Commission has also taken specific cases of violation of human rights to the Courts. The guidelines evolved by the Commission on the treatment of mentally ill persons held in prisons and child rape cases have been adopted by the Delhi High Court and commended to the authorities for adoption. The complementary role of the National Human Rights Commission and the higher judiciary in India is an illustration of 'best practice'.

7. The range of Commission's interventions and results thereof are reported in the Annual Reports of the Commission. The Annual Reports of the Commission up to 2006-07 have been submitted to the Government and reports up to 2005-06 have also been placed in the Parliament with reports on the action taken by the Government. The Commission also brings out annual journals and other publications. The website of the Commission, http://nhrc.nic.in gives updated information on the current status of each complaint. The Commission follows a completely transparent procedure in its functions. While details of Commission's actions can be seen in above documents/ website, some of the important recommendations made by the Commission are highlighted in succeeding paragraphs.

8. Since December, 1996, the Commission has been dealing with complaints alleging starvation deaths in Koraput, Bolangir and Kalahandi (KBK) districts of Orissa. The Commission after hearing the parties formulated a practical programme covering rural water supply schemes, public health care, social security schemes, water and soil conservation measures and rural development schemes. The implementation of the programmes as also its monitoring by the Commission through its Special Rapporteurs has yielded good results.

9. In the case of death of unidentified persons due to terrorist attacks and alleged fake encounters by the Police in Punjab in what has come to be

known as 'Punjab Mass Cremation Case', the Commission recommended compensation of Rs. 250,000 to the next kin of each of 195 deceased identified to be in deemed custody of police and Rs. 175,000 to each of next of kin of 1103 identified persons whose dead bodies were cremated by Punjab police, amounting to Rs. 24, 27, 25,000/- till the end of the year 2006-07.

10. Communal violence broke out in the State of Gujarat on February 27, 2002. The Commission took suomotu cognizance of the tragic incidents and has been seized of the issue since then. The Commission asked the State Government to entrust the investigation of certain critical cases to CBI. The Commission has been continuously monitoring the progress of measures taken by the State for the relief and rehabilitation of the riot-affected persons through its Special Rapporteur. In the year 2003, the Commission filed a Special Leave Petition in the Supreme Court of India to enforce "the right of fair trial" for all and a petition for transfer of nine serious cases for trial outside the State of Gujarat. The Commission's intervention in the Supreme Court of India led to several positive outcomes including the transfer of some serious cases to outside Gujarat, reopening and retrial in important cases and conviction of the guilty persons in `Best Bakery' and Bilkis Bano cases. In the Bilkis Bano case, the Commission extended legal assistance to her. Trials in other cases are continuing.

11. The Commission received a number of representations from non-government organizations and individuals regarding atrocities committed by the Joint Special Task Force set up by the States of Karnataka and Tamil Nadu to apprehend sandalwood smuggler and forest brigand Veerappan. After detailed deliberations, the Commission recommended immediate interim relief of 28 million rupees to 89 victims to mitigate their suffering and hardship.

12. In the State of West Bengal, large scale violence took place in March and November 2007 on the issue of proposed land acquisition for setting up a mega-chemical hub and a Special Economic Zone [SEZ] covering about 10,000 acres of land in Nandigram and adjoining areas. The Commission took suo motu cognizance of the case and not only called for reports from the State Government but also sent its own Investigation team. The matter is under consideration of the Commission. However, the concerns expressed and actions taken by various agencies like judiciary and Commission seemed to have had a salutary effect.

13. On a report received from the Special Rapporteur of the Commission who visited LGB Regional Institute of Mental Health, Tezpur, Assam in 2005 about lodging of five undertrial prisoners at the Institute for periods ranging from 32 to 54 years, the Commission took cognizance and called for a report from the Government of Assam. As a result of

the Commission's intervention, they have since been released and paid compensation.

14. The Commission took cognizance of a complaint alleging attacks on Christians and their institutions in Kandamal District, Orissa on December 24-25, 2007. The Commission has not only issued notice to the Chief Secretary, Government of Orissa and the Director General of Police, Orissa calling upon them to submit a report giving details of injured and casualties, if any, damage caused to the properties, steps taken by the Government to provide relief and compensation to the affected persons/ institutions but also directed that every possible protection be provided to the members of Christian community in the State. The Commission also dispatched a team from its own Investigation Division for an on-the-spot visit and to ascertain facts.

15. Some parts of the country like Jammu & Kashmir and North East region as also some other States are facing the menace of militancy and terrorism. The Armed Forces of the Union including Para Military forces have been deployed in some disturbed areas to aid and assist the State Government authorities to handle internal security situation. At times, there are allegations of Human Rights violations by the forces who conduct operations against terrorists and on receipt of such complaints, the Commission calls for reports from concerned authorities. Army has issued strict guidelines to all ranks on the observance human rights while operating in such areas. It has also been reported that since 1994, there have been 1318 allegations of Human Rights violations of which, 1269 have been investigated and 54 have been found to be true. 115 persons have been punished.

16. In the last 14 years, the Commission has endeavoured to curb violation of human rights as well as to promote a culture of human rights in the country through various measures. These include syllabus for the introduction of human rights education from the school level up to the university level, mass awareness programme by way of imparting training and bringing out publications in English, Hindi and regional languages etc. In order to sensitize various stakeholders, the Commission has been organizing training programmes and workshops on Human Rights issues since its inception. The target groups include police personnel, armed forces personnel, judicial officers, students, public representatives, NGOs etc. The programmes cover general human rights awareness as also some specific issues like rights of the disadvantaged sections e.g. women, tribals, food security, right to education and health and custodial justice etc. The 'Know your rights' series brought out by the Commission has proved highly useful in spreading human rights awareness. Other publications include Handbook on Human Rights for Judicial Officers, Disability Manual, HR education for beginners etc.

17. The Commission has been closely monitoring, as also urging State authorities to move aggressively towards complete eradication of the pernicious practice of manual scavenging. Under a Supreme Court directive, this is to be fully complied with by 2009.

18. India has been striving to protect and promote Human Rights of its citizens inspite of serious problems of terrorism, militancy, as also under development. While there is no denial that some achievements have been made, yet there are certain issues of serious concern related to enjoyment of Human Rights by all its citizens. These issues relate to trafficking in women and children, food security, right to education and health, disappearance of persons, displacement of persons due to disasters, conflicts and development, child labour, custodial deaths, prisons and the disabled. On these issues, the Commission is not only dealing with individual cases but also issuing policy guidelines for implementing agencies.

19. The Commission laid down stringent reporting requirements in respect of custodial deaths and rapes. A National Conference was organized in this regard which was attended by cross section of the society. It discussed ways and means to prevent it. The Commission has issued guidelines, among others, on deaths in alleged fake encounters, arrests, and protection of human rights in prisons. Scrupulous adherence to the Commission's guidelines would go a long way in the protection and promotion of human rights. The Commission was a respondent in a petition in the Supreme Court related to Police Reforms and enactment of new Police Act.

20. The Commission has also taken a proactive approach to periodically monitor and review the implementation of measures by Government for ensuring some basic Human Rights areas of concern. Some of these are as follows:

2. Right to Education

21. The Commission has been advocating since 1994 for free and compulsory education to all children until they complete the age of 14 years. The 86th Constitutional Amendment Act, which was passed in 2002, mandates that 'the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.' As of now, there is no central legislation in this regard. The Model Right to Education Bill was circulated to the States in June 2006. Though the Constitutional Amendment Act has been passed, this right is a stillborn right as the corresponding legislation is not in place. Notwithstanding *Sarva Shiksha Aabhiyan* and other programmes, fundamental right to education cannot be realized all over the country in the absence of a clear policy and legislative measures, whether through a Central or

State legislation. The Commission is deeply concerned about equity and quality of education, which leaves much to be desired. There are significant gaps between urban and rural areas and between elite and non-elite schools in educational attainments with backward districts and tribal people lagging behind the general public.

2. Right to health

22. Universal equitable access to essential health care based on need continues to elude us. There are significant inter-state, urban-rural and economic status related disparities in access to essential health care which have been clearly brought out by the National Family Health Survey III.

Quality assurance in mental hospitals and protection of the rights of mentally ill is also a challenge. The Commission recommended compulsory rural attachment for the doctors and having nurse practitioners to resolve the issue of manpower.

3. Rights of children

23. The Commission regularly monitors the measures towards elimination of the practice of child labour in hazardous work through its Special Rapporteurs and issues recommendations for compensation as well as penal action. The Commission is of the firm view that children should be in schools and not work for their livelihood and that there should be stricter enforcement of protective provisions in the Constitution and in the laws. The Commission has also been deeply concerned about the findings of slow decline in infant mortality rate brought out by the National Family and Health Survey (NFHS 3). Deeply concerned about juvenile justice, the Commission held a National Conference and made detailed recommendations in this regard. Instances of sexual abuse of children have been on the rise and are a matter of deep concern for the Commission. The Commission intervened in specific cases of child sexual abuse including in the Nithari incident where it constituted a High Level Committee on Missing Children and based on its report, it made detailed recommendations on the issue. In July 2007, it has issued Guidelines for speedy and sensitive disposal of child rape cases. The predominantly patriarchal, social, cultural and religious set up based on the foundation that the family line runs through a male has contributed extensively to the secondary status of women in India. This has led to a strong desire to avoid the birth of a female child in the family resulting in decline in the child sex ratio at an alarming rate. Modern technology combined with a cultural preference for sons rather than daughters has led to the mushrooming of neo-natal clinics across India where parents can check the sex of their unborn child. In some parts of the country parents are choosing to abort if the child is female.

4. Right to food

24. Though sufficient food grains are available in the country, the Commission has been concerned about issues relating to access to food and malnutrition. Ins pite of a plethora of schemes, there seemed to be no convergence. On one hand, we have overcome famines and moved away from being a food deficit country, while on the other hand, there are instances of starvation and malnutrition. The Commission is of the firm view that there is a need to redefine concepts like, 'Right to Nutrition', 'Malnutrition', 'Starvation' so that there is a paradigm shift from 'welfare' approach to 'rights based approach' to the issue of malnutrition and starvation. The Commission has held that Right to Food is not only a constitutional guarantee but also a basic human right. In order to ensure quality execution of Right to Food, the Commission has recommended constitution of Committees which would monitor the access and availability of food grains to the eligible and most vulnerable sections of the society. The Commission has issued the guidelines on the constitution and functioning of the committees to all the State governments and the Central Ministries. The Commission hopes that, if implemented in letter and spirit, these Committees, which will act as Watch Committees, would pave the way for a hunger free India. Besides drawing up a draft National Action Plan on Right to Food, the Commission is also monitoring incidence of malnutrition in Maharashtra.

5. Rights of persons with Disability

25. The Commission was actively involved in the drafting of the Convention on the Rights of Persons with Disabilities and soon after its adoption by the UN General Assembly, the Commission commended it to the Government of India for ratification, which has since been done. Article 33 of that Convention provided a role for NHRIs in the monitoring of implementation. Accordingly, the Commission has initiated follow up action. It proposes to hold regional workshops to sensitize various stakeholders about the provisions of the Convention and monitor the execution of the rights of persons with disabilities.

6. Corruption and Human Rights

26. Recognizing linkages between corruption and good governance and how the former impinges upon the enjoyment of Human Rights, the Commission held a National Conference on this subject in May 2006 and based on it, made detailed recommendations to all authorities concerned.

7. Review of international human rights commitments

27. As an 'A' category Paris Principles compliant National Institution, the Commission has been playing an active role in the International Coordinating Committee and in the Asia Pacific Forum of NHRIs and was instrumental in the UN Human Rights Council resolution 5/1 which listed critical role of NHRIs in the UN Human Rights Council. On request from the Government of India, the Commission actively participated in the preparation of the India Country Paper.

28. In the interpretation of applicability of international conventions, the Courts and the Commission have always interpreted it in a progressive manner in harmony with international law. Based on the Commission's efforts, the Government of India has signed the Torture Convention. Following the Commission's advice, it has signed and ratified two Optional Protocols to the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. In the same vein, the Commission has been advocating for the ratification of the 1951 UN Convention relating to the Status of Refugees and the Torture Convention. In addition, it has been advocating for a National Law on Refugees.

8. Conclusion

29. There is an increasing convergence of positions amongst various sections - the State, Human Rights Institutions and civil society - that development is one of the necessary requisites for promotion and protection of human rights and right to Development. Two challenges need to be met before this right can be taken seriously in policy and action. The first is to create a robust concept of development; the second is to identify the practical steps to implement this right by gearing up the administration and the operation of law. The object of this right is to reduce disparities, harmonize aspirations of freedom and dignity with material improvement of human conditions. Neither objective is possible under conditions of poverty. Poverty often results from willful neglect and discrimination. Lack of adequate development or that which permits exclusion and discrimination in allocation of resources paves the way to increased inequality and marginalization of the poor and the vulnerable. It denies them their human rights in terms of lack of capacity.

30. In the words of Nobel laureate, Amartya Sen, "the overarching objective of development is to maximize people's capabilities - their freedom to lead the kind of lives they value, and have reason to value." Economic and social inequalities create differences in access to political power, justice, basic goods and services, all of which are essential for the full realization of human rights. The process of development must strive to

realize all human rights entitlements of all rights holders. This is particularly relevant for the poor and the marginalized. For them, it is necessary that the development process move away from needs based exercise in charity and assistance to one that creates and sustains genuine entitlements that span all aspects of their life - economic, social and cultural as well as civil and political.

31. The second challenge is to translate political commitment to practice. Development with social justice cannot be achieved in the absence of respect for human rights. There has to be an enabling environment - legal political, economic and social - sensitive in the local context for realization of right to development. The gap between intention and action has undermined the credibility of several schemes. NHRC targets to be a facilitator to trigger this process for the realization of the right to development.

(iii) NHRC, INDIA REPORT

At 13 Asia Pacific Forum Meeting - 28-31 July, 2008, Presented by Justice Shri S. Rajendra Babu, Chairperson, NHRC

I. INTRODUCTION

1. The motto of the National Human Rights Commission is *"Sarve Bhavantu Sukhinah"*. Happiness and health for all is sought to be achieved through a rights-based regime where respect for human beings and their dignity is cardinal. The Constitution of India provides the basic framework for this rights based regime. The constitutional framework is complemented by several legislations and institutional mechanisms that serve to respect, protect and promote human rights. In addition to this domestic framework, the international conventions to which India is a party also form the basis of human rights protection.

2. The National Human Rights Commission of India was set up in 1993 for "better protection of human rights and for matters connected therewith or incidental thereto". It is a statutory and autonomous body, which works independently. It has full financial and functional autonomy and has a wide mandate.

3. Over the last 14 years, the Commission has endeavoured to give a positive meaning and content to the objectives set out in the Protection of Human Rights Act, 1993. During this period, the Commission has also worked vigorously and effectively to create awareness and to sensitize public authorities for promoting and protecting human rights in the country.

4. In the early years after inception, the Commission focused on civil and political rights like terrorism and insurgency, prisons, monitoring of custodial deaths, cases in detention, including mental homes and juvenile justice homes etc. However, in the succeeding years, the economic, social and cultural rights have also been given prominence. It is the belief of the Commission that all rights are inter-related and inter-dependent. Apart from working for the eradication of bonded labour and child labour and the rights of the children, women and other weaker or marginalized sections of the society, the Commission has also undertaken work in other fields, such as, right to health, food and education, right of displaced persons due to natural and man made calamities etc

5. The Commission received only 496 complaints of violation of human rights in 1993-94, the first year of its establishment. The number steadily increased over the years and during the financial year 2007-2008, the Commission received 100,616 complaints. The Commission disposed off 101,272 complaints which included complaints carried forward from the previous years. The phenomenal increase in the number of complaints is indicative of growing awareness amongst the people in the country as well as increased faith in the Commission. In 188 cases, the Commission recommended immediate interim relief of Rs.5,64,26,500 during 2007-2008 and in Punjab Mass Cremation case the interim relief is to a tune of Rs.25, 75, 25,000/-.

II. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

6. The following are some of the important activities undertaken by the Commission to monitor the economic, social and cultural rights:

Human Rights Awareness Programme in 28 Backward Districts

7. The Commission selected 28 backward districts in the country, one in each State, for direct interaction with their field level functionaries with a view to spread human rights awareness at cutting edge level in the administration and also to facilitate better assessment of enforcement of various measures related to human rights. In this effort, the special attention will be on (i) food security, (ii) right to education, (iii) right to health, hygiene and sanitation, (iv) custodial justice, (v) human rights issues of Scheduled Castes(SCs) and Scheduled Tribes (STs), (vi) right to culture and protection of Community Assets and (vii) right to life, living conditions and nature of responsibility of Government and Panchayat (unit of local self-government)

8. In pursuance of this programme, the Chairperson and officers of NHRC visited Chamba District in Himachal Pradesh from 1st to 5th July, 2008 and had detailed discussions with district level functionaries, elected representatives in local bodies and NGOs.

Right to Health

9. The Commission has been stressing that health and education are two basic human rights and are part of our fundamental rights. Keeping in view the rights approach, the Commission has been impressing upon the State functionaries that they are duty bound to do their best to realize these rights.

10. With a view to discuss the availability of trained manpower in remote parts of the country, a meeting with the Medical Council of India, Indian Nursing Council and Ministry of Health & Family Welfare, Govt. of India was held on 30 August, 2007 in the Commission. After extensive deliberations, the Commission recommended to the

Government to make necessary changes in the Indian Medical Council Act to have one year compulsory rural attachment of the MBBS students before their registration. To increase intake of students for Psychiatry courses, the Commission has recommended to the Medical Council of India to relax its norms. With a view to improve the emergency medical service in the country, the Medical Council of India approved a course in M.D.(Emergency Medicine) on the recommendation of the Commission.

11. The Indian Nursing Council, on the recommendation of the Commission, approved the syllabus of nursing, midwifery to ensure effective service to the population. The Commission has also taken up among others, the issues of unsafe drugs and medical devices, silicosis and availability of anti rabies vaccines.

12. The representatives of the Commission have been visiting mental hospitals across the country to monitor the implementation of its recommendations on 'Quality Assurance in Mental Health'. To review and update the Manual on Quality Assurance in Mental Health, the Commission organized a conference of all Health Secretaries and State Mental Health Authorities at Bangalore in May, 2008 in collaboration with the National Institute of Mental Health and Neurosciences, Bangalore (NIMHANS).

HIV/AIDS and Human Rights

13. In order to spread human rights awareness among people, the Commission has taken the initiative of producing a series of short films on selected human rights issues. One such film and a video spot are on the rights of persons infected/affected by HIV/AIDS. This film and video spot were telecast by Doordarshan (National Channel) and other private channels. This is also shown in various awareness programmes.

Persons with Disabilities

14. The National Human Rights Commission of India played a major role in the drafting of the UN Convention on Rights of Persons with Disabilities and advocated for inserting Art.33 relating to national implementation and monitoring mechanisms. Therefore, it advocated for its early ratification with the Government of India, which has since been done in the year 2007. As a follow=up action, the Commission appointed a Special Rapporteur on Women, Children and Disability related issues and constituted a Core Advisory Group on Disability to advise the Commission on matters connected with and incidental to the promotion, protection and monitoring of rights mentioned in the Indian Constitution and laws for persons with disabilities and also envisaged in Art. 33 (2) of the UN Convention on the Rights of Persons with Disabilities.

15. In the light of its role as envisaged in Art.33 of CRPD, the NHRC, India is organizing regional workshops during the year in different parts of the country to assess the enforcement of rights of the persons with disabilities with particular reference to their education, employment, access and services. The Commission has evolved a format to collect detailed information with regard to right to education, employment, access and services being provided to persons with disabilities.

16. The Commission, deeply concerned about the education of deaf children, identified the lack of training in sign language as the major constraint. In order to standardize the sign language for deaf persons which can be introduced in teachers training, the Commission played a catalytic role to evolve a project entitled " Indian Sign Language for Deaf Persons" through the National Institute of Hearing Impaired, Mumbai.

Rights of the Internally Displaced Persons

17. To discuss the human rights implications of displacement following conflict, development projects, and natural and manmade disasters, the Commission organized the National Conference on "Relief and Rehabilitation of Displaced Persons" on March 24-25, 2008 at New Delhi. All key stakeholders, including Chairperson/Members of State Human Rights Commissions, government officials of both the Central and State governments, officials of the National Disaster Management Authority, UN agencies and NGOs participated in this conference. The participants deliberated on various human rights issues related to displacement and made several recommendations on land acquisition and relief and rehabilitation of displaced persons from human rights perspective. The Commission is currently finalizing the recommendations which will be sent to all concerned agencies.

Trafficking

18. The National Human Rights Commission of India is working relentlessly to help in the prevention and combating of human trafficking. Special attention is being given to the plight of women and children being exposed to such a heinous crime. At the request of the UNHCHR as well as recommendation of the APF of NHRIs, the NHRC, India nominated one of its members as a focal point on Human Rights of women, including human trafficking. The Commission in collaboration with the National Commission for Women has assisted the Ministry of Women and Child Development in the Government of India in formulating a Plan of Action to Prevent and Combat Trafficking with special focus on women and children.

Food Security

19. The National Human Rights Commission has consistently maintained that the Right to Food is inherent to living a life with dignity. The

Commission has expressed the view that the Right to Food includes nutrition at an appropriate level. 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 is of the view that mortality alone should not be considered as the effect of starvation but destitution and the continuum of distress should be viewed as indicators demonstrating the prevalence of starvation. There is thus an accompanying need for a paradigm shift in public policies and relief codes in this respect.

20. The Commission has constituted a Core Group on Right to Food with experts in the field. In last meeting of the Core Group, it was observed that Panchayats, being burdened with so many other responsibilities may not be in a position to pay focused attention to this aspect in all the areas in their jurisdiction. Hence a need for the constitution of watch committees at various levels in States was felt. The purpose of these independent committees is to see implementation of the related schemes, availability of food grains and their proper distribution and report to the concerned authorities in the State or to the SHRC/NHRC directly in some select cases, as the case may be.

III. CIVIL & POLITICAL RIGHTS

21. Besides evolving stringent reporting system and guidelines, the Commission continued to monitor custodial deaths, rapes, deaths in alleged fake encounters etc. Besides redressing individual complaints, the Commission also stressed the need for systemic reforms in the Police and Prisons. The Commission continued to monitor conditions in prisons. The Commission took up, among others, overcrowding in prisons, medical treatment of prisoners, sensitization of prison staff. In October, 2007, the Chairperson, NHRC, India addressed a letter to Chief Ministers of all States and Union Territories highlighting the need for modernization of jails and also the Chief Justices of all High Courts requesting them to take steps for speedy trial and we are receiving the response for the same.

22. There are 15024 deaths in judicial custody and 2222 in police custody since 1.9.1993. These deaths are reported within 24 hours to NHRC and analysed by NHRC. Out of the above, 10658 deaths in judicial custody and 1485 deaths in police custody are due to natural causes but in 153 deaths in judicial custody and 158 deaths in police custody, the NHRC has recommended interim relief, prosecution and departmental action against defaulting personnel.

Violent incidents in Nandigram area of East Midnapur District, West Bengal.

23. The Commission intervened in the matter of violence that occurred between the ruling party supporters and the Bhoomi Ucched Pratirodh Committee (BUPC) - an organization to channelize the protest against the proposed land acquisition by the State Government and resultant police firing on 14 March, 2007 and the incidents of group clashes in November, 2007 in Nandigram area of East Midnapur District of West Bengal. The incident has its origin in the decision of the State Government of West Bengal to set up a Special Economic Zone (SEZ) and a chemical hub in an area of about 10,000 acres in Nandigram area of East Midnapur District of West Bengal. The police firing on 14 March, 2007 resulted in death of 14 persons and injuries to 300 people including 52 policemen. In the subsequent event of blockade and group clashes from 6th to 12th November, 2007, seven persons were killed and 32 persons, including 16 police personnel sustained injuries. Several houses and other properties were damaged either fully or partially. The Commission, after considering the reports of the State Government and its own investigation team, made certain general observations regarding the role to be played by the ruling party, opposition, media etc. It also constituted a Committee under its Secretary General for suggesting quantum of compensation for damage that occurred and to ensure that monetary relief does not fall into wrong hands and reaches the genuine persons. The Committee visited the areas and has made recommendations which have been accepted by the Commission and conveyed to the State authorities for implementation.

Incidents of violence by Salwa Judum activists and Naxalites in Chhattisgarh.

24. The petitioners Ms.Nandini Sundar & others in their complaints before the Supreme Court of India prayed for directions to the State Government (i) to refrain from supporting the activities of the Salwa Judum, (ii) independent and impartial inquiry into the incident of killings, abductions, rapes and gross violation of human rights by the security forces and the Salwa Judum activists, in endeavouring to counter the Naxalites and to investigate the killings by the Naxalites, (iii) grant of compensation etc.

25. The Supreme Court of India on consideration of the matter on 15.4.2008, directed thus:-

"After hearing both sides, we feel that in view of the serious allegations relating to violation of human rights by Naxalites and Salwa Judum and the living conditions in the refugee settlement colonies, it will be appropriate if the National Human Rights Commission examines/ verifies these allegations. We leave it to the NHRC to appoint an

appropriate fact finding Committee with such members as it deems fit and make available its report to this Court within eight weeks"

26. Pursuant to the directions of the Supreme Court of India, the Commission deputed a Fact Finding Team comprising its Deputy Inspector General of Police, two Senior Superintendents of Police and other officers in the Investigation Division to inquire into the allegations of large scale human rights violations by Salwa Judum activists, naxalites and security forces in the State of Chhattisgarh. The team of the Commission undertook strenuous visit to the remote tribal and forest areas for collecting facts. There were incidents of attack on police by some groups during the visit of the team. Threat to their lives did not deter the team from performing their assigned task and they completed the visit displaying enormous courage. The report of the team was being finalized for submission before the Apex Court for its consideration.

IV. STATE HUMAN RIGHTS COMMISSIONS

27. Section 21 of the Protection of Human Rights Act, 1993 provides for constitution of State Human Rights Commission (SHRC). Seventeen States in India have constituted SHRCs.

28. The National Human Rights Commission of India is keen that such State Human Rights Commissions are set up in every State so that the redressal mechanism is easily accessible to the citizens in all parts of the country and NHRC can concentrate more on the larger issue rather than individual complaints. The Commission has suggested to those States which have not yet constituted State Human Rights Commissions to favourably consider the same at the earliest. Further, the Commission has taken initiative to hold regular interactions with the State Human Rights Commissions to explore and further strengthen areas of cooperation and partnership.

29. A meeting of the NHRC and SHRCs was held on November 19, 2007 in New Delhi for better coordination and to develop joint strategies for emerging challenges. Under the capacity building of the State Human Rights Commission, the National Human Rights Commission of India has made a special provision in its own budget to strengthen the SHRCs by way of installing Complaint Information and Management Systems (CIMS) and impart training to those Commissions which want to incorporate it in their Commissions. Towards achieving this, on the recommendations of the Commission, the Planning Commission, Govt. of India has approved allocation of Rs.10 crores in the 11th Five Year Plan with an annual allocation of Rs.2 crores each year to NHRC to strengthen the SHRCs and to complete the installation of CMS package in the SHRCs expeditiously.

Human Rights Courts

30. Section 30 of the Protection of Human Rights Act, 1993 has provided for setting up of Human Rights Courts for the purpose of providing speedy trial of offences arising out of violation of human rights.

V. Commission's Interaction with NGOs

31. Encouraging the efforts of the Non Governmental Organizations (NGOs) working in the field of Human Rights is a statutory responsibility of the Commission under Section 12 (i) of the Protection of Human Rights Act, 1993.

32. A Core Group of NGOs has been constituted to encourage the efforts of the NGOs. The Core Group provides the Commission with crucial inputs regarding the hopes, aspirations and expectation of the civil society from the Commission. The Core Group of NGOs is expected to play a positive role in this regard.

33. Besides the Core Group of NGOs, the Commission has also set up Core Group of Experts on specified subjects related to Human Right issues to advise the Commission on complex technical issues. Some of the important Core Groups that have been set up by the Commission are:

    i) Core Group on Mental Health.
    ii) Core Group on Right to Food.
    iii) Core Group on Disability.
    iv) Core Group on Health.
    v) Core Group of Lawyers.

    These Core Group also include some experts associated with NGOs

34. The Commission constantly associates NGOs in its programmes related to human rights issues. For example, Jan Swasthya Abhiyan is associated in Right to Health survey. In the programme in 28 select districts local NGOs are being invited in the deliberations. In regional workshops on disability the regional NGOs collaborate actively with NHRC.

Special Rapporteurs

35. The Commission has appointed 4 Special Rapporteurs on the subjects of (i) Bonded/Child Labour and conditions in Mental Hospitals (ii) Women, Child and Persons with Disability, (iii) Civil and Political Rights and (iv) Economic, Social and Cultural Rights. Besides, Special Rapporteurs have been appointed in five zones to visit the areas and give feed back to the Commission on human rights issues.

VI. INTERNATIONAL COOPERATION

International Coordinating Committee of National Human Rights Institutions (ICC) Meetings.

36. The Commission participated in the Expanded Bureau Meeting of the International Coordinating Committee (ICC) held on 12-14 December, 2007 in Geneva and later in the 20th Session of the meeting of the ICC from 14 to 18 April, 2008 at Geneva. There was appreciation for the Commission's offer to host the web-site of all NHRIs. The Commission actively participated, among others, in sessions relating to UPR and role of NHRIs in poverty alleviation. On two points the Indian delegation laid special emphasis. The first related to fund raising by ICC. India expressed that the funds raising should be transparent and funds should be accepted only from the sources whose credibility is well established. The second related to the accreditation procedure.

Cooperation and coordination with APF Member Institutions

37. The NHRC, India has been participating in technical cooperation and assistance programmes with the NHRIs in the Asia Pacific Region for better protection and promotion of human rights.

38. A four day Sub-Regional Workshop on National Inquiries was hosted by the National Human Rights Commission of India from October 29 to November 1, 2007. The workshop was jointly organized by the Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute (RWI) of Human Rights and Humanitarian Law, University of Lund, Sweden. The workshop aimed to provide the representatives with a step by step understanding of the process of conducting National Inquiries. The deliberations included a number of issues like the Right to Food, Mental Illness, accessible public land transport for people with disabilities, torture, homeless children and Right to Health.

Workshop on Strengthening Advisory Council of Jurists

39. The Workshop on Strengthening the Advisory Council of Jurists was organized by the National Human Rights Commission in collaboration with the Asia Pacific Forum (APF) of National Human Rights Institutions of NHRIs in New Delhi on February 27-28, 2008.

40. The purpose of the workshop was to bring together a representative group of forum councilors and jurists to consider, among other things, the most effective ways to utilize the expertise of the ACJ; how to improve procedures for the selection and development of references and the implementation and monitoring of their recommendations; how to clarify and strengthen the relationship between the Forum Council and the ACJ and between NHRIs and their ACJ nominees.

Universal Periodic Review (UPR) mechanism

41. The National Human Rights of India, in partnership with others, advocated for the effective participation of NHRIs in the Human Rights Council which resulted in the Human Rights Council Resolution 5/1 on "Institution-Building". In pursuance, the Commission has taken a very pro-active role at every stage relating to preparation of papers for UPR and in holding consultations with stakeholders. In its independent paper for UPR, the Commission flagged important human rights challenges relating to education, right to food, right to health, rights of women, children and persons with disability. While reviewing international human rights commitments, the Commission stressed the need to ratify the 1951 UN Convention relating to the Status of Refugees and the Torture Convention. The Commission's statement has been placed on our own website as well as on the website of OHCHR.

42. The representative of the Commission attended the plenary session of the Human Rights Council to adopt the final outcome relating to India under UPR on 10th June, 2008 and presented a statement on behalf of the Commission. The representative stressed that the UPR process held great potential for the protection and promotion of human rights.

International Seminars and Workshops

43. The Commission participated in various seminars and workshops abroad which included (i) the workshop conducted by the UNHCR Centre, Tokyo on "Basics of International Humanitarian Response' from 2-9 October, 2007 (ii) placement programme with the National Human Rights Commission from 9-17 October, 2007 at Seoul, South Korea (iii) Regional Workshop on the Establishment of National Human Rights Institutions in Asia from 15-17 October, 2007 (iv) training programme on human rights and migrant workers in Asia Pacific Region from 15-19 October, 2007 (v) Commonwealth Asia Colloquium on Gender Culture & Law from 30-31 October, 2007 (vi) 'Commonwealth National Human Rights Institution Forum meeting from 19-20 November, 2007 at Kampala, Uganda (vii) Regional Training Programme in Human Rights from 19-28 November, 2007 (viii) Sensitization Course on Trafficking and Migration of Children for Labour organized by the ILO in Italy from 21-25 January, 2008 and (ix) the UPR meeting organized by the Commonwealth Secretariat in London from 17-18 March, 2008

Exchanges and other interactions with foreign delegates in the Commission

44. The Commission exchanged views on protection and promotion of human rights with various foreign delegates who visited the Commission viz. (i) Lutyens Trust, UK, (ii) the Members of Royal College

of Defence Studies, UK (iii) Mr.Brad Adams, Executive Director, Human Rights Watch (iv) a team from All China Women's Federation, China (v) Mr.Paul Hunt, UN Special Rapporteur on Right to Environment to the enjoyment of the highest attainable standard of Physical and Mental Health' (vi) a delegation of Mongolia on "Access to Justice and Human Rights" (vii) Prof. Michael Stein, Executive Director, Harvard Project on Disability, Harvard Law School, Cambridge (viii) Ms.Asma Jahangir, UN Special Rapporteur on "Freedom of Religion and Belief" (ix) Mr. Pierre Sane, Assistant Director General, Social and Human Sciences Sector, UNESCO, Paris (x) a delegation from Irish Parliament's Joint Committee on Constitution, (xi) a delegation from National Human Rights Commission of Rwanda (xii) Mr. Erik Kurweil, Political Consular, German Embassy, New Delhi and (xiii) two staff members of Indonesian Human Rights Commission.

45. A delegation of two staff members along with the vice president of the National Commission for Human Rights, Rwanda visited the Commission on a study trip from 29 March to 9 April, 2008. The delegates exchanged their experiences with our Commission. Another delegation consisting of two staff members of Indonesian Human Rights Commission also visited the Commission from 28 April to 12 May, 2008 on a study trip. The delegates were given first hand knowledge of the functioning of all divisions of the Commission.

46. Based on the request of the OHCHR, the National Human Rights Commission of India sent two of its staff members to Rwandan Human Rights Commission to assist them in developing their Complaint Management System from 26 November-7th December, 2007. The Commission also sent two staff members to the Ugandan Human Rights Commission from 11 to 25 February, 2008 respectively

NHRC, India delegation to Irish Human Rights Commission, Northern Ireland Human Rights Commission and the United Kingdom.

48. A high level delegation led by Chairperson, NHRC, India visited the Irish Human Rights Commission at Dublin, Ireland on 11th April, 2008 and held discussions with Mr. Maurice Manning, President, Irish Human Rights Commission. The two sides discussed about the various activities undertaken by both the Commissions for better protection of human rights and agreed to collaborate and cooperate closely with each other in future.

49. The NHRC, India delegation later visited the Belfast and held discussions with Prof. Monica McWilliams, Chief Commissioner, Northern Ireland Human Rights Commission. The discussions covered activities taken up by both Commissions and scope for collaboration. Later, the NHRC, India delegation visited the United Kingdom and held discussions with the Secretary General,

Commonwealth Secretariat and the Foreign and Commonwealth Office, U.K. on matters of mutual interest.

A new Website of National Human Rights Institutions (NHRIs).

50. During the meeting of International Coordinating Committee (ICC) held at Geneva, Switzerland from 11 - 15 December, 2007, it was decided that the National Human Rights Commission of India will develop, host and maintain the Website for NHRIs. The earlier website of National Human Rights Institutions www.nhri.net was being maintained by Danish Institute for Human Rights, till March 2008. The Grant Agreement between the Office of the United Nations High Commissioner for Human Rights and the National Human Rights Commission of India was signed on 14 March 2008. A new email ID viz., nhrc.india@nic.in has been opened and given to all concerned in OHCHR and NHRCs for receiving the material to be posted on the website. NHRC, India has improved the home page and NHRI website is up to date with all details sent by OHCHR hosted on the website.

VII. HUMAN RIGHTS AWARENESS PROGRAMMES

Training

51. The Training Division, established in September, 1993, is imparting training to the officials of the Central and the State Governments, field functionaries and the representatives of NGOs, Universities etc. The main objective is to sensitize the participants of various levels/groups on Human Rights and equip them to work with more sensitivity in their respective fields with a Rights Based Approach. The methodology adopted in the seminars/workshops/trainings is lecture method, group discussions, syndicate report, action plan etc. The participants are exposed to international and national level Human Rights Conventions and Law and Culture.

Internship training programe

52. The Commission has been conducting the "Summer Internship Programmes" since 1998, and in 2000 the Winter Internship Programme was introduced with a view to spread awareness of human rights issues among university students. The Winter Internship programme 2007 organized by the Commission was commenced on December 17, 2007 and ended on January 16, 2008. This year the programme covered 102 sessions on various issues including interaction with Chairperson and Members of the Commission, State presentations, project work presentation, field visits to SOS Children's Village, Faridabad, Tihar Jail, Sulabh International, Social Service Organizations in Delhi, Government Hospital etc. The project report covered issues like prisons, development and Human Rights, child rights and trafficking, religion and Human Rights, Human Rights Development Index, farmer

suicides, migrant workers, fact finding, scrutiny of complaints, IT in Human Rights Promotion etc. In all 46 interns comprising 19 girls and 27 boys from various States of India completed their internship.

Publications

53. The Publication Wing under the Information and Public Relations Division of the Commission plays an important role in creating awareness amongst the people regarding their human rights. The Wing has a good number of publications relating to Human Rights. They include Monthly News Letters, National Old Age Pension Scheme: Issues of Policy and Governance, Journal of National Human Rights Commission, Human Rights Manual for District Magistrate (sent to all 605 districts), Human Rights Best Practices relating to Criminal Justice in a Nutshell, Handbook on Human Rights for Judicial Officers (available with 12,000 judicial officers), Theme Based Wall Calendar, Right to Health Booklet for Elderly Persons and the Hindi journal *Nai Dishayien*. The 'Know your rights' series brought out by the Commission has proved highly useful in spreading human rights awareness.

VIII. CONCLUSION

54. There exist many challenges on the human rights horizon today - poverty, food security, terrorism, iniquities in global economic order, to mention but a few. To confront these effectively, free and frank exchange of views, coordination at regional and international levels, convergence in resources and technical cooperation have great value. The Commission is of the view that cooperation and coordination at various levels, be it national, regional and international, is essential for better protection and promotion of human rights. There is much that NHRIs can learn from each other's experiences and best practices.

BOOK REVIEW

Review of Shiv R.S. Bedi's book on The Development of Human Rights Law by the Judges of International Court of Justice

*By Prof. (Dr.) Ranbir Singh**

While most other books on the subject enumerate existing rights in international law, this book takes a more comprehensive approach and goes beyond the lawyers' law. It provides a fair and clear understanding of the procedural and institutional factors defining the field of action of the International Court of Justice. The Court is not a specialized human rights institution, either in terms of its mandate, its jurisdiction, its procedures, or its personnel, and each of these elements may well limit the Court's future role in the human rights arena. The book successfully maps the current trends in and evolution of human rights theory in the international legal regime. The preface proclaims the principal message of the book - regard for innate values and basic principles of human rights. Another recurring theme in the book is the harmonious intertwining of the fundamental principle of human dignity with the human rights doctrine.

It is known that the only contentious cases the World Court can hear are the cases between States, and the individuals have no right of direct access. This is a significant difference between the Court and other human rights institutions which allow some type of direct access. This limitation reflects the State-centered view of international law prevailing when the statute of the ICJ's predecessor was drawn up after World War I. Nonetheless, it does not mean that energetic and imaginative counsel can never get individual clients' situations before the Court, as the work shows. The ICJ issues advisory opinions on legal questions when requested by the General Assembly or Security Council or by another U.N. organ or specialized agency authorized by the General Assembly. The book cogently reflects on some important contributions to human rights processes through advisory opinions by the Court.

Although there are no limits on the sorts of inter-State legal disputes the Court can hear, a few types of cases have provided much of its work. A significant majority of its cases have involved disputes over land frontiers

* Vice Chancellor, National Law School, Delhi

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and maritime boundaries. *South Africa* generated four advisory opinions and two judgments. While the Court has also served as a sort of Constitutional court for the United Nations, several of its advisory opinions have established key principles in respect of the powers and functions within the U.N. it may be pertinent to note that there have been only a select few World Court decisions significantly contributing to human rights law, constituting a small part of the docket. Human rights issues therefore, have been an intermittent and not an integral part of the Court's work, and most of the explications are manifested by way of dissenting or conflicting opinions. As evidently put forth by the work, the Court has accorded great weight to the human rights doctrine in some cases. In the two consular notification cases by Paraguay and Germany against the United States, it clearly was of central importance to the Court that the cases ultimately involved convicted persons facing capital punishment. The Court has also made commendable contribution towards the reinforcement the U.N.'s rather modest human rights machinery. A pair of advisory opinions confirmed that Special Rapporteurs carrying out human rights mandates for ECOSOC's human rights bodies ought to be accorded the privileges and immunities of U.N. Experts on Mission under the U.N. Convention on Privileges and Immunities. Another case that involved the Special Rapporteur on Independence of the Judiciary, who faced extensive and expensive legal proceedings at home in Malaysia for critical comments made to the press as regards certain judicial proceedings. The ICJ concluded that he should be immune from such suits, although the Malaysian Courts have so far apparently disagreed.

Bedi has intelligently chosen phrases such as the doctrine of human rights and principle of human dignity to describe notions of human rights central to his work and which is apposite to emphasize the argument. Modernist rights have unabashedly excluded slaves, colonized people and women at different periods and provided justifications for imperialism and racism. In contrast, 'contemporary' human rights have rejected racism and apartheid through conventions and *jus cogens* (this may be roughly defined as the 'higher law' upon which international law is based) sought to outlaw discrimination against women, among other profound declarations. Bedi attempts to analyze the legal reasoning of the Court and the opinions appended to its decisions by the individual judges in light of the human rights jurisprudence.

While outlining the actors and their attitudes in the practice of contemporary human rights, Bedi traces the history and importance of the pronouncements of the Court in treating the human rights law more than merely a normative branch of international law. The Court's judgment in *Arrest Warrant* is also relevant at this juncture. Human rights groups have heavily criticized the judgment, particularly some of the dicta. What the Court actually holds in the operative part of the judgment strikes as a

plausible balance between the requirements of international accountability and of carrying on international relations. A potential limit on the Court's role is its limited jurisdiction to hear contentious cases. Jurisdiction is the foundation of international adjudication; compelling facts or legal theories are no good if the Court cannot hear them. Historically, only a few inter-State disputes posing significant human rights legal issues have gotten through the jurisdictional filters required for ICJ consideration.

Most importantly, in contentious inter-State cases, both parties must consent to jurisdiction. Only about a third of UN members accept compulsory jurisdiction based on Article 36(2) of the Statute. Many of these have significantly conditioned their acceptances. Even some States usually seen as law-abiding paragons have limited their acceptances of jurisdiction so as to protect values they see as insufficiently reflected in existing international law. Of course, States do sometimes agree to compulsory jurisdiction, either generally or under a specialized treaty regime, so a few human rights cases get though. Jurisdiction in the two Vienna Convention Consular Convention cases against the United States rested on the parties' acceptance years ago of a separate compulsory dispute settlement protocol to the Consular Convention. The *D.R. Congo* established jurisdiction against Belgium in the *Arrest Warrant* case based on both parties' acceptances of compulsory jurisdiction. The meticulous footnotes and a vast bibliography serves as an excellent guide for the curious reader to delve deeper into the profound issues and has paved way for future avenues of research in this area. Finally, the book urges the avid academics and researchers to converse and evolve more creative approaches to the challenges thrown by the processes of LPG, namely, liberalization, privatization and globalization, and their interaction with the corpus of international human rights law.

We know that human rights and globalization discourses interrelate in a number of ways. Universalism of human rights is the centre of the controversy regarding globalization. A variety of discourses see a virtuous link between globalization, the growth of international human rights instruments and national implementation of those instruments in the countries of the South, economic development and the relief of poverty. It may be noted that the rulings of the Court do not establish a clear trend; the Court has not always received human rights claims so supportively. In the 1996 advisory proceeding on the *Threat or Use of Nuclear Weapons*, it was vigorously argued that the use of nuclear weapons would unlawfully violate the right not to be arbitrarily deprived of life under Article 6 of the Covenant on Civil and Political Rights. The Court did not buy it. It agreed that Article 6 of the Covenant applied in wartime, but ruled that what is arbitrary must be determined through the applicable *lex specialis* – the law of armed conflict. Indeed, even in the *LaGrand* case, the Court seemed a bit reluctant to extend the sphere of human rights. Jurisdiction over one of Germany's claims required a finding that the Convention conferred individual rights on the

LaGrand brothers as a matter of international law. This led to a lively debate whether the right to consular notification was a human right. The Court declined to decide this question. It found that the Convention by its terms conferred individual rights on the brothers, and it simply did not need to decide whether these could be viewed as human rights. Furthermore, the Court rendered an advisory opinion upon the request of the Security Council on the legal obligations of states arising from the illegal presence of the then regime of South Africa in Namibia. Noteworthy indeed was the Court's important contributions to human rights law, was the Court's finding that apartheid was objectively illegal, and is a flagrant violation of the purposes and principles of the UN Charter.

If, therefore, some notion of human rights is now widely accepted by most states in the world, even to the point of approaching their oft-proclaimed and celebrated "universality," the same cannot be said about the attempts that have been made to provide some sort of sound theoretical basis to support the allegedly emerging consensus. Indeed, even if the political agreement on human rights goes no deeper than the most superficial level, it is nonetheless striking that such agreement was at all possible in the absence of any sound and widely accepted theoretical understanding of the concepts involved. The attempt to effect such a description is one of the main themes of Bedi's extensive as well as intensive analysis.

Bedi notes that the development of a worldwide community of international judges has the potential to stimulate innovative legal thinking and to enhance the stability of international law. The controversial role of international judges as builders-not merely interpreters-of the law has contributed to significant advances in the clarity and scope of international human rights law. Bedi elegantly traces the judicial history of the International Court of Justice, which is enjoined to apply international law when making its rulings, and which has, in appropriate cases, applied both human rights law and international humanitarian law. Already in 1949, in the *Corfu Channel* case, the Court had referred to "elementary considerations of humanity" which are to be observed by the parties to a conflict. In the case concerning *Military and Paramilitary Activities in and against Nicaragua, Merits,* the Court pointed out that "the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of fundamental principles of humanitarian law". Accordingly, the parties must respect those principles independently of their obligations under the Conventions.

Most recently, in considering the request for an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered the effects of the use of such weapons in the light of human rights law and international humanitarian law. In that case, the Court took the view that the most fundamental problem posed by nuclear weapons related to the protection of human life on the planet, in other words the right to life. It

referred to Article 6 of the International Covenant on Civil and Political Rights, which provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". The implication is that to the extent that the effects of nuclear weapons cannot discriminate between civilians and combatants, human life will be taken arbitrarily. This would seem to be a case in which human rights law and humanitarian law are in convergence. If the objectives set out in the Universal Declaration some 50 years ago have not been achieved, and if its principles have not been upheld, it cannot be for want of specific legal instruments or institutions to implement and enforce them. The answer lies elsewhere, namely, in our unwillingness or inability to respect the obligations we have undertaken.

Bedi notes that litigation in the ICJ can be slow, cumbersome, and expensive, particularly if parties vigorously contest jurisdiction and admissibility and other issues. The Court has taken some steps to reduce complexity and delay, but problems remains. The Court also has rather rudimentary procedures for presenting and assessing disputed evidence in cases with complicated disputed facts. Where the Court presses and the parties cooperate, simple cases like *Arrest Warrant* can move rather quickly; it was only sixteen months between filing and judgment in that case. But more complex and fiercely contested cases can drag on for years. Bosnia filed a substantial case alleging genocide against Yugoslavia in March 1993. Less than a month later, the Court issued a strongly worded provisional measures order directing Yugoslavia to take all measures within its power to prevent genocide, an order it reaffirmed five months later. However, Bosnia-Herzegovina chose to plead its case very broadly, and the respondent contested it vigorously. Years after the case was filed, and after substantial proceedings on provisional measures, on jurisdiction and admissibility, and on counterclaims, the case was still pending. We must remember that judges in the Court come from a variety of backgrounds, often involving extensive government service. Those with extensive human rights backgrounds are a minority. This is not to say that the others will not give human rights claims full understanding and fair appreciation, but simply that they might be receptive to other types of claims as well.

At the end of the day, it is evident that the process of testing and refining of claims through litigation before the only true World Court should help to produce a body of human rights law that is more broadly accepted and effective.

Bedi critically examines the discourses on the nature of human rights, their histories, the myths that are embedded in them, and contributes an alternative reading of those histories by placing the concerns and interests of the people in struggle and communities of resistance at centre stage. The book, by way of constant referrals, examines the cold reality that despite the last century being justly described as the century of human rights, the

rightless and disarticulated people still remain. It carefully analyses the gulf between the actuality and possibilities for the future. It elucidates the significance of the UN and the Universal Declaration of Human Rights and carries out the study of the more contemporary issues such as the post-modernist critique of the universal idiom of human rights and analyzes the impact of globalization on the human rights movement.

A state is responsible in international law if its organs have breached the duty to protect wrongful acts or have tolerated such acts by failing to prosecute those responsible. In other words, the state is not obligated to absolutely prevent all harmful acts of private persons, but is bound only to exercise '*due diligence*' in order to prevent such activities. Thus for a state to be responsible convincing proof of improper governmental administration is necessary. In the *Hostages in Iran* case, the ICJ while affirming due diligence as a constituent of state responsibility held that Iran had the means to prevent the actions of militants, but failed in its duty to use such means. Thus there is no state responsibility for acts of individuals as long as reasonable diligence is used by the state in attempting to prevent the occurrence of such wrongs. It is thus a well-established principle of international law that no government can be held liable where it is itself guilty of no breach of good faith or of no negligence in suppressing the unlawful activities of private individuals.

Various human rights issues that have come before the International Court of Justice, including self-determination, reservations to human rights treaties, the application of human rights instruments to occupied territories, and allegations of genocide by one state against another. President Higgins notes that in the past few decades the ICJ has been joined by regional human rights courts, commissions and treaty monitoring bodies. Similar human rights claims are surfacing in these diverse fora, but the acknowledged expertise of these specialist bodies and the desire to avoid fragmentation provide an impetus for all concerned to seek common solutions on evolving points of law.

Article 2(4) of the UN Charter stipulates the general prohibition that, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...". Simultaneously, Article 51 permits actions of self-defense in response to an "armed attack". Being an exception to the *jus cogens* norm of prohibition on use of force, the International Court of Justice (ICJ) also adopted a narrow interpretation of self-defense. Also, in the *Corfu Channel case*, the court found that the acts of minesweeping by the United Kingdom in the Corfu Straits were unlawful – the action violated Albanian territorial sovereignty, and legal sovereign rights were not to be vindicated through the manifestation of a policy of force.

Now, India has ratified various international conventions and human rights instruments committing to secure equal rights of women. Human rights law, obscured by the fallacies of realism, has traditionally concentrated on action by States. It has been assumed that it is governments

that have the primary responsibility both for protecting human rights and for ensuring that human rights are not infringed, either by state agents or by third parties. However the credibility of this vertical imposition of responsibility is losing ground with a plethora of non-state bodies now acting on the international stage. What is missing now is, of course, an answer to the question about the role non-state actors ought to play in international affairs. It is not surprising that we do not have the answer because we really do not have one international law. At least we do not have a unified system of international law. On the bright side, the space opened by globalization does foster the role of non-state actors in law-making, law-interpreting, and law-implementing. It is true that many challenges remain, but the door of citizen participation in the international law-making process has now been open, and perhaps will never be closed again due to the efforts of the human rights movement in the last fifty years.

Thus, a reopening of constitutional spaces is a crying need and this needs judicial activism in its truest sense. In the midst of rapid liberalization and development the judiciary can make efforts to promote sustainable development which will take into account various competing factors, rather than purely economic development. No longer can the process of development be viewed a dichotomy of black and white. It is the task of the judiciary to find the shades of grey that will promote the economic development of our country, while still driving it to achieving the status of an ideal welfare state.

The very aim of education process should be to impart knowledge that equips or empowers an individual to take charge of the world around him or herself. It is in furtherance of this goal that education should be disseminated. The purpose of the exercise should be to produce human beings who can internalize the ideals taught to them, only then can knowledge be truly beneficial. Human Rights of an individual can only be realized if a basic level understanding exists as to what are your rights that are inextricably linked with your survival, only then can you stand up and speak for yourself. What is being advocated thus is an education system that leads to capability expansion, as Amartya Sen had put forth. Education should lead to overall development of capability to perform. Thus, the fact of acquiring an educational degree then becomes subservient to what you can do with your life after this degree has been conferred. Whether or not education system produces such results is a matter that has to be seen, but the goal of legal education should be furthering of capabilities. Human beings should be seen as an end in themselves and not just as means to an end.

This highly readable book manages to demonstrate just how important the role of the Court has been in constructing the global legal order. The book's aim of examining the contribution of the World Court in shaping the legal framework within which the UN operates has therefore amply been achieved.

I am extremely thankful to my former student Mr. Ketan Mukhija for his valuable inputs for the Book Review.

The Jurisprudence of Inclusion: Martha Nussbaum's Frontiers of Justice Disability Nationality Species Membership Oxford University Press, New Delhi (2006)

*Amita Dhanda**

Human beings are autonomous, independent, self reliant beings who cooperate with each other for mutual advantage. Consequently all those from whom no advantage can be obtained or who can be coerced to provide social cooperation have no role in the formation of the social contract. Due to their exclusion from the contract making process; they are also not perceived as beneficiaries of the original social contract. Their concerns can be subsequently accommodated on benevolent considerations but do not form part of the justice discourse[1].

Nussbaum creates her jurisprudence of inclusion by challenging these presumptions of the social contract theory. She questions the presumption of independence and points to the neediness of human beings. Humans like non human animals are biologically needy consequently they cannot stably achieve a dignified life on their own. In the face of this mutual need social cooperation stems from a "shared desire to produce a life of human dignity"[2]. It is this shared desire which prompts the capabilities approach. Nussbaum has for long been promoting social justice through the capabilities approach. In this volume she examines whether the capabilities approach can be a basis for addressing the rights of persons with disabilities[3]; the concerns of non human animals[4] and the questions of transnational justice[5]. The book is thus an elaboration on the relevance of the capabilities approach to each of the excluded communities.

1 Whilst these premises can be culled out in greater or lesser extent from all social contract theorists Nussbaum devotes special attention to the work of John Rawls.
2 Martha Nussbaum's Frontiers of Justice Disability Nationality Species Membership at p 2 (2006)
3 Id at pp155-216
4 Id at pp 346-352
5 Id at pp 273 -315

* Professor of Law, NALSAR University of Law

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To respect the right to dignity is to treat individuals as ends in themselves. This mandates that persons with disabilities are entitled to the same capabilities as non disabled persons. Such a recognition Nussbaum asserts is necessary if impediments that are social are not to be seen as natural[6]. Further unless persons with disabilities are perceived as entitled to these capabilities opportunities which allow for the development of these capabilities shall not be provided for. Such an approach becomes especially problematic when disability is understood in terms of severity and persons whose disability is categorized above a certain percentage of severity are seen as incapable of enjoying certain capabilities. It is important to note that the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act 1995 extends the protective regime of the statute on the basis of the severity of the disability. Such severity becomes a reason to provide for subsidized services and an automatic transfer from regimes of participation to regimes of care[7]. Nussbaum perceives such an approach as a deprivation of rights and one which primarily emanates from the fact that persons with disabilities are not seen to have the right to evolve their capabilities on an equal basis with others.

Significantly the approach that Nussbaum espouses has been adopted by the recently enforced United Nations Convention on the Rights of Persons with Disabilities[8]. This perspective is especially demonstrated by the manner in which the CRPD provides for legal capacity[9]. The CRPD recognizes that all persons with disabilities are persons before the law with full legal capacity. This legal capacity includes both the capacity to have rights and the capacity to act. At the same time the CRPD concedes that some persons with disabilities may require support to exercise that capacity. It thus obligates States Parties to make provision for the support. The obtaining of support in no way negates the legal capacity of persons with disabilities and that there is no subtle displacement of this capacity is ensured by laying down that the support is provided without either coercion or undue influence. The safeguards against the abuse of support increase with the extent of the support. Thus the support of persons with high support needs is subject to greater scrutiny than other support.

The question whether the UNCRPD should adopt a supported or a substituted decision making model was a highly debated one in the deliberations of the Ad Hoc Committee which negotiated the Convention.

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6 Id at p 188

7 The Mental Health Act of 1987 which is the guardianship law for adults with psychosocial disabilities primarily operates on the premise of appointing a guardian of person and manager of property for those persons living with mental illness who are unable to look after themselves or their property. And once such a substituted regime comes into place the law ceases to engage with the person with disability.

8 The Convention was adopted by the United Nations in December 2006 was opened for signature in March 2007 and has come into force in May 2008 one month after the requisite number of 20 ratifications were obtained.

9 Article 12 CRPD

Persons challenging the substituted decision-making model or guardianship underscored the fact that it was premised on the incapacity of persons with disabilities. Such like support was provided by robbing the dignity of persons with disabilities and hence was not acceptable. On the other hand persons who spoke for the retention of guardianship drew attention to those persons with disabilities who had high support needs and thus necessarily required guardianship. Article 12 of the CRPD has opted for a compromise solution whereby it has neither prohibited guardianship nor promoted it. In fact paragraph (4) of article 12 can be read, depending upon one's predilections both to retain and to oust guardianship. [10] The conflict on the true import of this provision may not cease with the adoption of the CRPD. Hence the manner in which Nussbaum has dealt with the guardianship question may be a useful way to bridge the gap between the two perspectives. Nussbaum does not seek the ouster of guardianship but requires that it be so constituted that it makes for the flourishing of persons with disabilities[11]. The kind of guardianship which does not do so Nussbaum finds illegitimate. This interpretation requires disability rights activists and policy makers not to get trapped in terminology but to look behind words and see the purpose for which a legal institution has been set up and design plans and programs to promote such purpose.

Nussbaum has sought the rights of persons with disabilities to be addressed on the platform of justice. A shared vision of human dignity requires that it be so. This shared vision I hold obtains greater legitimacy if by recognizing the claims of persons with disabilities all of humanity is benefitted. I here make reference to the recent economic crisis haunting the global community. The crisis is placing the basic rights of the entire global community at risk and all socially responsible economists are asking for government spending. "Digging ditches and filling them" is hardly the most inviting way of undertaking that spending. But a serious implementation of the support requirement of the CRPD would make for the full social participation of persons with disabilities along with generating employment for the providers of support. Most importantly these support services once put in place will not only benefit persons with disabilities. Illustratively if the State launches a Home Delivery Food Service for persons with Disabilities , the demand for such service shall not stay confined to persons with disabilities, because the need for such service is not only felt by persons with disabilities. Or if an entertainment escort service is launched the benefit will not be restricted to persons with disabilities but the providers of entertainment shall be advantaged with the entry of this new customer. The point basically is that the inclusion vision promoted by Nussbaum obtains

[10] For an in depth analysis of the negotiation process on the article see Amita Dhanda " Lodestar for the Future or Stranglehold of the Past Legal capacity in the Disabilities Rights Convention" 34 (2) Syracuse Journal of International Law and Commerce pp429-462 (Spring 2007)

[11] Supra note 2 at p 199.

greater purchase the moment we start to see that the inclusion is both intrinsically and instrumentally beneficial to all.

There has been for long this spin around first generation and second generation rights. Even as human rights activists have stressed on the indivisibility of human rights and the facetiousness of the division the dichotomy refuses to die out. Nussbaum in putting together her list of capabilities has again questioned this dichotomy and shown how civil political and socio-economic rights are inextricably woven together[12]. She has made her point by elaborating on the capability claims of persons with disabilities and by deliberating on the agendas of transnational justice. The CRPD once again concretely illustrates the validity of Nussbaum's contention. Thus for example freedom of speech and expression makes little sense for persons with disabilities unless it is accompanied with appropriate communication aids and you cannot ensure the right to health without obtaining the informed consent of persons with disabilities for the health intervention.

The life course of the human life demonstrates our lack of independence and makes a case for interdependent living. Such interdependent living mandates an indivisible package of civil political and socio-economic rights. Whilst this reality is often masked for the rest of humanity it has to be openly acknowledged for persons with disabilities for their human rights to be really and not symbolically guaranteed. In the CRPD the international community has put together an international legal text which pushes the human community in that direction though it would be naïve not to expect resistance. The jurisprudence of inclusion expounded by Nussbaum in Frontiers of Justice can be usefully employed to both overcome resistance and to obtain creative adherence to the inclusive enterprise of the CRPD.

There is a common thread in the recent agitation against people from the north of India in Maharashtra; the various protests around the foreigners question in Assam; the rising xenophobia in several first world countries and the racial targeting of security agencies port the 9/11 events. Each of these incidents foregrounds the insider-outsider dichotomy. They also show how economic well being is a connected enterprise in a globalized world. It is not possible to obtain the prosperity of one without the prosperity of all and nor is it possible to ensure the security of some without guaranteeing the security of all. It is this insight which causes Nussbaum to make a case for transnational justice. She does not seek a dismantling of the nation state in this enterprise; instead she clearly allocates the role of implementation to the nation state but seeks to obtain an overlapping consensus in the international community on the need to provide opportunity to the development of capabilities of all people. A globalized world she holds mandates that the deprivation of some should be the concern of all. And yet in order to ensure that capabilities do not become the

[12] Id at pp 288-290

new stick to beat the less developed countries she writes of the need to distinguish between justification and implementation. International Law should provide justification for the implementation of the capabilities it does not have to take over the responsibility of implementation.

The above two themes in the book were concerned with human animals, with the third theme Nussbaum expands her enterprise to include other living beings and addresses the concerns of non human animals. Before commenting on the specific issues that Nussbaum takes up whilst addressing the rights of non human animals, it is important to underscore the significance of this issue in the inclusion enterprise. If the "us and them" outlook has to be foundationally challenged then it is important to critique these attitudes wherever present. Human beings in different ways have practiced such exclusion and such demonizing or such animalizing of other human beings. To treat human beings like animals would become all the more difficult once duties of sentient solidarity and an obligation to ensure their flourishing stands extended to non human animals. Even though Nussbaum is not seeking the recognition of the rights of non human animals for such instrumental reasons, the instrumental benefits of her enterprise cannot be escaped. She underscores the connected nature of our existence by contending that the capabilities approach was equally relevant to non human animals. It is a different matter that Nussbaum is more pragmatic when she discusses the claims of non human animals. Thus she does not opt for compulsory vegetarianism but requires the dignified and comfortable existence of animals being grown for food. She does not seek a total ban on the use of animals for scientific experimentation but mandates that such experimentation needs to be reflexive and circumspect and cannot happen in an indiscriminate manner.

In these days of participative decision-making and self advocacy Nussbaum by taking up the case of non human animals shows the continued relevance of paternalism; but this paternalism is not one where the patriarch hands out to the protected what he thinks is in their best interest. Instead she speaks of paternalism that is sensitive to the different forms of flourishings that different species pursue[13] and hence asks for species sensitive paternalism.[14] Intelligent respectful paternalism she holds cultivates space for choice[15]. It is this species sensitive reflexivity which causes her to distinguish between domestic and wild animals. This distinction she holds is also important to work out the varied role of humans. Whilst wild animals may require the right to be left alone the domestic animals may now need human companionship for their flourishing.

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[13] Supra note 2 at p 375

[14] Id at 377

[15] Ibid

Ostensibly it would seem that the book is a forced amalgam of unconnected areas. However this book on the three separate themes hangs together because of the active connections that the author continually draws between them[16]. More importantly in showing the commonalities in seemingly unconnected areas Nussbaum has foundationally queried selective and exclusive discourses on justice. Unless these frontiers of exclusion are crossed it is not possible to guarantee a just and inclusive society. The book through the intelligent combination of theoretical propositions and practical illustrations makes a well reasoned argument for inclusion which is of utility to both the policy maker and the rights activists.

[16] These connections are further strengthened by the author using the same examples and anecdotes through the book.

Contributors

Justice D. M. Dharmadhikari
Chairperson
MP Human Rights Commission, Bhopal

Justice S.R.Nayak
Chairperson
Karnataka State Human Rights Commission

Prof. Kalpana Kannabiran
NALSAR University of Law
Hyderabad

Shri R.S. Kalha
Former Member, NHRC

Prof. B.B. Pande
Human Rights Chair Professor, NHRC
NIHR,
National Law School of India University
Bangalore

Prof. R. Venkata Rao
Professor & Dean
Andhra University

Shri P.C. Sharma
Member, NHRC.

Dr. K.N. Chandrasekharan Pillai
Indian Law Institute,
New Delhi

Prof. Ranbir Singh
Vice Chancellor
National Law School, Delhi.

Prof. Amita Dhanda
NALSAR University of Law,
Hyderabad