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Justice Cyriac Joseph
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Acting Chairperson, NHRC

PREFACE

The first issue of the English Journal of the National Human Rights Commission was released in 2002. Since then, the Journal has been published regularly as an important means for spreading human rights literacy among its readers, primarily from the universities and colleges, human rights institutions and members of civil society. The Journal has also served the purpose of initiating discussion and thought on present day issues having human rights relevance among scholars working in this area.

The selection of thematic issues for the Journal of this year has been carried out by the Editorial Board after detailed discussions. Based upon these deliberations, six important areas of current relevance have been chosen for coverage in this edition. The 2015 Journal starts with a section devoted to "800th Anniversary of the Magna Carta", which was proclaimed in the year 1215 as a harbinger of fundamental rights and liberties. It is followed by a section on the important area relating to "Access to Justice – Contributory Factors for its Denial and Deprivation". An article highlighting the failures of the Criminal Justice System in India, especially for the economically and socially backward sections of society has been included in this section.

The human rights of persons with disabilities have been an important area of concern for the Commission ever since it was constituted. The rights of the mentally ill persons, who are one of the most vulnerable sections of the society are of special concern. Accordingly, a section has been devoted to the subject of "Disability and Human Rights".

India's diversity and pluralism are among the most debated issues in the country at present. Hence, very appropriately, a section on "Diversity, Pluralism and Human Rights" has been included. Articles covering issues regarding the constitutional provisions in this regard as well as the State responsibility have been included under the section. An important associated

area pertains to the rights of the people of the North East India in view of the continuing conflict situation in some parts of this region as well as the problems faced by these people in other parts of the country. Accordingly, a section relating to "Human Rights and North East India" has been added.

The rights based approach to development has been an important area of research, especially after the adoption of the Declaration on the Right to Development by the UN General Assembly in 1986. The subject is particularly relevant to a country like India as it raises various issues like displacement, environmental degradation as well as ecological and livelihood rights of people. Therefore, the section on "Development and Human Rights" is important.

The Commission has organized several important seminars and conferences during the last one year from which important recommendations have emanated. These have also been included in the Journal. Besides, a book review of a publication with rich content of human rights issues has also been made part of the English Journal, 2015.

I sincerely appreciate the very valuable contributions made by academicians and experts for bringing out the Journal. I express my deep gratitude to all of them and also the members of the Editorial Board whose deep knowledge and experience have enriched this Journal.

I hope that this Journal of the National Human Rights Commission will prove to be a successful endeavour to create greater awareness and knowledge in the area of human rights.

New Delhi
10th December, 2015

Justice Cyriac Joseph
Acting Chairperson

SECRETARY GENERAL NHRC

FROM THE EDITOR'S DESK

Annual English Journal of the National Human Rights Commission, which started in 2002, has been a source of stimulating interest among scholars and practitioners of human rights. The articles in this Journal by learned experts including academicians, jurists and members of civil society will, no doubt, enrich the human rights literature. They also bring into focus the human rights perspective in the current areas of public interest and debate.

The Journal of this year, focuses on very important issues, which include 800th Anniversary of the Magna Carta; Access to Justice – Contributory Factors for its Denial and Deprivation; Disability and Human Rights; Diversity, Pluralism and Human Rights; Human Rights and North East India and Development and Human Rights besides important recommendations emerging from seminars and conferences organized by the Commission recently. As in the past, the Journal also has a Book Review section.

I am extremely grateful to the editorial board members as well as the learned authors who have contributed to the release of this Journal.

I sincerely hope that the English Journal of 2015, as before, will help in stimulating further thought on key issues concerning human rights.

New Delhi

(Satya N. Mohanty)

10th December, 2015

I – 800th Anniversary of Magna Carta

800 Years of the Magna Carta: The Magna Carta and the Making of the Indian Constitution

*Chintan Chandrachud**

Abstract

The fundamental rights provisions of several constitutions are said to have been influenced, in one way or another, by the Magna Carta. The Indian Constitution is amongst them. A committee established to commemorate the 800th Anniversary of the Magna Carta has observed that '[t]he legacy of [the British] empire left behind the principles of Magna Carta enshrined within the constitution of the world's largest democracy in 1947.' In the same vein, a former British Prime Minister said that although the Magna Carta 'was undeniably English by birth, its principles travelled the length and breadth of the English-speaking world – to India, Canada, New Zealand, Australia'. These are ambitious claims that demand considerable justification. This paper seeks to test these claims by exploring the role played by the Magna Carta in India's Constituent Assembly debates. Was the Magna Carta cited in the debates to begin with and if so, to what end? More interestingly, what role did it play in the debates – was its role merely symbolic or also substantive? This paper finds that the Magna Carta's direct role in the making of the Indian Constitution was limited to discussions focusing on the right to life and personal liberty and the 'due process' clause. Nevertheless, several metaphorical references to the Magna Carta suggest that it also had a modest symbolic role in the framing of the Constitution.

Introduction

The year 2015 marks eight hundred years since the Magna Carta was sealed by King John at Runnymede[1]. The Magna Carta is widely conceived

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* He is pursuing his Ph.D. from the University of Cambridge.

1 There is an absence of consensus on the specific date on which the Magna Carta was sealed by King John (Carpenter 1996; Holt 1957).

of as the harbinger of fundamental rights and liberties as we understand them today. But beneath this mystique lie complex historical debates about the events leading up to Magna Carta, how it came into being, and how (and indeed, whether) it influenced global discourses about constitutionalism and rights. However, that the Magna Carta also bears some contemporary relevance, despite its antiquity, is most easily demonstrated by the fact that parts of it remain on the statute books of England and a few Australian states (Irvine 2003: 239-240).

The fundamental rights provisions of a long list of constitutions are said to have been influenced, in one way or another, by the Magna Carta. The Indian Constitution is amongst them. A committee established to commemorate the 800th Anniversary of the Magna Carta has observed that '[t]he legacy of [the British] empire left behind the principles of Magna Carta enshrined within the constitution of the world's largest democracy in 1947. With a population of over 1.2 billion people, India is a powerful guarantor of Magna Carta principles.'[2] In the same vein, a former British Prime Minister said that although it 'was undeniably English by birth, its principles travelled the length and breadth of the English-speaking world – to India, Canada, New Zealand, Australia' (Major 2015). A prominent broadcaster went even further, observing that the Magna Carta laid the 'foundation stone' for the Indian Constitution (Bragg 2015).

These are ambitious claims that demand considerable justification. This paper seeks to test these claims by exploring the role played by the Magna Carta in India's Constituent Assembly debates. Was the Magna Carta cited in the debates to begin with and if so, to what end? More interestingly, what role did it play in the debates – was its role merely symbolic or also substantive? This paper finds that the Magna Carta's direct role in the making of the Indian Constitution was limited to discussions focusing on the right to life and personal liberty and the 'due process' clause. Nevertheless, several metaphorical references to the Magna Carta suggest that it also had a modest symbolic role in the framing of the Constitution.

The Magna Carta: A Very Brief History

Historians have long debated what prompted the sealing of the Magna Carta at Runnymede in June 1215. A comprehensive record of

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[2] See 'Magna Carta Today', available at http://magnacarta800th.com/magna-carta-today/.

what transpired there is still unavailable (Harvey 2015). Nevertheless, two competing narratives have emerged. In many historical accounts and in popular culture, King John is portrayed as a tyrannical ruler who oppressed his people, ordered that twenty-two captive knights be taken to a castle and starved to death, and had his own nephew murdered (Morris 2015). The 1938 film 'The Adventures of Robin Hood' portrays him as an evil king with nefarious designs. So according to this narrative, the evil designs of the king prompted the land-owning Barons to rebel, and force his accession to the Magna Carta.

However, there is a compelling counter-narrative. This narrative argues that King John was a victim of the difficult economic situation in which he found himself. His father, King Henry II, and brother, King Richard I, had extracted large sums of money from the people to account for the costs of constant warfare. During his reign, King John lost parts of his territory in continental Europe and was eager to regain them. The King, therefore, had little choice but to continue to maintain a 'war economy' (Turner 1994: 78). In this context, the story of the Barons appears in a different light. As Melton and Hazell observe: '[i]nstead of a righteous group of barons trying to restrain a tyrannical king, it [this narrative] sees Magna Carta as an attempt by self-interested barons to take advantage of a relatively weak king with few allies in Continental Europe' (Melton and Hazell 2015: 6).

It is therefore unsurprising that an overwhelming majority of the Magna Carta's provisions were dedicated not to the recognition of constitutional rights, but to resolving fiscal issues amongst elites. These included the prohibition of 'scutage' (a tax imposed on feudal land owners), the removal of fish weirs, and the standardization of weights and measures. As these examples suggest, it is a code with predominantly 'minute and particular provisions' (Radin 1947: 1072). In fact, twenty-five barons agreed to be suretors to ensure that the King did not renege on the agreement (Hughes 2012: 246).[3]

Out of its sixty-one 'chapters', there are just two dedicated to the protection of rights.[4] These are chapters 39 and 40, which are translated to read as under:

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[3] A further thirty-eight barons agreed to be suretors should the existing suretors fail.

[4] The Magna Carta of 1215 contained sixty-one chapters, whereas the one which was sealed in 1225 contained thirty-eight chapters.

'(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.'

Chapter 39 is now conceived of as the guarantee of due process and trial by jury, whereas chapter 40 is interpreted as a guarantee of speedy trial. It is almost certain that these chapters implied something narrower than this when the Magna Carta came into being. Some scholars note, for example, that these chapters were primarily intended to transfer the settlement of disputes amongst barons from the king to communal inquests (Melton and Hazell 2015: 7; McIlwain 1914: 32). Nevertheless, as a matter of interpretation, it is not necessarily illegitimate for lawyers and judges to read the Magna Carta more expansively, unless their interpretation of the text is controlled by its 'original public meaning' (Scalia 1997:38).

The political actors involved in the sealing of the Magna Carta would not have anticipated that it would acquire the revered constitutional status that it does today. In fact, the charter had an unenviable beginning. It was 'repudiated by a king, annulled by a pope, and, for long periods of English history, honoured only in the breach' (Harvey 2015). Its early failures have prompted some scholars to argue that its 800th anniversary should more fittingly be celebrated in 2025, the date of its re-issuance (Harvey 2015: 327; Radin 1947: 1063). All this notwithstanding, the Magna Carta was unique for a very important reason. Civil wars in the past had been fought on behalf of individuals. This was the first time that a civil war was being fought for a document - the embodiment of a cause (Holt 1992: 1).

The Constituent Assembly Debates

This section will now consider the role of the Magna Carta in the Constituent Assembly Debates. Before doing so, a short note on methodology is in order. I ran searches through each of the recorded debates of the Constituent Assembly. The debates have been digitised and are accessible through Parliament's website.[5] Magna Carta was sometimes

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[5] See http://parliamentofindia.nic.in/ls/debates/debates.htm.

misspelt[6] – however, these references have been taken into account.

The Magna Carta was cited on only eleven (out of one hundred and sixty five) days of debate in the Constituent Assembly.[7] The phrase 'Magna Carta' appears sixteen times across these debates.[8] Some of these references were substantive, while other references to the Magna Carta were symbolic or metaphorical. It is in this sequence that the references will now be considered.

a   *Substantive references*

As explained previously, chapter 39 of the Magna Carta is widely regarded as being amongst the earliest texts to recognize the notion of due process. The right to life, then draft article 15 of the Constitution, provoked significant debate in the Constituent Assembly. The constitutional history behind article 15 is well known (Chandrachud 2011). As it originally stood, the article closely resembled the 'due process' clause in the United States Constitution.[9] However, during the drafting process, the words 'due process of law' were replaced with 'procedure established by law'. On the advice of Justice Felix Frankfurter, B N Rau - Constitutional Advisor to the Assembly - argued that the courts would rely upon the due process clause to strike down economic regulatory legislation (Austin 1996: 103; Choudhry 2013: 9). This was in the context of the Lochner Era, during which the US Supreme Court frequently struck down socio-economic legislation that was perceived to be necessary for relieving the distresses of the Great Depression.

Nevertheless, many members of the Assembly argued in favour of reverting to the due process clause, looking upon it as the only way in which the courts would protect citizens from the tyranny of both the executive and the legislature. It was argued that the Indian version of the due process clause

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[6]   The most common form of misspelling was 'Magna Charta' - see *Constituent Assembly Debates,* Volume V, 27 August 1947 (V I Muniswami Pillai). Whereas common misspellings of Magna Carta have been taken into account, it is possible that misspellings that are more difficult to detect have slipped through the cracks.

[7]   In chronological order, these are - 27 August 1947, 30 August 1947, 6 December 1948, 9 August 1949, 20 August 1949, 10 September 1949, 15 September 1949, 17 November 1949, 18 November 1949, 19 November 1949, 22 November 1949.

[8]   A better way of contextualizing these figures is by comparing them to how often other foreign sources, such as the US Constitution or the Constitution of the Irish Free State, were cited. This exercise is, however, left for another occasion.

[9]   Constitution of the United States of America, Fourteenth Amendment ('nor shall any person… be deprived of life, liberty, or property, without due process of law').

would not produce the uncertainties of its American counterpart on account of two differences between them. First, the American clause referred to 'life, liberty and property', whereas the Indian version omitted the word property, which had led to considerable uncertainty. Second, the world 'liberty' in India was prefaced with 'personal', to clarify that it did not interfere with the liberty of contract.[10] Amongst those who argued in favour of a due process clause was Krishna Chandra Sharma, a member of the Congress from the United Provinces. Tracing the origins of the due process clause to the Magna Carta, he argued that the clause was essential for protecting the rule of law and the right to a fair trial:[11]

"Mr. Vice-President, Sir, my amendment No. 523 sought the substitution of the words "without due process of law" for the words "except according to procedure established by law". This article guarantees the personal liberty and life of the citizen. In democratic life, liberty is guaranteed through law. Democracy means nothing except that instead of the rule by an individual, whether a king or a despot, or a multitude, we will have the rule of the law. Sir, the term "without due process of law" has a necessary limitation on the powers of the State, both executive and legislative. The doctrine implied by "without due process of law" has a long history in Anglo-American law. It does not lay down a specific rule of but it implies a fundamental principle of justice. These words have nowhere been defined either in the English Constitution or in the American Constitution but we can find their meaning through reading the various antecedents of this expression. As a matter of fact, it can be traced back to the days of King John when the barons wrung their charter from him, i.e., the Magna Carta. The expression "Per Legum Terrea" in the Magna Carta have come to mean "without due process of law". Chapter 39 of the Charter says:- "No free man shall be taken, or imprisoned, disseised, or outlawed, exiled, or in any way destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." These words were used again in 1331, 1351 and 1355. Statute No. 28 during the reign of Edward III says:- "No man of what state or condition so ever he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor indicated, nor put to death, without he be brought to answer by due process of law". Sir, in the American Constitution, these words were first used in 1791:- "Nor shall any person . . .

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[10]   Constituent Assembly Debates, Volume VII, 6 December 1948 (C C Shah).

[11]   Constituent Assembly Debates, Volume VII, 6 December 1948 (Krishna Chandra Sharma).

. . be deprived of life, liberty or property, without due process of law". What this phrase means is to guarantee a fair trial both in procedure as well as in substance. The procedures should be in accordance with law and should be appealable to the civilised conscience of the community. It also ensures a fair trial in substance, that is to say, that substantive law itself should be just and appealable to the civilized conscience of the community. Sir, various decisions of the American Supreme Court, when analysed, will stress the four fundamental principles that a fair trial must be given, second, the court or agency which takes jurisdiction in the case must be duly authorised by law to such prerogative, third that the defendant must be allowed an opportunity to present his side of the case and fourth that certain assistance including counsel and the confronting of witnesses must be extended. These four fundamental points guarantee a fair trail in substance."

Once it was resolved that the Constitution would not include a due process clause, many members expressed concern that the right to life was a protection only against executive, rather than legislative action. All that had to be done to legitimize powers of arrest was for Parliament to enact a law on the subject, regardless of how restrictive or onerous it was. For this reason, Dr Ambedkar proposed the introduction of a new fundamental right - draft article 15A - as a protection from arbitrary arrest, despite strong objections from the Home Ministry (Austin 1997: 110). This would prevent Parliament from having a 'carte blanche' to 'provide for the arrest of any person under any circumstances as Parliament may think fit'[12]. Draft article 15A, it was argued, would partially compensate for the void left by the absence of the due process clause.

The debates on this provision formed the backdrop for further references to the Magna Carta. Dr Bakshi Tek Chand, a former judge of the Lahore High Court, staunchly opposed draft article 15A on the basis that it would legitimise detention without trial for long periods. This provided another opportunity to lament the assembly's refusal to replace 'procedure established by law' with 'due process of law' in draft article 15:[13]

"I feel--and I may be pardoned for saying categorically that I consider article 15A as the most reactionary article that has been placed by the Drafting Committee before the House, and therefore I would ask the House

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[12]   Constituent Assembly Debates, Volume IX, 15 September 1949, See B. R. Ambedkar.
[13]   Constituent Assembly Debates, Volume IX, 15 September 1949.

to reject it altogether and not allow it to form a part of the Constitution. I will ask Dr. Ambedkar and I will ask Mr. Munshi and I will ask our great jurist Shri Alladi Krishnaswami Ayyar whose knowledge of constitutional law is perhaps second to none in this country, and who has contributed so much to the drafting of this Constitution, if there is any written Constitution in the word in which there is provision for detention of persons without trial in this manner in normal times…[He then explains the history of draft article 15] If I may just digress for a minute here, what does the, expression "due process of law" mean? It was for the first time introduced in England in the, year 1353 in the reign of King Edward III when a statute was passed incorporating the substance, of the great Magna Carta which King John had given to the people of England a century earlier… in the Magna Carta the words were "no person shall be arrested, etc.. except according to the law of the land". That was the expression originally used. Later, it was incorporated in the Statute of Edward III in the words, "no person shall, be arrested without due process of-law". Centuries later when the American Colonies had separated from England and they framed their own Constitution, in the 14th Amendment to that Constitution they put in the words…"

Dr Bakshi Tek Chand then argued that although the 'procedure established by law' terminology had been borrowed from the Japanese Constitution,[14] the Assembly had failed to recognise that the draft Constitution did not embody other due process guarantees provided for in the Japanese Constitution.[15]

The other occasion giving rise to substantive references to the Magna Carta in the debates was during the consideration of the Supplementary Report of the Fundamental Rights Committee. P S Deshmukh, a Congressman from the Central Provinces (Chidrayakanth 1999), was highly skeptical of the idea of nonjusticiable fundamental rights or directive principles. In his view, fundamental rights were meant to protect the liberty of the individual. It was in this context that the Magna Carta was cited as an ideal to aspire to - a binding document whose diktats were meant to be enforceable and not merely recommendatory. Deshkumkh's speech is worth quoting:[16]

"Actually, Sir, these are described as fundamental rights and fundamental

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[14] Constitution of Japan 1946, article 31.
[15] Constitution of Japan 1946, articles 33, 34.
[16] Constituent Assembly Debates, Volume V, 30 August 1947.

rights, Sir, are in my opinion primarily intended for the protection of the life, liberty and comfort of an average man. The fundamental rights idea is actually something like the principles of the Magna Charta [sic] against possible oppression either by a monarch or by some body of people who can get into the Government. My view is that in the framing of our present constitution there was not much need of having fundamental rights as such. All the principles, the inclusion of which we thought necessary and especially this portion of the fundamental rights which are merely recommendatory, it not being incumbent upon any Government to carry out, could, I submit, Sir, have been either embodied as ordinary provisions in a constitution or radically altered. What are the difficulties that we the people of India suffer from? Our difficulties and impediments are diverse. The first is the poverty of our people, then ignorance and illiteracy, then lack of food, lack of vitality, lack of morals, inhuman greed and consequent exploitation, ruthless profiteering and consequent oppression-moral, mental, social, spiritual and last but not least economic. To what extent are these fundamental rights going to protect us from this oppression, that is the question. And to what extent we can regard this as something on which we can go and remove these difficulties and reorganise our society, so that there is no poverty, there is no ignorance, no starvation, no unnecessary concentration of wealth in a few hands, etc. None of these things have been dealt with."

Dr Deshmukh thus argued that rather than including the notion of (nonjusticiable) directive principles in the Constitution, it would have been preferable to unequivocally provide for the state ownership of natural resources and industries (Saraswati 2002: 114).

b   Metaphorical references

Substantive references to the meaning and implications of the Magna Carta formed a minority of the occasions on which it was referred to in the Constituent Assembly Debates. References to the Magna Carta in its metaphorical or symbolic sense were more common. Let us consider some examples. Dalit activist V I Muniswami Pillai held out the report of the Advisory Committee on Minorities as a Magna Carta 'for the welfare of the Hairjans':[17]

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[17]   Constituent Assembly Debates, Volume V, 27 August 1947.

"Mr. President, Sir, I feel today is a red letter day for the welfare of the minority communities that inhabit this great land. Before I proceed, I have to congratulate the Honourable Sardar Vallabhbhai Patel for this great tact and ability in bringing a report to the satisfaction of the majority and minority communities of this land. The document that has been produced by the Advisory Committee, I consider to be the Magna Charta [sic] for the welfare of the Harijans of this land."

Similarly, while lamenting the inability of the Draft Constitution to adequately embody principles of socialism and economic welfare, Seth Damodar Swarup (who had famously questioned the representative character of the Constituent Assembly the previous year (Jha 2013)) likened the right to property to a 'Magna Carta in the hands of capitalists':[18]

"Now, Sir, before actually speaking in support of my amendment, I hope I will be excused to say something by way of introduction to the proposed amendment. The Draft Constitution has, in my humble opinion, failed, and failed rather miserably to deal properly with the question of the economic rights of the people. This article 24, which is now under discussion, I am sure, is soon going to be a Magna Charta [sic] in the hands of the capitalists of India. While we were under foreign rule, a few years back, we had been hoping fondly, not against hope, that in a free India the people of this country will be able to frame a really peoples' constitution which will as a whole be the Magna Charta [sic] of the toiling masses."

Swarup could have been referring to the Magna Carta in two distinct ways. He could either have been referring to the Magna Carta in a purely symbolic sense, as 'a document constituting a fundamental guarantee of rights and privileges'.[19] Alternatively (and more profoundly), however, he may have been citing the Magna Carta as an instance of elite bargaining - where the fruits of the bargain were secured by a privileged few, to the exclusion of the masses. A contextual reading of the passage – in which he later explains that he hoped that the Constitution of India could be a Magna Carta for the people – indicates that he probably meant the first. For if the second reading were accepted, this statement would be a contradiction in terms.

Swarup made a similar reference to the Magna Carta during the final

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18   Constituent Assembly Debates, Volume IX, 10 September 1949 (Seth Damodar Swarup).

19   See   http://www.merriam-webster.com/dictionary/magna%20carta.

stages of the Constituent Assembly Debates. Arguing that there was nothing in the Constitution for the masses, he was critical of the fact that the Draft Constitution did not contain any justiciable guarantee of work, employment, or minimum wages. This prompted him to go so far as to label the Draft Constitution as 'nothing more than waste paper':

"In these circumstances, Mr. President, even though this Constitution may be the biggest and bulkiest constitution in the world, may even be the most detailed one, it may be heaven for the lawyers, and may even be the Magna Charta for the capitalists of India, but so far as the poor and the tens of millions of toiling, starving and naked masses of India are concerned, there is nothing in it for them. For them it is a bulky volume, nothing more than waste paper.[20]"

There were many other comparable symbolic or metaphorical references to the Magna Carta in the Debates. These included: a reference by B Das to Dr Ambedkar's treatment of the Government of India Act 1935 as if it was a Magna Carta on 'which all constitutions could be based';[21] a reference by A K Ayyar defending the emergency provisions of the Draft Constitution on the basis that 'a war cannot be fought on principles of the Magna Carta';[22] a reference from Annie Mascarene observing that the Indian Constitution has drawn inspiration from the Magna Carta;[23] and another reference by B Das lamenting that the Constitution, which is the Magna Carta of the nation, did not embody the true spirit of the Congress Party.[24]

Conclusion

What do these references to the Magna Carta in the Constituent Assembly Debates tell us? Is the 800th Anniversary Committee correct in arguing that the principles of the Magna Carta were enshrined in the Indian Constitution? Much depends upon how we conceive of the ways in which one canonical document can influence another and once conceived, how to accurately measure that conception.[25] Examining explicit references to

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[20] Constituent Assembly Debates, Volume XI, 19 November 1949 (See Seth Damodar Swarup).

[21] Constituent Assembly Debates, Volume IX, 9 August 1949.

[22] Constituent Assembly Debates, Volume IX, 20 August 1949.

[23] Constituent Assembly Debates, Volume XI, 18 November 1949.

[24] Constituent Assembly Debates, Volume XI, 17 November 1949.

[25] See Melton and Hazell 2015, 'Magna Carta's influence is unclear, because the term influence itself is unclear', p-8.

the Magna Carta in the debates is a direct, but certainly not the only, way of measuring its influence on the Indian Constitution. Nevertheless, this examination showed that there were few substantive references to the Magna Carta, all of which arose in the context of the right to life and personal liberty and the due process clause. This should not come across as surprising, when considered in context of the fact that only a handful of provisions of the Magna Carta embody guarantees of the kind that we acknowledge as fundamental to modern conceptions of constitutionalism. As some scholars note, it is perhaps unfair to expect the Magna Carta to be breaking the surface (Irvine 2003: 245), because contemporary constitutional law and human rights law has traversed significant ground since 1215.

Nevertheless, the several metaphorical references to the Magna Carta as a rhetorical tool in the debates also tell an interesting story. They suggest that the Magna Carta no longer refers to a document from the thirteenth century embodying a compromise between the barons and King John at Runnymede. Instead, its status has been so far elevated beyond this, that its invocation most often involves a classic exercise of constitutional 'wish fulfillment' (Tribe and Dorf 1991: 14) – fulfillment of the wishes of those who invoke it. The Magna Carta stands for whatever those who invoke it believe it should stand for. For better or for worse, the myth of the Magna Carta as the 'fountainhead of political liberty' (Radin 1947: 1060) endures.

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Magna Carta: Celebrating 800 Years

Ranjit Singh and Amit G Thakre***

Abstract

Historically speaking, the idea of Human Rights is as old as human civilization and Magna Carta is one of the first recorded documents laying down the concept of human rights protection way back in 1215. The focus of Human Rights is centered on liberty, justice, equality and human dignity. In 1215, King John was forced to sign this charter by the revolting Barons who were annoyed by the monarchy of the King. The major principles emerged out from the Charter are; right of institutions free from coercive ruler, right to property, protection from unfair taxation, right of widows, rule of law and right of accused. The charter also covered official misconduct. The ideas presented in the Charter were later profoundly resounded in Universal Declaration of Human Rights, 1948 and International Convention of Civil and Political Rights, 1966 (ICCPR). In 21st century, the relevance of Magna Carta has increased manifolds as there is need of reintroducing the core ideology propounded by Magna Carta to limit state powers over controlling lives of its citizens, promote culture of human rights focusing upon human dignity as well as equality and giving supremacy to the 'rule of law' in the democracy.

Introduction

Human Rights is a universal phenomenon which is as old as human civilization, entitled and inherited by all humans irrespective of their background, nationality, sex or any other condition. According to section 2 of the Protection of Human Rights Act, 1993, 'Human Rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India (National Human Rights Commission 1993).

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The term Human Rights holds so much importance today is because of philosophical debate that has started way back in 12th Century. The European societies were of the belief that the laws and social norms are set according to the will of elite class which willingly or unwillingly has to be adhered by major lower strata of the society. They called for acknowledging natural rights for common citizens. They were of the view that politics should always be run by moral principles wherein the rights and dignity of an individual will always be held supreme to the ruling power.

Magna Carta reflects the importance of interdependence of rights and this is evidently enshrined in the treaties and customary international laws. Non discrimination was one of the basic reasons behind creating Magna Carta which was also illuminated in the International Conventions. Magna Carta, for the first time in human history stroke a perfect balance between protecting the rights of public and obligating authorities from abuse of power. Documenting exact event in the history which was responsible for the genesis of human rights would be an arduous task considering the wide scope and depth of the subject. Although, Ishay in his work surgically extracted out the initial developments in the field of human rights in various traditions (Ishay 2000). Since, religion has justified sense of belonging amongst fellow beings; Ishay looked into religion's impact on acknowledging rights of human beings (Ishay 2007). His work states that the Hammurabi Code of Babylon professed on justice and punishment for the first time; way back in 1700 B.C. Similarly, Hebrew Bible contained lessons on sense of entitlements. On care and protection of environment, Hindu and Buddhist scriptures gave valuable inputs to the mankind. On social aspects, Greeks and Romans documented about rational behavior of an individual and value of natural laws. On the other hand, Christianity and Islam believed in value of human solidarity. Cumulatively, it appears that various religions across the world even in different times share commonalities in terms of preserving human dignity and encouraging greater good of the society. Magna Carta appears to be consolidation and documentation of human values enshrined in various religious scriptures.

Historically, the Magna Carta was introduced 800 years ago in England's public domain by King John in 1215. The charter was not introduced voluntarily by the King; instead King John was made to forcefully place the royal seal on it, in order to resolve the ongoing state crisis. The highlight of it was 'equality before the law'. Over a period of next 10 years, Magna

Carta was substantially amended to sync its clauses with stabilizing social structure of England. The Magna Carta was reintroduced in 1225 with 63 clauses covering fundamental rights of everyone in the King's regime. For example, clause 39 of the Charter states about right to justice and fair trial by all 'free men'. Subsequently, the core principles of Magna Carta were taken up by various nations and prominent organizations to formulate their own guidelines, policies and law of the land. Some of the inspired and prominent examples are; the US Bills of Rights (1791), Universal Declaration of Human Rights (1984) and European Convention Human Rights (1950). Magna Carta has been phenomenal in shaping world's view of Human Rights. As famously stated in one of its clause, '*No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will be proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.*[1]

To no one will we sell, to no one deny or delay right or justice[2].'

This clause was interpreted conveniently by various governments across the world over and consequently adopted it; for the greater good of generations to follow. For example, in 14th century the English Parliament interpreted Magna Carta in Jury trials, 17th century it brought declaration of individual liberty and later on the whole things consolidated to shape up American Bill of Rights (1791) and the Universal Declaration of Human Rights (1948). In simple words, it could be said that in times of dictator and tyrannical regimes, Magna Carta came in as protector of vulnerable citizens. Magna Carta was the first formal document which guaranteed individual liberty and equality before the law, including the royal ones. The importance of individual liberty was also highlighted by Baxi in his reference to the 'Rights of Man' wherein every individual has his own reasons for taking decisions of his life (Baxi 1998). This fact should not be devalued in the name of 'modernity' as it had happened in the past leading to slavery system and the glimpses of the same could be seen in form of exclusion and marginalization in 21st century.

The Ancient Law Codes that influenced Magna Carta

Magna Carta was drafted initially to protect the sovereignty of England churches which were being challenged by the then King John of England.

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[1]   Article 30 of Magna Carta.
[2]   Article 40 of Magna Carta.

The Charter was framed by Archbishop of Canterbury on seeing the King John being cornered by the angry Barons[3] due to King's unfair ways of ruling (especially unjustified taxation mechanisms). The first English historian, i.e. Bede in his work mentioned about the Ethelbert law code, Ernulf, Bishop of Rochester's legal document 'Textus Roffensis' and late 9th century law code of King Alfred named as 'Charter of Liberties' to have significant influence over the Magna Carta (Bede 1990). The Ethelbert law code was the first documented work in English that illustrated on fundamental social rules and it also helped in formalizing British laws. The prime motive was to pen down the unwritten laws that talks of compensating victims of criminal acts. The natures of physical injuries were categorized as per their seriousness and subsequent compensation for example, for punch on nose or removal of thumbnail would mean 3 shillings; whereas incapacitated big toe would mean paying 10 shillings (Wormald 2005). This code laid foundation for 'compensation culture' in England. Interestingly, the Ethelbert law code described the ideal way of governance, individual security and women's equality (ibid.: 10). This code also defined the role of the monarch in protecting public properties, rolling out welfare compensatory schemes for victims of physical injuries and safeguarding public processions (Oliver 2002). The code also professed for consultation process while making laws. The body of consultants comprised of senior members of the society a.k.a. 'Witan[4]'. The final documents made out from the major consensus of 'Witan' would then be brought before public for final approval (Richardson and Sayles 1996).

In 1100 AD, King Henry I of England signed a document named as Coronation Charter a.k.a. 'Charter of Liberties'. This document limited the powers of monarch and banded king with the laws of church and nobility. The aim here was to remove fear from the public about being prosecuted by the State arbitrarily. The rule of law was given supremacy with adjudicating judicial powers to maintain order in the society. From 900 to 1035, the Anglo-Saxon law code came into existence and this era of 135 years saw 13 England kings and all issued legislative texts during their respective rulings. The first one illustrated on providing relief to the deprived ones[5]. Another text titled, 'Ordinance relating to Charities', directed King's desire to help in all capacity

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[3] Wealthy class during King John's regime who used to lend their lands to the peasants for farming

[4] Full form is Witenagemot, these were the councils of Anglo-Saxon kings of England who were advisory to the King in matters of law and policy making.

[5] Ibid. p.18.

to absolve the poor from their grievances. Interestingly, there was fine also if in case an able citizen was found to be not helping out the destitute fellow being. In another instance, Aethelstan text on 'Ordinance' demonstrated various economic provisions. This included issuing of common and genuine currency across the state and there was a provision for strict punishment in case of counterfeiting. The Anglo-Saxon law also resonated upon the importance of social unity by calling social gathering from all strata of the society to ponder over the extent of implementation of statutory provisions and taking feedbacks from the citizens. The powers of the king, religious bodies and administrators were clearly defined to prevent oppressive governing tactics. This era was a good example of healthy social framework with independent and inclusive governance and to a greater extent motivated the framers of Magna Carta.

The Concept of Magna Carta

The Magna Carta primarily dissolved highly centralized powers vested at King's disposal. This was in favor of Barons who thought that limiting powers of the king was important in order to protect the rights of civilians. By and large Human Rights are stated as 'Gift of West to the Rest', which is not the case here because the essence of protecting dignity of every human being is resonated in scriptures of various countries. For that matter, we could take India's example where in Bhagavad Gita it is stated that 'all humans are equal and everyone is unique in his own way'. This was estimated to be written during 1500 BC. Similar is the case with Hebrew Bible. This shows that the idea of human rights has trickled down from scriptures to Magna Carta. Even Magna Carta was formulated from the culmination of ideas from various ethnicities which involves English, French and Latin. This makes the Magna Carta a document of universal applicability.

Magna Carta was never created with the mission to inspire the world for creating societies with high values for human rights; it was basically created to meet the Baron's personal grievances. The Charter was created in haste, furnished in aggrieved manner and had no concern for legal measures. Despite its unanticipated start, the Charter went on to motivate philosophers, policy makers, laws and constitutions across the world to weigh more on upholding rights of its citizens. Despite Magna Carta's design to serve feudal society, the Charter rooted for following rights: Freedom from Arbitrary Seizure, Freedom from arbitrary imprisonment, Right to fair trial in proper

Courts, Right to justified fines and punishment, Rights of Widows, Rights of Orphans & Right to equality. Magna Carta also propounded for setting up Parliament and exercising fair taxation across the state. The Charter not only diluted the autonomy of ruler but also stressed upon individual liberty.

The concept of human rights was initially introduced in medieval Europe immediately after King John signed the Magna Carta in 1215. This charter redefined the powers of Monarchs, created space for individual liberty and their inalienable rights. An ideology of establishing constitution for democratic set up was profoundly echoed in Magna Carta. The origin of practicing human rights in governance was first introduced by the Magna Carta and the same has been acknowledged while releasing the first copy of UDHR by Franklin D. Roosevelt in 1941. He famously stated that, *"The democratic aspiration is no mere recent phase in human history….It was written in Magna Carta."* (Roosevelt 1941). The UN even called UDHR as the 'Magna Carta of All Humanity' (United Nations 2015).

The Charter exclusively mentioned on the women rights. Although, women rights were mainly restricted to married/widows, yet it was a groundbreaking initiative of early 12th century. Magna Carta intended that after the death of her spouse, the widow was conferred with all the property rights[6]. The women were also freed from social compulsion to marry after her husband dies and if they want they could chose to not marry as well[7]. The widows were also freed from the burden to pay up for debts taken by her deceased husband[8]. One of the major reasons in framing Magna Carta by the Barons was to limit arbitrary taxation by the king, the Charter curtailed king's powers over contracts, loans, taxes and debts. The Charter contained sureties wherein King's powers were clogged till the debtor is discharging his duties sincerely[9]. These provisions of Magna Carta which defined rights of sureties, over the year became the reference points for all the 21st century contract laws.

An important feature of the Magna Carta is placing the rule of law over the King's authority. The Barons in Article 61 of the Magna Carta described 'distraint' under which the Barons has the power to overrule any decision of

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[6]   Article 7 of Magna Carta
[7]   Article 8 of Magna Carta
[8]   Article 11 of Magna Carta
[9]   Article 9 of Magna Carta

the King if found unjust for the society. Magna Carta is the first document to acknowledge the preserving of individual rights against the state oppression. It emphasized on natural rights and protected all individuals from arbitrary detention as unless violated law of the land. The Charter also restricted king's directives amounting to unnecessary torture of citizens and inculcated a clause on right to justice against the king as well. Another important feature of Magna Carta which substantially resonated in International Covenant on Civil and Political Rights (ICCPR) and Universal Declaration of Human Rights (UDHR) is justifiable quantum for punishment. The Magna Carta illustrated on humane approach towards punishment with justified treatment of the offender while in detention. The era of king John brought in three major changes, viz., first, the feudal system was discarded to adopt industrial set up and state machinery to meet up with the national goals. Secondly, the kings who were earlier enjoying unlimited powers (leading to horrendous acts out of xenophobia or racial hatred) have brought under the purview of state's machinery. Thirdly, the king needs to have consent from internal organs of the state administration to pass a new law or float king's order. The Magna Carta has inspired the states in augmenting will power for protecting rights and duties of all. The major shift in world order could be seen over the years after Magna Carta was introduced. The emergence of oppressive regimes (Nazism and Fascism) has slowly but steady shifted to monitoring of individuals roles in the society. Magna Carta played crucial role in galvanizing humanitarian efforts and progressively transformed era of autocratic regimes to constitutional democracies.

Relevance of Magna Carta: Indian Perspective

The framing of Magna Carta was fuelled by Baron's notion of restricting King's monarchy through signing a contract. This single act was powerful enough to change the course of governance internationally; towards more humane form. This also proved vital in shaping Constitution of India as well. The evolution of human rights in India dates back to the scriptures of Mahabharata (9th – 8th Century BC), Ramayana (5th – 4th Century BC), Upanishad (6th Century BC) and Vedas (2nd to 1st Century BC). The era of Kautilya (371 BC – 283 BC) and Ashoka (304 BC – 232 BC) the emperors held the rights of public in importance through welfare of vulnerable segment and reforming incarceration mechanisms. Mahatma Gandhi (1869-1948) was one of the greatest defenders of human rights and his efforts were dedicated towards eradication of discrimination, setting up democratic government

and peaceful protests against tyrannical regime of British. Another human rights crusader was Dr. B. R. Ambedkar (1891-1956) who played crucial role in upholding dignity of Dalits and setting up provisions for their upliftment. The constitution of India enshrines fundamental rights for every Indian citizen that covers right to equality (article 14, 15, 16, 17 & 18), right to freedom (article 19, 20, 21 & 22), right against exploitation (article 23 & 24), right to freedom of religion (article 25, 26, 27 & 28), cultural and educational rights (article 29 & 30) and right to constitutional remedies (article 32). The Constitution of India endeavors to preserve and protect the rights in secular and democratic manner.

India has been ruled by various powers for around thousand years. The Muslims (Arabs, Turks, Mughals and Afghans), European and British regimes have in some way or the other, suppressed Indian masses to meet their vision of creating an empire of wealth and supremacy. In such conditions, human rights violations become inevitable. To state a few example, during Mughal era in late 1700's, a series of unprecedented instances of genocide and holocaust was done against Sikhs and Maratha armies. During mid 1500s, the Portuguese in Goa have practiced cruelty and execution against Indians (Saraiva 2001). The British India depicts horrific picture of human existence under cruel regime, this was evident in instances of 'Amritsar Massacre' on April 13, 1919, when nearly 1000 innocent citizens were killed and around 1000 were injured; partition of India in 1947 which left 30 million people displaced and manslaughter on religious disparities; the infamous 1943 Bengal Famine, which could be prevented by the British government, led to the death of around three million people due to hunger. Such horrendous past of gross human rights violations made India to adopt a national document ensuring individual liberty and freedom from state's atrocities. This effort brought in the Constitution of India which was designed by the framers to protect the citizens of India from arbitrary abuse of power by the administrators. Sen in his work stated that freedom should be supported and promoted by the state authority so that recognition of human rights is well respected; and astoundingly the same ideology is rooted in Magna Carta (Sen 2013).

During the framing up of Constitution of India, vital elements from Universal Declaration of Human Rights (UDHR) were inculcated in it; and obviously the UDHR was inspired from Magna Carta. So, it could be stated that 'Constitution of India is linked to Magna Carta'. In fact, Part III (Fundamental Rights) of the Constitution of India is a.k.a. 'Magna Carta

of India' (Chandra 1964). Article 13 (2) of the Indian Constitution is moral fiber of the whole of Chapter on 'fundamental rights' of an individual because it resonates the core idea of Magna Carta, i.e. State not to frame laws jeopardizing individual rights of any individual. The 'Rule of Law' is given preeminence over absolutism of parliamentarians, executives and judiciary. Magna Carta came out from the mutual contract between citizens and ruler and same goes with the Indian Constitution. The rulers are democratically elected and govern by the 'rule of law'. The same concept is stated in Hon'ble Supreme Court judgment[10] that, *'The constitution was framed considering poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. Part III & IV of the Constitution provides for the protection of rights of its citizen'.* The essence of protecting human rights in Indian Constitution can also be sited in Directive Principles of State Policy wherein directions are given to States in matter of economic and social matters.

The message of protecting rights of the accused for fair trail to dispose justice was profoundly echoed in the Magna Carta and the same has been covered in the Constitution of India under Article 20 and 22. These two articles emphasized on procedural law under which the accused if found guilty should be punished as per the quantum of wrong committed. The article also speaks about non-jeopardizing in upholding human rights of accused person. The essence of Magna Carta fragranced in efforts of Indian Criminal Justice System which were reverberated in hon'ble Supreme Court's Judgment in Maneka Gandhi v. Union of India, Bhagwati, J.[11], *"The fundamental rights represent basic values cherished by the people of this country and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights, and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."*

Road Ahead

The framing of Magna Carta culminated towards formation of constitutional mechanisms where the 'rule of law' is followed by one and all. The contributions from Churchill, Roosevelt and Stalin were very important in eradicating Nazism and Fascism. In the same era, UN was established along with introduction of UDHR and ICCPR which further supported and carry forwarded the message of Magna Carta to the coming generations. The era in

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[10] *Lrs. v. State of Tamil Nadu & Ors.,* 1976.

[11] AIR 1978 SC 597, p. 619.

which Magna Carta was born is pretty much different from period in which we live in today. The human rights violations during ancient times were of violent nature but in 21st century, the acts are subtle but more vicious. Some examples of such forms of crimes are: human experimentation, state surveillance, stringent counter terrorism laws, cyber crimes and media censorship. Such emerging form of crimes is threat to civil liberties and undermines the safety of citizen's rights. This calls for reconsidering the global legacy of Magna Carta on a common platform with inputs from experts from the field of bureaucracy, politics, media houses and academicians. Magna Carta has more relevance in today's world compared to the era in which it was originally created. The foundation laid by clause 39 (dealing with rule of law) and 40[12] (dealing with liberty) of Magna Carta still forms the basis of our legal system. These two clauses need constant vigilance in any representative democracy. Recently, territorial disputes have erupted international confrontations and with the global networking all nations are vulnerable to contagious effects of conflicts. The solution lies in rules based international system. The nation's international conduct should be driven by rules not power, abiding by rule of law of Land, Air, Sea, Space and Cyber Space. There should be dispute resolution mechanisms to contain disagreement amongst nations with assistance from international organizations.

Environmental deterioration due to climate change and global warming should also be a prime concern for international community as millions are forced to migrate. The devastative natural disasters witnessed by humanity in recent times all over the world calls for strengthening global environmental rights protection policy. This should also cover the support and protection of rights of environmental human rights defenders. The international community should strive for a system wherein the UN's sustainable development goals (SDGs) could be integrated with the way business is done in 21st century with an aim to preserve rights of one and all. In a world of globalization and technology, business is booming and spreading its reach to nooks and corners of the world and this can become a strong tool to sponsor the fundamental ideologies founded by Magna Carta and propagated by International Convention, i.e., protecting human rights of all. For every humane effort done towards creating sensitized societies, framing of Constitutions or making laws with respect to the social setup of 21st

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[12]   To no one will we sell, to no one will we refuse or delay, right or justice.

century; Magna Carta will always be enshrined as the role model for coming generations and will be celebrated to mark the unity in diversity.

The current complex system of governance needs coercive and intrinsic powers to practice rule of law. The state now has more legislative control than when Magna Carta was there. Currently, surveillance technology can be both abused and misused by the State and Private Citizens. The challenge for the government is not only to protect personal freedom but to maintain personal and public security. There is a need to strike a perfect balance between the two. Magna Carta for most of the countries is a colonial import but still due its universality it became vital to every country's justice system. Magna Carta should be made relevant in current society to support the traditionally depressed segment of the society. Access to justice is still a big problem in reaching the people situated in far-flung areas and without which a healthy system of CJS could not sustain itself. Magna Carta strongly holds the onus of executive power to the 'rule of law', having said that, the emerging forms of human rights violations and state sponsored crimes calls for political and constitutional reforms. The public should be actively involved in decision making processes as they are at the receiving end of whole spectrum of constitutional democracy. Democracies have become more chaotic and with clandestine powers bestowed with governing bodies, the gradual dwindling of public trust is cause of major concern for every responsible administrator. The notion of upholding individual rights should be floated across all the democratic institutions in line with the Magna Carta which is bible of human rights protection.

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II - Access to Justice - Contributory Factors for its Denial and Deprivation

Barricading Justice : Failures of India's Criminal Justice System

*Harsh Mander**

Abstract

The Constitution of India affirms equality of all citizens before the law. The criminal justice system in India is based on the premise that the State would be responsive to the victims of crime and counter the perpetrators. For this reason, the State prosecutes the alleged perpetrators of crime and not the victims. However, the actual situation on ground is different. At least, this is not so when the victoms are dalits, muslims, tribals, women and poor people. This paper exemplifies the instances of unequal access to justice through several examples of disadvantaged persons/groups being denied their rights by the State and allowing the perpetrators to go scot free.

India's Constitution affirms in many ways the equality before law of all citizens. However, in practice, many disadvantaged and oppressed segments of the population are routinely barred from accessing justice. The criminal justice system has become inured to these everyday denials, indeed barricading of justice, in ways that almost normalise routine and pervasive injustice. Women, men and children are in reality profoundly unequal in their actual capacities to access and secure justice from the institutions, laws and India's ponderous and gargantuan justice system.

This paper will illustrate several examples of failures of legal justice through denials of access to justice of dispossessed people. It will firstly briefly describe the situation of jail under-trials, and then persons trapped by beggary laws and extraordinary laws like terror laws, and laws banning associations of profiled populations illustrated with the on-going ban on SIMI.

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It will go on to illustrate the other side of the same coin of intense failures of access to justice to these disadvantaged groups. This is of impunity: the failures of Dalits, tribal people, Muslims, women and the poor in general to secure justice when they are victims of violence by persons or groups of socially and economically powerful people – upper-caste people, the majority Hindu community, and men. Also the shielding of the police from any punitive action or reparations for their failures to secure justice[1].This paper will exemplify this highly unequal access to justice of highly socially and economically disadvantaged and oppressed categories with the case studies of two encounter killings in 2015 in Andhra Pradesh and Telangana, the failures of justice in recent court rulings related to the anti-Dalit atrocities in Tsundur, and the massacre of Muslim youth by PAC personnel in Hashimpura.

The criminal justice system is founded on the premise that the state would always be on the side of the victims of crime, and opposed to the perpetrators. For this reason, it is the state which prosecutes the alleged perpetrators of crimes, and not the victims. But if the victims are Dalits, tribal people, Muslims, women and the poor, the State may actually be on the side of the perpetrator and *against* the victim. This leaves the perpetrator almost defenceless against adversaries who are not just socially, economically and politically far more powerful than the victims, but also biased institutions of the state and the criminal justice system.

Jail Under trials

Even a cursory analysis of the social and economic profile of jail under-trial populations reveals the preponderance of people hugely disadvantaged by their impoverishment, caste and religious identity. The high over-representation of Dalits, tribal people, Muslims[2] and the poor in general in prison populations[3] (and the death row as outlined in the next section), suggests that they are unable to access justice because of both institutional bias and their inability to receive the quality of legal representation that is available to persons who are socially and economically stronger than them[4] (Raghavan and Nair 2011).

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[1]   See case of Zamir Ahmed http://nhrc.nic.in/PoliceCases.htm#46.

[2]   Raghavan, Vijayand and R. Nair. "A Study of the Socio Economic Profile and Rehabilitation Needs of Muslim Community in Prisons in Maharashtra," *unpublished report, TISS, Mumbai* (2011).

3   See data from National Crime Records Bureau, 2012, "Prison Statistics in India".

4   See data from National Law University, Delhi. "Death Penalty Research Project" at http://www.deathpenaltyindia.com/death-penalty-in-india/.

An 'under-trial' prisoner is one against whom there is a charge of criminal violation of law, but this charge has still not been proved, and who has, for whatever reason, not been released on bail. The individual remains in prison till he or she is released on bail, or is discharged or acquitted in the case, or is convicted and released on completion of sentence, payment of fine, admonition, or probation. Data from the 2012 NCRB report indicates the presence of 2,54,857 prisoners under trial. The large numbers of poor and socially disadvantaged persons in prisons is not because they are guilty of the majority of crimes. It is just that they are too powerless to free themselves from the grip of the law: they lack the necessary money, education and political clout. The report also states that 1,10,385 prisoners have no education beyond 10th grade. Little has changed for them since K.F. Rustamji, Member of the National Police Commission, observed compassionately in his report on under-trials as far back as in 1978, that prisons are 'a system which is slowly grinding thousands of people into dust'[5]. He found hundreds of under-trials to be 'dumb, simple persons, caught in the web of the law, unable to comprehend as to what has happened, what the charge against them is, or why they have been sent to jail. These are the people without a calendar or a clock, only a date in a court diary, extended from hearing to hearing... There are many charged with ticketless travel, possession of weapons, or illicit liquor or some minor infraction of the law...' He found to his dismay that 'several of them have been under-trials for more than five years'.

Our visits to prisons even today sadly confirms how little this reality of normalised everyday injustice has remained almost unchanged decades later. The Centre for Equity Studies, in its study on under-trials in UP for the NHRC (which was on-going at the time of writing this paper) found that a lot of people (from very poor and disadvantaged backgrounds) are often framed for crimes they have not committed. Sometimes the police plants incriminatory evidence (such as a knife) to further their case for booking them. Moreover, police assumes guilty before proved innocent, not the conventional innocent till proven guilty.

It is important to remember that under-trials are incarcerated for these long periods even though no offence has yet been proved against them. This may include the possession of weapons, drugs, or even in many states cow meat! It is possible that at the end of the trial they are discharged, but nothing

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[5]   See Rustamji, KF. "The Undertrials of India." National Police Commission: Tour Note no. 15 Dec 1978.

can bring back their irretrievably lost years spent behind jail walls. Even more tragic is that many of these under-trial prisoners are not even charged with any offence. They are sometimes picked up under preventive detention sections of the Code of Criminal Procedure, like Section 109, which enable State authorities to detain people when they consider this to be necessary to prevent crimes. But I observed in many years in rural districts that these sections are widely used against poor and destitute people, including those who are homeless, uprooted, mentally disturbed or destitute. In the words of Rustamji, tragically relevant even today: 'Some of them looked as if they have been youngsters wandering over the country, drop-outs from school, and the law had picked them up because the number of cases had to be brought up to the specified figure'[6].

Beggary and the Law

Laws to criminalize beggary were enacted in India for the first time under colonial rule[7], overturning a very different civilizational tradition which taught the giver to treat the person in need with respect even while giving. Separate laws on begging were enacted in the 1940s in the wake of large-scale destabilization caused due to post-war unemployment and economic recession. The laws enacted in this period institutionalized the society's discriminatory attitudes towards the poor, marginalized and the migrants. Beggary laws to criminalize the poor were therefore enacted for these reasons: (1) the poor were perceived to be inferior or sub-human (2) the way of life of the poor was considered an anti-thesis to the civilized way of life, (3) the poor needed to be disciplined and educated in order to be converted into a resource for the larger society. The poor were perceived to be idlers and social parasites instead of being regarded as an inseparable adjunct of modern industrial capitalism.

Currently, 20 States and two Union Territories have laws that criminalize beggary[8]. Although these laws originated before Independence, these have been retained with few amendments in the decades of freedom which followed, denying both freedom and dignity to the most destitute. In all these laws, begging in public places is criminalized. They also provide for

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[6]   Refer to Rustamji report.

[7]   Refer to Indian Lunacy Act, 1912, and Lepers Act, 1898.

[8]   See Rajendra Kumar Sharma, *Social Problems and Welfare*. Atlantic Publishers, 1998, pp.91-96.

the custody, trial and punishment of beggar offenders, and their detention in custodial beggars' homes, combining the worst features of poor-houses of Victorian England with India's oppressive prison system[9].

'Begging' under all these laws is defined expansively to bring within their ambit not only beggars, meaning thereby those caught in the act of soliciting alms, but also others who, due to their destitute status, are presumed to be beggars[10]. Typically a beggar is defined in most of these laws to include anyone without 'ostensible means of livelihood' which really means that these laws make destitution not a subject of social assistance but of crime[11].

The penal consequences of begging in public places vary from release after admonition or personal bonds for first time offenders to detention for up to 10 years. The offence of beggary is established on the basis of summary trials in designated "beggars' courts" that are presided by a first class magistrate or a special magistrate. These courts are documented to follow whimsical practices, making assumptions about a person's resort to begging without even conventional requirements of evidence. All the laws provide strict penalties and imprisonment for those employing or causing persons to beg or using persons for begging.

It is significant also that although all these laws contain provisions on the procedure to be adopted for detaining beggars in certified institutions, there are few with provisions that specifically outline measures to be taken for their welfare, empowerment or rehabilitation. Most of these laws allow for the detention of dependents of beggars as well as indefinite detention of 'incurable beggars' thus posing serious challenges to the right to life and liberty enshrined under the Constitution[12].

Practice reveals that the implementation of these laws have nowhere met with the stated objectives of preventing beggary and have instead led to the further marginalization, harassment and violation of fundamental rights of those who are already marginalized and destitute. The law and its practice

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[9] See Ashish Goel, "Indian anti-beggary Laws and their Constitutionality through the Prism of Fundamental Rights with special reference to Ram Lakhan V. State." *Asia Pacific Journal on Human Rights and the Law* 11.1, 2010, pp. 23-38.

[10] See "The Bombay Prevention of Begging Act (1959)" adopted by many States and UTs.

[11] See Usha Ramanathan, "Ostensible Poverty, Beggary and the Law." *Economic and Political Weekly* (2008): pp. 33-44.

[12] Refer to "The Bombay Prevention of Begging Act (1959)".

neither pay heed to reasons that lead to destitution nor facilitate responses that addresses destitution or uphold rights of marginalized citizens.

Terror Laws

It is these same oppressed populations who are most vulnerable to incarceration for terror crimes. In many Indian states, Muslims comprise a disproportionate chunk of the prison population. For instance, Gujarat's Muslim population may be 10 percent, but the percentage of Muslims in its jails stands at 23. The little data publicly available also evidences skewed ratios in the jails of U.P. and Madhya Pradesh[13].

The labelling and blanket condemnation of people merely because of their Muslim identities – now a global phenomenon – is not confined to lay people. It extends more dangerously to how states respond to terror attacks, in effect holding the entire Muslim community guilty unless they can prove their innocence[14]. The victimization and demonisation of Muslims in the guise of investigation of terror offences, creates insecurity and alienation in the minds of not only the families of the victims but also other members of the community[15].

The problem begins immediately after a bomb attack, when governments are under great pressure to produce 'results'. The pattern in India has been that just hours, sometimes even minutes after an attack, the police claim irrefutable proof that an Islamist organisation is behind the terror act. For many years, they would declare that this is the Pakistan intelligence agency ISI, or Pakistan based terror groups. For geo-political reasons that one can only speculate on, governments more recently shifted their instant indictments eastwards to Bangladesh, particularly to a till recently little-known organisation called HUJI. Now the 'foreign hand' seems to have receded; and the prime culprit has become even more worryingly the 'enemy within', the home-grown Indian Mujahideen, supported by the controversially banned SIMI (Students Islamic Movement of India). If the government indeed had such conclusive evidence in every case about the guilty, why did it not act on

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[13]   http://www.milligazette.com/news/6826-terror-allegations-are-false.

[14]   See Manisha Sethi, "Kafkaland: Prejudice, Law and Counterterrorism in India," *Delhi: Three Essays Collective,* 2014.

[15]   See Zaheer Baber, "'Race', Religion and Riots : The 'Racialization'of Communal Identity and Conflict in India," *Sociology* 38.4 (2004) pp.701-718.

time to prevent the terror attack? And even when a mosque is bombed, as in Hyderabad[16], the possibility that some of the terror attacks could have been engineered by extremist organisations of other persuasions than Islamist is not even considered. The state seems tacitly to subscribe to the canard that terrorists can only be Muslim, forgetting that in India itself we lost the father of the nation, and two Prime Ministers to terror attacks, and none of their terrorist attackers were Muslim.

The police then begin to interrogate its suspects, mostly Muslim youth. They are illegally abducted by police in civil uniforms and unmarked vehicles, blindfolded and driven to locations where they are tortured. In other states, the experience of torture is common, also in 'legal' police custody and sometimes even in judicial custody[17]. They are undressed, beaten relentlessly with belts made from old tyres or sticks, given electric shocks including on their genitals, their faith humiliated, their loved ones such as a pregnant wife or an aged father repeatedly summoned to police stations, and ultimately they agree to sign on blank confession papers.

If they are picked up from their homes, people report midnight knocks, violent searches and beating even of children and old women. Many testify the ransacking of their homes and shops. If they are picked up from elsewhere, their families are not informed, and they run from one police station to another to find their loved ones.

The youth come from diverse backgrounds, mostly with no previous criminal records. They maybe students, auto rickshaw drivers, ice cream sellers, clerics or computer professionals. But as soon as they are targeted by the police, they are disgraced, usually their employment is terminated, their livelihoods boycotted, and even Muslims are scared to associate with the family, for fear that they also maybe tarnished with the same crimes. The media usually accepts the police version uncritically, and broadcasts it with shrill sensational overtones which affirm the guilt of the accused persons to the general public, aggravating their stigmatisation.

The courts are also usually more than willing to go along with the police version, extending remand, denying bail, often responding with little urgency

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[16] http://www.rediff.com/news/slide-show/slide-show-1-mecca-masjid-blast-did-hyderabad-police-protect-hindu-radicals/20110518.htm#1

[17] See Grace Pelly, ed. *State Terrorism: Torture, Extra-judicial Killings, and Forced Disappearances in India: Report of the Independent People's Tribunal, 9-10 February 2008.*

even in habeas corpus petitions, and most gravely wilfully failing to act on even visible signs of torture on the body of the young men produced before them, refusing to act and take on record their complaints of torture, let alone actively confirming from them that they were not tortured. They also allow criminal proceedings to persist against minors. Sardar was 17 when he was charged with complicity in the Coimbatore blasts. He was 27 when he was acquitted, but only after nearly a decade of harrowing incarceration. Likewise Mohd Aamir was 18 when charged with terror blasts in Delhi. He was 32, a full 14 years later, when he was acquitted of all crimes.

Many young lives – as of Sardar and Aamir - are destroyed by the police labelling them as terrorists. The charges are often flimsy and far-fetched. It matters little that eventually the police is in most cases unable to prove the charges, and it sometimes itself drops the charges or the youth accused of terror crimes are eventually freed by the courts. But no one is held responsible for the lost years of dishonour, incarceration, and the crumbling of families. Many of the arrested are sole bread-earners: sons caring for aged parents and siblings, or for a young wife and small children. I have encountered in many states of India, families reduced to pitiful destitution because those who earned for them were detained for many long years. Most are ultimately acquitted, but return heart-broken to crushed and diminished families. Some die is custody, never to return, some lose their sanity. In militancy affected areas, the problems are even more compounded by enforced disappearances of loved ones; they are picked up illegally by security forces and families are not returned for years, sometimes for lifetimes.

Banned Organisations

Likewise, it is organisations and associations of the same social groups that are most liable to suffer bans and criminalisation by the application of extraordinary laws of the state, illustrated by the case study about the ban on SIMI in the case study cited below.

Firmly embedded in the popular majoritarian imagination is the idea that the Students Islamic Movement of India (SIMI) is a dangerous anti-national organisation that foments terror and disaffection among Muslim youth in India[18]. This idea, assiduously fostered by intelligence and police

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[18] See C. Christine Fair, "Students Islamic Movement of India and the Indian Mujahideen: An Assessment." *Asia Policy* 9.1, 2010, pp.101-19.

officials and many sections of the media, has contributed to the repeated ban of SIMI since 2001, upheld by a succession of judicial tribunals and court rulings[19].

An important report by the People's Union for Democratic Rights, however, interrogates the justice of these bans, from the prisms of both natural justice and politics, and concludes that the bans are a grave subversion of the basic guarantees of democracy[20]. It holds that among the freedoms critical for our pursuit of democratic rights conferred by the Constitution, are our right to form associations, to promote and propagate collectively held perspectives in the public domain, and that the orders under the Unlawful Activities (Prevention) Act (UAPA) 1967 by which SIMI is banned do not measure up against the yardsticks of reasonableness and fairness.

The official charges against SIMI are grave, that it spreads communal hatred, commits terror attacks, kills Hindus associated with the RSS, is pro-Pakistan, stokes militant ideas in the minds of impressionable Muslim youth, and is committed to its ideological goal of establishing Islamic rule in India. Successive prosecution agencies have alleged SIMI's involvement in a large number of blasts, serial bombings and terrorist attacks. However, as pointed out in a writ petition before the Supreme Court by two erstwhile SIMI members, out of 111 cases included in the background note prepared by the Centre before imposing ban orders in 2012, in 97 of these cases either the courts acquitted the accused or the government dropped the charges[21]. This trend of acquittal has only continued in recent times. The report also points to the magnitudes of social costs which families associated with terror cases have to bear, including the difficulty of finding employment, financial ruin of a family and social ostracism, un-remedied following acquittal after years of suffering[22].

The PUDR report further documents many instances of the arbitrary functioning of tribunals which successively upheld the bans. Apart from relying on criminal charges that courts routinely later drop, they rely substantially on 'confessions' made to police officers as the sole or predominant ground, as well

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[19]   http://www.milligazette.com/Archives/15102001/07.htm

[20]   See People's Union For Democratic Rights. "Banned and Damned: SIMI's Saga with UAPA Tribunals". PUDR, June 2015.

[21]   http://indianexpress.com/article/india/india-others/97-of-111-cases-sink-but-govt-pushes-for-simi-ban-yet-again/

[22]   Refer to PUDR report.

as on literature deemed 'seditious' but which in fact maybe in the possession of any average human rights activist or scholar. Confessions extracted by the police during interrogation of a suspect are considered unreliable since there is a high probability that there are associated with torture or other forms of coercion. The Evidence Act therefore rules out the use of confessions made to the police. This established norm was overturned by the Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1985, making it impossible to justly differentiate between innocence and guilt. TADA lapsed in 1995, but the same unjust provision survives in UAPA[23].

PUDR chronicles many instances[24]. One of these is of Shane Karim, a dental student of Bijapur (Karnataka) who in 2008 was arrested with 5 others for distributing provocative pamphlets. Recoveries made showed that he possessed pictures of Gujarat and Malegaon communal riots. Karim allegedly confessed to being an active member of SIMI since 2000 and 'master-minding' the poster campaign. However, during cross-examination the DSP Bijapur admitted that Karim's statement was taken in custody. Notwithstanding the prosecution's story, the High Court of Karnataka, in March 2010, granted bail to Karim, noting that the investigation had failed to show any incriminating evidence which attract the provisions of the UAPA.

A major problem with this grossly unjust law is that it is applied by official agencies in a partisan fashion specifically against minority groups. The report rightly concludes that the law is actually a 'sectarian tool and a repressive measure against a vast body of Muslim youth on whom it casts a "shadow of criminality". The sectarian outcome of UAPA', it observes, 'is wider than that of SIMI… Tribunals are expected to act as a check on the arbitrary actions of the Executive and act as a safeguard for the aggrieved. However, if without even the commission of a crime, the Government can declare an organization to be "unlawful" or "terrorist", then a grave threat faces us as an entire ideology can be silenced at whim' and large sections of a community criminalised.

PUDR rejects the official argument that bans are necessary in order to curb ideologies which promote violent actions[25]. Bans target one such

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23   Ravi Nair, "The Unlawful Activities (Prevention) Amendment Act 2008 : Repeating Past Mistakes." *Economic and Political Weekly* (2009): pp.10-14.
24   Refer to PUDR report.
25   Refer to PUDR report.

group while letting others professing similar ideologies go scot-free. 'Are we going to say that the Hashimpura-Maliana massacre by the PAC in 1987, the Kunan-Poshpora gang rape in 1991, mass crimes in anti-Sikh, anti-Muslim carnages, rape and plunder in Mumbai in 1992-93, in Gujarat in 2002, in Muzzafarnagar in 2014, to name a few, are not heinous or heinous enough crimes to attract the provisions of the UAPA because these have been carried out either by security forces or by Hindu fanatic groups? …A bomb planted in a cinema hall by the champions of *Hindutva* ideologies is not a terror crime but even the possession of a leaflet containing ideas or opinions close to SIMI becomes a terror crime!'

Bans on organisations therefore must be recognised to be not decisions taken with fairness and due process to preserve security and peace, but political decisions meant to target certain dissenting organizations in the name of national security. The PUDR report makes evident the selective imposition of bans in the name of national security, which violates Article 14, the fundamental right of equality before the law. While SIMI continues to be banned, other organizations which have carried out similar acts of terror and have engendered sectarian politics have not shared SIMI's fate. For instance, the RSS has been banned thrice but only on a temporary basis—in 1948, during the Emergency and, shortly after the demolition of the Babri Masjid in December 1992. In the first instance, the ban was lifted unconditionally in less than twenty months' time and, in the last instance it was lifted in less than six months' time. In 1992, the Narasimha Rao government banned the RSS, the VHP, the Bajrang Dal after the demolition of the Babri Masjid, and, in a show of balance, also banned the Jamaat-e-Islami Hind and the ISS, though they had nothing to do with the demolition.

For defending democracy, it is imperative to recognise with PUDR that freedoms enable people, especially for those fighting for equality and justice, an opportunity to mobilise and organise, to collectively express, promote, pursue and defend common political interests and concerns. They afford common people the right to peacefully dissent, to express public disagreements through demonstrations and protests. But to 'place a very large section of society under the ambit of a horrendous law in the name of "unlawful" and "terrorist" must be resisted at all costs. Free speech and right to form unions/associations is intrinsic to a democratic polity. To fight against the continuance of bans is to fight for the democratic freedoms of equality, association, thought and expression for all'.

Real democracy, PUDR rightly concludes, thrives on justice and equality and freedom of speech and expression, individually or collectively. It affirms its democratic conviction that in the final analysis it is better to err, if at all, on the side of freedoms than to get trapped into 'discrete charm' of security phobia which thrives on fear and falsification.

Dalit Atrocities and the Case Study of Tsundur

Indian democracy is dishonoured from time to time by brutal massacres of the country's historically oppressed communities – mostly dalits and Muslims. But its even greater disgrace is that mass killers who periodically target people only because of their religion or caste are rarely punished. This legal impunity of hate mass murderers derives from deep institutional prejudice which scars India's otherwise independent judicial system. Perpetrators of caste violence—especially violence against dalits—rarely face any judgment. In 2013, the Patna High Court cleared 26 accused from charges of slaughtering 58 dalits in 1997 in Laxmanpur-Bathe[26]. Similar echoes of injustice can be heard from cases in Kilvenmani, Villupuram, Dharmapuri, and Bathani Tola.

It should not surprise us, then, to see that in April 2014 the Andhra Pradesh High Court acquitted all 21 men who were serving life sentences for the massacre of dalits in Tsundur[27].

In 1991, a minor altercation in a cinema hall had spiralled into a terrifying massacre[28]. A high-caste Reddy man was enraged when a dalit college student Ravi rested his feet on his seat. In reprisal for his impudence, Ravi was first attacked in his village Tsundur, then charged with theft and arrested. Following this, the upper-caste community fell back on old weapons commonly deployed by higher castes through the ages to subdue disadvantaged communities: an economic boycott was imposed to break their back, as upper-caste farmers refused to employ the landless dalits as farm labour or tenants.

Emotions were then further ignited by widely circulating a false charge against a dalit youth, that he was sexually harassing local Reddy girls. (This

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[26] http://www.business-standard.com/article/news-ians/acquittals-in-dalit-massacre-can-shake-faith-in-system-comment-special-to-ians-113102200219_1.html

[27] http://kafila.org/2014/04/30/tsundur-massacre-normalising-injustice-the-judicial-way/

[28] http://www.newindianexpress.com/states/andhra_pradesh/Tsundur-Massacre-Case-Uninformed-Support-to-an-Untenable-Verdict/2014/05/12/article2220019.ece

allegation is chillingly similar to the one made 22 years later in Muzaffarnagar, which again was later proved false, but which similarly led to violent reprisal against local Muslims). A fever of mass rage gripped the surrounding countryside, and this resulted led to the well-planned attack on the dalits. As they desperately tried to flee the village they found it surrounded on every side by Reddy men in tractors armed with daggers and iron rods. They were brutally assaulted, and many mutilated bodies were flung into the Tungabhadra canal. This caste slaughter left eight men dead and three badly injured.

What followed was a rare judicial victory heroically won after many years of struggle by the dalit survivors of Tsundur village, who braved boycott, violence, and social and state intimidation in an epic battle for justice. Determined that the perpetrators of these atrocities should not go unpunished as they always had in the past, as Subash Gatade recalls in an article in Kafila[29], the survivors refused to accept court summons or to appear in court until government agreed to appoint a special court to hear the case and, for the first time, to conduct the special court in their village. They also demanded and ultimately secured both a public prosecutor and judge with reputations for fairness.

Typically these cases drag on for years, and witnesses and survivors are wearied and coerced into rescinding on their statements. In Maharashtra, the state government, pressured by the extremist Shiv Sena, withdrew 1,100 cases registered under the Atrocity Act. In Tsundur, facing injustice and inaction against the perpetrators,the dalit community did not allow chronic poverty and centuries of social oppression to break its resolve. The dalits resisted—and continue to resist—powerful attempts to buy their submission with threats, money and jobs, and raising the slogan 'justice not welfare'[30]. Young dalit men abandoned their education and refused to marry until justice was won for the survivors of the butchery. Gatade recalls many people who stood tall for justice. Merukonda Subbarao, a daily wage-worker became a local hero after he identified and named 40 of the accused in the court room from among the 183 accused. It took great courage for him to resolutely identify powerful men in court who earlier he could never even walk alongside or look in the eye.

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[29]   http://kafila.org/2014/04/30/tsundur-massacre-normalising-injustice-the-judicial-way/
[30]   http://www.countercurrents.org/gatade300414.htm

But their epic resistance and success in securing justice from a criminal justice system infamous for its anti-dalit bias has been reduced today to nothing. More than two decades after the crime, the Andhra Pradesh High Court ordered that 21 men serving life sentences for the massacre walk free (and one of them even joined Jagan Reddy's election campaign).

The High Court ruled that 'the prosecution failed to prove the exact time of the death of the deceased and place of occurrence and the identity of the persons who attacked them'. It found further fault with the prosecution, because no complaint had been filed about the attacks, and the judges rejected the witness statements because of 'contradictions'.

In so doing, the High Court ignored the formidable challenges of fear and loss faced by survivors of caste and communal mass crimes when confronting an openly partisan police system[31]. The Tsundur Special Court, which severely indicted the police for its anti-dalit bias, rightly acknowledged that a defective investigation could 'naturally' lead to 'contradictions and omissions' from prosecution witnesses. Therefore it accepted a certain amount of omissions in witness statements, rightly noting, 'Every omission is not a contradiction.' Indeed the Supreme Court in many rulings has held that it is unreasonable and unjust to expect the same standards of evidence in mass crimes as in regular individual crimes, because of embedded institutional bias.

The rejection of the veracity of the statements which the dalit survivors courageously made in open courts, battling violence, intimidation and boycott, is therefore a grave setback to the greater idea of justice. It was unjust for the judges of the Andhra Pradesh High Court to close their eyes to the larger context of economic and social violence and power imposed by caste superiority and ownership of large land holdings in rural India, and the close nexus of rich upper-caste landed communities with the police and ruling establishment.

The survivors of the Tsundur massacre chose to fight the injustice and bloodbath to which they were subject not by picking up arms by joining the Maoist rebellion, which already had struck deep roots in the surrounding countryside. Instead, they rightly placed their faith in the ponderous processes

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[31] http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/tsundur-judgment-a-predetermined-one/article6208376.ece

of a democratic state and its criminal justice system. But by letting them down so profoundly, India's superior courts have fuelled further the despair which is gripping segments of young dalit, tribal and Muslim men and women, confirming to them once again that justice and security is hard to secure for India's historically oppressed people in India's republic.

This is the agonising reality of oppressed communities which we collectively must reverse. The violence to which Dalit women are specifically subject with little protection and justice from the police continues to be the lived reality of millions of Dalit women[32].

Communal Violence and Impunity: the Case of Hashimpura

Uzma was born the terrifying night her father was dragged from his home by men in khaki, packed into a truck and driven to the banks of a canal, shot at point-blank range, his body thrown into the canal. 41 other men died with her father. Their only crime was the faith they followed.

Today Uzma is 28 years old. Two heroic pursuits shadowed her entire life. One, the struggles of her widowed mother to raise her children, grappling with the anguish of memory and penury. The other the treacherous journey of the criminal case against her father's alleged killers, 19 functionaries of the Provincial Armed Constabulary, armed police of Uttar Pradesh[33].

Nearly three decades after perhaps the largest incident of custodial killing in free India, the trial court passed judgment on 21 March 2015. The magistrate accepted that killings of these persons by men of the PAC did indeed transpire. However the court acquitted every one of the 16 accused policemen (3 died in the course of trial) on grounds of benefit of doubt[34]. For Uzma and other kinsfolk of 42 men killed, the agony is of being bereaved and betrayed again, once more by the violence and injustice of India's democratic state.

The facts of the massacre are almost erased today from public memory. The year was 1987. Communal tempers in the country were dangerously

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[32] http://www.countercurrents.org/gatade300414.htm

[33] See A. G. Noorani, "Amnesty Report on Meerut Killings." Economic and Political Weekly, 1987, pp.2139-40.

[34] http://www.thehindu.com/news/national/other-states/16-acquitted-in-1987-hashimpura-massacre/article7018797.ece

inflamed by the dispute over the Babri Masjid in Ayodhya. The Rajiv Gandhi government had ordered the opening of the locks of the mosque, enabling Hindu prayers in the mosque, sparking angry Muslim protests in many parts including Meerut, where fierce riots broke out. Amidst curfew and shoot-at-sight orders, on the night of 22 May 1987, the PAC rounded up nearly 50 Muslim men, all working class men including weavers and migrant daily-wagers, but instead of taking them to the police station, drove them to the Upper Ganga canal in Ghaziabad. According to eye-witness accounts of the four men who survived the deadly rain of police bullets - pretending to be dead and swimming through the canal - the policemen fired at the men in the dark at point-blank range, threw the corpses into the river, and drove away.

The story after that has been one of shameful cover-up by state authorities, and the deliberate erasure of evidence[35]. The truck in which the men were allegedly transported and killed was washed and repaired, destroying critical forensic evidence, and the rifles used were redistributed to PAC personnel for regular use, instead of preserving these as case property. Under public pressure, the state government finally ordered a CID enquiry in 1988. Its report was published only in 1994, but has never been made public to date, even by all subsequent state governments, although the report could supply crucial evidence for the prosecution.

It was only in 1996 that charge-sheets were filed in a court in Ghaziabad against 19 policemen, none of them senior officials - who remain untouched by the law to date. 23 bailable and 17 non-bailable warrants were issued between 1996 and 2000 against the junior accused policemen, but they were declared untraceable and absconding, although they were all this while serving with the PAC! Bowing finally to public outrage, 16 men surrendered in 2000, were arrested, but soon released on bail after which they again joined service. Unconscionable state prejudice was further exposed after RTI applications filed by victim families revealed that all accused men not only remained in service, enjoying regular promotions; that they faced trial for murder was not even mentioned in their Annual Confidential Report[36].

The relatives of the slain men petitioned the Supreme Court to transfer the case to Delhi because of clear bias of the court, and this was granted in

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[35] http://www.rediff.com/news/special/in-meerut-no-cry-of-justice-for-hashimpura-victims/20150406.htm.

[36] http://kafila.org/2007/08/31/hashimpura-rti-replies-expose-state-patronage-of-impunity/.

2002. The state government further delayed the appointment of a Special Public Prosecutor for four years. Trial actually began only in 2006, a full 19 years after the massacre. It took another 9 years for the court to pronounce judgment, only to acquit all the accused.

I visited the Tis Hazari court to attend one of their hearings, with their lawyers Vrinda Grover and Rebecca John. I was touched to find that around 20 relatives and survivors visited the court for solidarity, every single hearing month after month, year after year. They were not supported by any NGO; instead these working class families pooled money for every hearing, sacrificing also their day's wages. In these years, Uzma grew from a child to a young woman, all under the shadow of a Delhi trial court.

Extra-judicial Killings and Impunity : Two Cases from Andhra Pradesh and Telangana

Some most troubling instances of this are what are described in both police and popular idiom as 'encounters'. According to a 2009 report by the Asian Centre for Human Rights (ACHR), 1,184 people were killed in police custody just within the span of April 2001 and March 2009[37]. Coincidentally, on a bloody Tuesday in April 2015, 25 men were gunned down in 'encounters' by men in uniform in two separate incidents in the neighbouring states of Andhra Pradesh and Telangana[38]. 20 of these were charged to be red sandalwood smugglers, and 5 Islamist terrorists.

The law of course does not permit the murder of even most feared and dangerous criminals except by due process of law. After all, the most fundamental of all rights in a democracy is the right to life, and this right endures even for those charged with monstrous crimes. But the claim after every 'encounter' killing is that police persons shot in legitimate self-defence; that if they had not killed the criminal, lives of police persons and innocent persons would be endangered. It matters little that in the majority of 'encounter' killings[39], such as those of April 7, this story is very thin.

The official version of the shooting dead of 20 men in Seshachalam

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[37]   See ACHR. "Torture in India 2009." Asian Centre for Human Rights.

[38]   The police of undivided Andhra Pradesh has a worrying history of extra-judicial killings. See http://www.unipune.ac.in/snc/cssh/humanrights/02%20STATE%20AND%20ARMY%20-%20 POLICE%20REPRESSION/A-%20Andhra%20pradesh/10.pdf.

[39]   See APCLC fact-finding report, reproduced here: http://sanhati.com/excerpted/13274/#1.

forest near Tirupathi is that these were dangerous red sandalwood smugglers who mortally threatened police and forest officers with stones, axes and sickles. The imperilled policemen were therefore left with no option but to fire at the criminal mob, leaving a trail of 20 dead men.

What the police version does not explain first is that if there was such imminent danger to the police and forest officials from the mob, why are there no injuries or casualties reported from the police. Firing into a mob is prescribed as the course of last resort by the police, but there is no evidence that the police tried less lethal methods such as cane-charges or tear-gas to first repel the allegedly violent crowd. It is telling that the bullet injuries suffered by most of the dead men are on upper parts of their bodies[40]. The law and police manuals demand restraint by the police when shooting at mobs: the purpose of police firing is to disperse crowds, not to kill them. No police bullets were found in the surrounding tree-trunks and foliage as maybe reasonably expected if police is firing to disperse a threatening mob. Police is also unable to explain why most bullets pierced right through the bodies, possible only in close-range killings and not distant firing.

The official story of the killing of five men charged with (but not convicted of) terror crimes in Warangal is equally implausible[41]. The five men were chained to a police van, and guarded by 17 policemen. Police claim that the handcuffs of one of the men were unlocked because he wanted to urinate, but after he relieved himself, he snatched the weapons of his guard, and so did the remaining four chained men. The guard therefore had no option except to kill all five men in close-range machine-gun fire. But the police photograph shows one hand of the first dead man still cuffed to the seat of the bus, and both hands of the other four men were all cuffed. It is then entirely far-fetched to suggest that the men could have snatched the weapon together and that therefore it was necessary to kill all five men.

The actual facts of what took the lives of these men are unlikely to emerge even from the mandatory magisterial enquiries into the killings, given past record of hundreds of such 'encounter' executions in past decades. Almost every investigation ultimately confirms the police version, however implausible this maybe.

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[40]   http://indianexpress.com/article/india/india-others/tirupati-red-sanders-killings-burn-scars-bloodless-wounds-and-many-question-marks/.

[41]   http://www.business-standard.com/article/pti-stories/5-terror-operatives-gunned-down-in-warangal-115040700696_1.html.

NHRC reports 1,788 encounter killings between 2002 and 2013. The last four years alone have seen 555 such cases[42]. Men felled by police are alleged to be Maoist, separatist or Islamist insurgents, or members of criminal mafia or smuggling gangs. Policemen who pull the trigger are almost never punished. As Chaman Lal, retired police officer passionately committed to human rights explains, 'Fake encounters are considered an operational necessity, legally impermissible, but morally justified by most police personnel.' Police, magistrates and ordinary people widely feel police are justified in breaking the law to secure what they regard to be wider justice. Impatient with a protracted judicial process, and unable or unwilling to undertake scientific investigation to build robust criminal cases which would withstand court scrutiny, police take recourse to murderous short-cuts, acting as investigator, prosecutor, judge and executioner, all in one.

However extensive political and social sanction to extra-judicial killing of persons charged but not convicted of grave crimes ultimately both corrupts and brutalises the police force. It strips people of their basic democratic protections, culpably compromises our collective conscience, and leaves democracy enfeebled.

Conclusion

These few examples illustrate the vast chasms that separate the lived realities of India's most marginalised and oppressed communities from the affirmation of India's Constitution of the equality before law of all citizens. These millions of disadvantaged people face tall barriers that block them from accessing justice.

Whether it is tens of thousands of impoverished persons charged with often petty offences in jails unable to access bail or legal representation; or persons charged with the 'crime' of destitution in beggary laws; or people alleged to have committed terror crimes and therefore incarcerated for years without the protections that normal criminal law provide; or survivors of violence against Dalits, tribal people, minorities and women; or victims of extra-judicial killings and disappearances; these are all examples of the profound and sometimes insurmountable barriers that India's socially and

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42 http://www.thehindu.com/todays-paper/555-fake-encounter-cases-registered-across-india-in-last-four-years/article4916004.ece.

economically most disadvantaged persons face from accessing system. As we observed at the start, the profound and pervasive difficulties faced by these vulnerable people from accessing justice, have become routinized and normalized. India's justice system works sadly for those with the economic, social and political resources to make it work. For others, sadly, justice remains most often a distant, insurmountable dream.

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III – Disability and Human Rights

Making up the Indian Legal Mind on the Legal Capacity of Persons with Disabilities

Amita Dhanda*

Abstract

The right to legal capacity includes the right to be recognized as a person before the law and the right to act on all aspects of life on an equal basis with others. All persons with disabilities including persons with intellectual, psycho-social and developmental disabilities are recognized as bearers of this right by the United Nations Convention on the Rights of Persons with Disabilities. In so far as the municipal laws of most countries do not accord such total recognition to this right, the realization of the right to universal legal capacity is one of the major challenges of implementation thrown up by the Convention. India has signed and ratified the UN Convention and thereby obliged to respond to this challenge.

The Right to Persons with Disabilities Bill and the Mental Health Care Bill are two law reform proposals which are intended to bring Indian municipal law in harmony with the Convention. It is contended that these legislations do not meet the mandate of the CRPD as enunciated by the Treaty Body in General Comment No 1 and the concluding observations. Both legislations fall short of the change required by the Convention even as options which are closer to the CRPD mandate lie forgotten in legislative archives. The article firstly sets down the mandate of the Convention; next demonstrates how the proposed legislative reforms fail to realize the mandate; and lastly suggests how the mandate of the Convention can be fulfilled.

I Introduction

It is a truism of international human rights law that once a State ratifies a human rights convention, it is obliged to bring its national laws and policies in harmony with its international commitment. The process

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of obtaining conformity varies between monist and dualist countries but the duty to achieve that harmony is undisputed. The only means by which States escape these obligations is by entering permissible reservations. I am recounting these trite rules of international law in order to provide context to the disability law reform efforts in the country. These reform efforts need to be initiated because India unlike other States[1] ratified the Convention on the Rights of Persons with Disabilities (hereinafter CRPD) on 1st of October 2007 without entering any reservations or filing any interpretative declarations, which meant that the substantive laws impacting on the rights of persons with disabilities would need to be brought in consonance with the CRPD.

This process of harmonizing would need to be done in order to ensure the realization of all the rights guaranteed by the CRPD[2]. In this piece, I am however limiting myself to Article 12 which guarantees the right to legal capacity and equal recognition before the law. This article in my view encapsulates the heart of the CRPD, as it both helps in constructing the person and provides procedures for realizing that personhood. This human right needs to be correctly interpreted as such interpretation would significantly impact upon several other rights in the Convention[3]. Further, both at the stage of negotiation and at the point of implementation the substantive content of this article has been highly disputed. A large body of the dispute arose from the varied perspectives from which the question of legal capacity was addressed. The protective standpoint, which predominantly occupied the field before the CRPD, agreed to the induction of autonomy but without the cause of protection being abandoned. Those who sought empowerment, relied upon equality and non- discrimination to question the demands of higher competence from persons with disabilities and especially persons with intellectual and psychosocial disabilities. They pointed to the near impossibility of factually establishing competence and pressed for the presumption of competence to be universally recognized. Further

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[1] For example reservations entered by Australia, Canada, Egypt, Estonia, Norway are amongst the countries that have entered reservations on Article 12. See https//treaties.un.org. Last visited on 12th November 2015.

[2] On the requirements of the exercise, see Amita Dhanda and Rajive Raturi (ed) Report on Harmonizing Laws with the UNCRPD, 2010.

[3] A similar significance was accorded to Article 12. For details see http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/political-participation/art-12-CRPD. Last visited on the 7th of November 2015.

acknowledging the omnipresence of vulnerability and the reality of human interdependence placed an obligation of providing support on the State.

The warring perspectives on Article 12 gave rise to following points of dispute:

- How should legal capacity be defined? Should it only be perceived as being the capacity to have rights or did it also encompass the capacity to act?

- If the latter, then did this right to act also extend to all persons with disabilities especially persons with intellectual and psychosocial disabilities?

- Was the capacity to act connected with the factual competence possessed by persons? Does legal capacity flow from mental capacity?

- What is meant by support? Does it also include substitution regimes such as guardianship?

- Should substitution be permitted provided it is accompanied with more rigorous fair process safeguards?

In an earlier exposition on Article 12[4], I had attempted to answer these questions in the light of the negotiations on the article as the use of traveauxpreparatoires is authoritative interpretative device to determine the meaning of ambiguous text. The narrative, in that exposition, recounted how the conservative and reformative standpoints were in constant tussle during the negotiations. And how, the deliberately ambiguous text of Article 12(4) was a smart diplomatic strategy of obtaining consensus. It was, however, my hope that driven by the force of disability aspiration the more progressive interpretation of the article would be adopted, even if text existed in article 12 (4), which could support a more conservative exposition.

Since then, on 11th of April 2014, the CRPD Treaty Body adopted General Comment No 1 on Equal Recognition before the Law[5]. This General Comment informs States Parties of the Treaty Body's position

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4   See Amita Dhanda "Legal Capacity in the Disability Rights Convention : Stranglehold of the Past or Lodestar for the Future", *Syracuse Journal of International Law and Commerce* Vol. 34, No.2, p.429, 2007.

5   See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en. Last visited on 7th November 2015.

on some of the above stated disputes. The Treaty Body has pronounced that legal capacity was not limited to the capacity to have rights but also the capacity to act. In recognizing the capacity to act, State Parties are not to conflate mental and legal capacity, and make the grant of legal capacity dependent upon the determination of mental capacity. Such conflation has been viewed as discriminatory as it singles out persons with intellectual and psychosocial disability. The Treaty Body has distinguished between support and substitution and required that substituted decision-making systems should be replaced with support systems. The General Comment has also examined the inter-sectional impact of the right to legal capacity and required that the capacity to act should be duly protected in all the varied contexts. Thus the realization of the right to health mandates that treatment be administered only with informed consent and procedures of compulsory institutionalization and care be phased out. Similarly, the right to franchise was held to be universally available and any denial of the right on the basis of mental capacity would be an impairment based exclusion which the Treaty Body ruled was impermissible on a joint reading of Articles 12 and 29.

A General Comment of a Treaty Body is an instrument of high persuasion as the reports of the States would be evaluated on the basis of the principles outlined in that comment. States would now need to engage with the General Comment in planning their implementation of Article 12[6]. In so far as India has made an unqualified ratification to CRPD and the process of harmonizing Indian law and policy is still work in progress, the need to test the Indian legislative proposals has long term usefulness. It is to that task that I now turn.

II Harmonizing Municipal Law with the CRPD

India started the process of bringing Indian law in harmony with the CRPD by starting the process of reforming the National Trust for Persons with (Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act 1999 (hereinafter NTA); the Mental Health Act 1987 (hereinafter MHA); and the Persons with Disabilities (Equality of Opportunities, Protection of

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[6] On the highly authoritative character of General Comments see http://www.institut-fuer-menschenrechte.de/en/topics/development/frequently-asked-questions/9-what-are-general-comments/ Last visited on 7th November 2015. For a collection of materials arguing against the non binding nature of General Comments see http://autonomy.essex.ac.uk/wp-content/uploads/2014/07/Legal-status-of-General-Comments-.pdf.

Rights and Full Participation) Act of 1995 (hereinafter PWDA). Even as the law reform effort on legal capacity was inaugurated with NTA[7], the initiative did not translate into a parliamentary proposal. The process of reforming the NTA remained a National Trust driven process, where the Trust engaged with its own Board and civil society stakeholders[8] but could not convince the Ministry to move the exercise to the next stage of transforming the deliberations into formal legislative amendments.

The task of reworking the MHA was handed over to a two member team of mental health and legal professionals. The team began by seeking to amend the MHA and then abandoned that exercise to propose a fresh legislation which after a series of stakeholder consultations was introduced in the upper house and immediately thereafter was sent to the Standing Committee. The Committee submitted its report in November 2013[9], however, except for an occasional mention in the legislative business of a session[10], no further steps towards the enactment of the legislation have taken place.

Like the MHA, the process of harmonizing the PWDA was also started by introducing amendments into the existing legislation. However, as it became apparent to the Ministry that and incremental steps would not suffice, they issued a Government Order whereby a cross sectoral committee was constituted with the mandate to produce a disability rights legislation which could be the primary vehicle of implementing the CRPD in the country. The Committee after large scale consultations through the length and breadth of the country submitted a draft legislation to the Ministry on 30th of June 2011. The Ministry examined this draft and then put out a modified version for comments in 2012. After a long period of silence a grossly altered version was sent to Cabinet for approval in December 2013[11]. However this Bill got leaked and the large scale changes between the people consulted draft and this version, caused protests to erupt all over the country. Despite the protests,

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7   See http://www.dnis.org/news.php?issue_id=8&volume_id=6&news_id=920&i=6. Last visited on 7th November 2015.

8   See http://www.disabilitystudiesnalsar.org/ntamendment.pdf where a copy of the National Trust for Persons with High Support Needs Amendment Bill 2011 can be found.

9   See http://www.prsindia.org/uploads/media/Mental%20Health/SCR%20Mental%20Health%20 Care%20 Bill,%202013.pdf.

10   See http://www.prsindia.org/parliamenttrack/parliament-updates/-parliament-session-alert-monsoon- 2015-3932/.

11   See http://www.legallyindia.com/201402064316/Constitutional-law/what-is-wrong-with-disabilities-bill-2013. Last visited on 7th November 2015.

the PWDB was introduced in the Rajya Sabha on 7th of February 2014 and was sent to the Standing Committee on Social Justice and Empowerment on 24th of February 2014. The Standing Committee could not complete the examination due to pronouncement of elections and the subsequent dissolution of the Lok Sabha. The Bill was re-referred to the Standing Committee on 16 September 2014 and it submitted its recommendations in May 2015[12]. Like the Mental Health Care Bill (hereinafter MHCB), the legislative future of this legislation also hangs in the balance.

The above narration shows that even as there has been legislative tumult on the issue of disability law reform generally, and legal capacity more particularly, the question of perspective and paradigm is yet to be settled. In the circumstances, it seems apposite to evaluate existing legislative proposals on the touchstone of the General Comment No 1. Such an examination should show the gap between the opinion of the Treaty Body and the proposed law in India - a discourse, which could help in making up the Indian legal mind on legal capacity.

A. The Mental Health Care Bill 2013 in place of MHA

This legislation was proposed to replace the MHA, which regulated the admission and discharge into psychiatric hospitals and nursing homes. The Act of 1987 permitted voluntary care but primarily made provision for compulsory care to psychiatric hospitals. Consequently, whilst it had provisions whereby the discharge of a voluntarily admitted patient could be compulsorily stopped[13], there was no provision to convert an involuntary admission into a voluntary one. In the main, the statute, redistributed the powers of admission between judicial officers and medical personnel. Thus all short term admissions were kept within the domain of medical personnel and indefinite long term admissions were approved by Magistrates (Dhanda 2000). Both short term and long term admissions could be made on therapeutic or social control grounds. The statute required rules to be promulgated laying down standards for care and treatment to be observed by psychiatric hospitals and nursing homes[14] but did not recognize a right to treatment.

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[12] See http://164.100.47.134/lsscommittee/Social%20Justice%20&%20Empowerment/16_Social_ Justice_And_Empowerment_15.pdf

[13] Section 18(3) of MHA.

[14] Section 94 (3) of MHA.

Similarly, a right to legal representation and aid was provided but where and how this right would be inducted in the procedure of admission was not provided[15]. The MHA was thus fulfilling the basic constitutional requirement of employing a legislative procedure to deprive the life and liberty of a person with mental illness; whether this procedure could also be considered fair, just and reasonable was an issue which did not receive direct judicial scrutiny; even as public interest actions questioning the constitutionality of specific provisions of the statute were filed in the apex court.

Notwithstanding these inadequacies of MHA, a new law was not being floated to address these deficiencies but as the preamble of the MHCB acknowledged, the Bill was being introduced as "it was necessary to align and harmonise the existing laws with the … Convention". The exercise was then carried out in accordance with how the expert team and the Ministry of Health understood the CRPD.

Conflation of Legal and Mental Capacity

Thus Clause 4(1) of MHCB declares that " (e)very person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental health care or treatment, ***if such person has ability to …***" And the remaining parts of the sub clause outline the key components, which are the ability to: understand the relevant information; retain it; use or weigh that information whilst making the mental health care and treatment decision and communicate the decision by any means or measure. The clause has placed the burden of establishing capacity on the person with mental illness. The Standing Committee took note of the disproportionate burden placed on the person with mental illness and on its suggestion the burden was reversed. Consequently, the clause was redrafted to provide that all persons including persons with mental illness shall be deemed to have capacity to make decisions with regard to his/her care and treatment unless the abovementioned lack of capacity is proved. The Standing Committee by reversing the burden has surely accorded a greater chance to a person with mental illness to assert capacity; however, the link between mental capacity and legal capacity has not been severed. Thus once absence of mental capacity is proved then the freedom to make one's own decisions is taken away[16].

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[15]   Section 91 of MHA.

[16]   Supra note 9 at pp 28-29.

What the Committee and the reworked section fail to appreciate is that information is processed according to each individual's world view on well-being. Thus a person's refusal to stay within a deadening job or a loveless marriage or to take a medication which produces debilitating symptoms could be seen as a failure to understand relevant information by someone for whom staying employed, married and drugged for improving health are non-negotiables However, if these conditions are not viewed as ends in themselves, then would a refusal to undertake initiatives which would save those ends, still be seen as failure to understand relevant information. Information is processed by each individual according to their life goals and if the goals of the test taken are different from those of the test giver, is it possible to arrive at a neutral judgment of competence. It is for this reason that General Comment No 1 has ruled against the conflation of mental and legal capacity. Even the amended clause 4(1) fails to make the required break between cognitive understanding and legal capacity.

Sub clause (2) requires information to be provided in accessible manner and (3) directs that the disagreement of the decision-maker with the decision taken by the allegedly mentally ill person "by itself shall not mean that the person does not have the capacity to make mental health care or treatment decision".

A finding of incompetence cannot be reached by solely relying on the nature of a decision but partial reliance on such decision is possible. It can, therefore, be concluded that Clause 4(2) only imposes a qualified prohibition on arriving at an outcome based on determination of incompetence.

Support or Substitution

The General Comment No 1 has asked States Parties to replace substitute decision-making with supported decision making. Clause 5 of MHCB allows the making of an advance directive in writing which specifies how a person wants or does not want to be treated for a mental illness. By clause 5 (3) a person can create a list of nominated representatives in order of preference. Persons can override a previously written advance directive provided they are possessed of competence to make care and treatment decisions. The advance directive need not apply in an emergency; it can be questioned by family or professionals who disagree with it. The burden of ensuring that a medical professional has access to an advance directive,when needed,is placed on the nominated representative;and the professional is indemnified

against any mishap which may happen by reason of adhering to the advance directive. Advance directives could qualify as support under Article 12(3) of the CRPD if they are designed as artefacts which advance the will and preference of persons with disabilities. In the MHCB design however, the will of the person with mental illness as expressed in the advance directives is continually subject to the best interest concerns of professionals and family subject to some mandatory scrutiny by the Board.

The second mode of providing support is set up by clause 14 of MHCB which states that every person who is not a minor has the right to appoint a nominated representative. Though the right has been granted to every person, the person nominated as representative is required to file a written consent with the concerned mental health professional to discharge all duties and perform all functions under the Act. In further collapse of support and substitution, when no nominated representative has been appointed, sub clause (3) of clause 14 provides a list of persons who in order of precedence shall play the role of nominated representative. The list begins with the person nominated as representative in the advance directive, and continues with relative; caregiver; an appointee of the Board and if no suitable person can be found under the above categories then as last resort and on temporary basis the Director of the Department of Social Welfare can function as the nominated representative. There is provision to change the nominated representative, when such change is required to protect the best interests of the mentally ill person. This best interest has to be determined by the various statutory authorities; and such best interest would at all times trump the will and preference of the person with mental illness.

Insofar as the MHCB has compounded a highly diluted mix of adult legal capacity with support, it is not surprising that the principle of evolving legal capacity for children is given a total go by. The MHCB appoints legal guardians of minors with mental illness as their nominated representative[17]. It is generally presumed that such natural guardians would protect the best interest of the child and the statutory duties of officialdom awaken, only if the guardian is not acting in the best interest of the minor[18].

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[17] Clause 15 (1) of MHCB.
[18] Clause 15 (2) of MHCB.

Right to Mental Health Care

In comparison to the MHA, various provisions of the MHCB provide for the care and treatment of mentally ill persons. MHCB does not envision treatment in institutional terms alone, therefore there are several provisions which place obligations on the government to make treatment facilities available in the community[19]. The statute does not limit access to health care in the government sector alone and persons needing treatment have been given the right to access such treatment on reimbursement basis from private establishments also.[20] The Insurance Development Authority has been directed to ensure equity in insurance between mental and physical illness[21].Whilst the bio-medical interventions of western psychiatry have been privileged, the option to access other systems of medicine, free of cost has also been recognized[22].

The legislation acknowledges the need to reduce institutionalized care[23] and seeks to promote voluntary accessing of facilities[24]; however, be it for danger to self or others or due to health and safety, the statute does not eliminate compulsory treatment[25]. It attempts to mitigate the force by putting in place elaborate procedures of review and appeal[26]. Oversight be it judicial, administrative or professional is at the end of the day a mode of substitute decision-making. It militates against the informed choice of the patient. General Comment No 1 has adopted an unequivocal stance on the question of compulsion and choice. All health interventions would necessarily have to be informed choices and any compulsory or involuntary treatment has been termed discriminatory, as it compels persons with mental illness to seek treatment against their will and preference. Insofar as the Treaty Body has perceived compulsory treatment as militating against both the right to legal capacity and the right to health, the endorsement of involuntary commitment puts MHCB at odds with the CRPD.

It would be apposite to point out, that all the above lacunae were brought

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[19]   See Cl. 18 (4) (d) of MHCB.

[20]   Cl. 18 (4) (f) of MHCB.

[21]   Cl. 21(2) of MHCB.

[22]   Cl. 18 (10) of MHCB.

[23]   Cl 19 of MHCB.

[24]   Cl. 94(2) of MHCB.

[25]   See for example Cls. 98, 109 and 110 of MHCB.

[26]   See Chapter XI of MHCB.

to the notice of the Standing Committee on health when it scrutinized the MHCB. The Committee as already mentioned has made some mitigation but these correctives are driven by the thinking of the old paradigm, the issue of prejudiced perception and the problems associated with substitution has not concerned the Committee. At present the MHCB is a legislation which is under consideration of Parliament. In the face of the above analysis, it is worth deliberating on what the government should do with a legislation which is evidently not going to fulfil the object with which it was introduced. I will return to this question after evaluating the Right to Persons with Disabilities Bill which is the other pending disability legislation addressing the question of legal capacity in Parliament.

B. Right to Persons with Disabilities Bill 2014 to Replace PWDA

The PWDA was the first disabilities rights law which was enacted in the country in 1995. It was a legislation which only made provision for the socio-economic rights of persons with disabilities and since questions of autonomy, choice and participation are often considered foreign to socio-economic rights, the matter of legal capacity has not been an issue in either the text or the jurisprudence of that legislation. Consequently, when the law reform process started the question of legal capacity was to be considered for the first time in a Disability Rights legislation. There were provisions disqualifying persons with disabilities from exercising legal capacity but they were generally found in other general legislations; and there were provisions surrounding guardianship in the MHA[27] and NTA[28].

As already mentioned, work on a CRPD consonant law had been on for nearly four years before the RPDB 2014 was introduced in Parliament. Since every new legislative effort seemed to have studied the previous one and selectively drawn from it, in order to explain the jigsaw of legal capacity and guardianship in the RPDB 2014, it is necessary to trace the growth of the concept from 2011 till date.

The 2011 Bill formulated by the Committee carried an unequivocal provision which declared that all persons with disabilities had legal capacity

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[27]   Section 52 of MHA.

[28]   Section 14 of NTA.

on an equal basis with others in all aspects of life[29]. This Bill also rendered unenforceable any legislation, rule, notification, order, byelaw , regulation, custom or practice which denied legal capacity to a person with disability[30]. In furtherance of Article 12(5) the right to legal capacity was stated to include the right to own or inherit property; manage financial affairs and seek loans, mortgages and other forms of financial credit[31]. Whilst persons with disability had the choice to access support[32]; the fact of seeking support could not be a basis for denying legal capacity[33]. Other provisions of the clause laid down the obligations of the support giver and the manner in which support was to be provided[34]. The question of easing out substituted decision-making was addressed by creating a legal fiction whereby all plenary guardianship were converted into limited guardianship[35]. This was a transitional strategy, which was aimed at reducing the restrictions of plenary guardianship, by allowing for a more participative protection till the requisite systems of support were created. Lastly the Bill of 2011 entitled a person with disability to approach the nearest court having jurisdiction, if deprived of their legal capacity[36]. The 2012 Bill retained all of the above but the provision which provided judicial redress on being denied legal capacity was deleted.

The PWDB of 2014 in swift flip deleted the provisions, which recognized the right to legal capacity; invalidated laws which denied legal capacity; and allowed accessing of support without losing legal capacity but retained the provision which permitted persons with disabilities to own property and manage financial affairs[37]. Protecting legal capacity along with provisioning of support was made a duty of the State not a right of the person with disabilities[38]. After deleting the provision which invalidated laws denying legal capacity how such capacity would be ensured is not explained.

The 2011 Bill created the fiction of limited guardianship to phase out plenary guardianship. The 2014 Bill made plenary and limited guardianship

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29   See Cl. 18(1) of RPDB 2011.
30   See Cl. 18(2) of RPDB 2011.
30   See Cl. 18(3) of RPDB 2011.
32   See Cl. 18 (4) of RPDB 2011.
33   See Cl. 18 (5) of RPDB 2011.
34   See Cl. 18 (7) of RPDB 2011.
35   See Cl. 19(1) of RPDB 2011.
36   See Cl. 21 of RPDB 2011.
37   See Cl. 12 (1) of RPDB 2014.
38   See Cl. 3 of RPDB 2014.

and support as interchangeable options and a person whose concerns could not be addressed through support could be offered limited or even plenary guardianship[39].

The manner in which legal capacity impacts on other rights has not been addressed by PWDB 2014. Thus the right to universal franchise has not been included in the clause on political rights and no right to marry has been pronounced in the clause on home and family. The right to legal capacity has been fought for and demanded in the CRPD in order to offset the capacity disqualifications subsisting in several laws especially against persons with intellectual and psychosocial disabilities. The right or rather the duty to ensure legal capacity has been incorporated in a half-hearted manner in PWDB 2014. This tentativeness is further magnified by the fact that clause 110 does not give overriding effect to this Act; as a result all disqualifications which subsist against persons with disabilities in other statutes such as Contracts Act or Indian Succession Act or Transfer of Property Act continue to occupy the field of legal capacity.

PWDB 2014 addresses the question of legal capacity along with other civil political and socio-economic rights. Be it in conflating mental and legal capacity or in perceiving support and substitution as interchangeable, the RPDB 2014 falls well short of the standard for Article 12 set out by the Treaty Body. Whilst the Parliamentary Standing Committee of Social Justice and Empowerment has asked the Ministry to reconsider the guardianship related provisions, it has endorsed the conversion of the right to legal capacity an obligation of the government, without asking how this obligation would be fulfilled. The impact of legal capacity on other rights was not addressed in the Bill but this absence was in no way noted by the Parliamentary Standing Committee.

III At the Crossroads of Municipal and International Law

This piece is only looking at the manner in which the mandate of universal legal capacity is being realized in Indian Municipal Law. The explanatory narrative shows that both legislations have flirted with the terminology used by the CRPD. Both have made claims of universal capacity but these claims have not been translated into change of approach. The impairment linked

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[39]   See Cl. 13 of RPDB 2014.

approach towards competence explains why both legislations incorporate clauses whereby substitution and best interests are saved. Freedom to seek treatment according to one's own lights is ostensibly provided by MHCB but even before the person can spell freedom, safeguards against its abuse have been built into the statute. The new paradigm speaks of the dignity of risk but both legislations reek of the fear of risk.

My reason for writing this piece is to ask: what now? It is evident that the legislations we are set to enact, in order to bring Indian law in harmony with the CRPD, are not in conformity with the CRPD. It is also true that the breaches in Indian law are no more than what have been found by the Treaty Body in the laws of several countries[40]. The Concluding Observations of the Treaty Body have asked an innumerable number of countries: to phase out substituted decision-making and usher in support; to keep mental and legal capacity distinct and separate because conflation would only usher in impairment based discrimination[41]. The General Comment No 1 celebrates informed consent and a prohibition of compulsory care. We have just about deposited our State Report in Geneva and it could well be 2017 before the Report is taken up.

In the circumstances should we as a country just assert State sovereignty and the non –binding nature of General Comment and continue with the old paradigm? Such a course of action, may at worst cause the Treaty Body to express concern about our legislative choices on legal capacity and ask the country to make changes in our law so that it is in conformity with General Comment No 1. We could at that time, obtain that extra time from the Committee and either act according to its dictates or assert the primacy of our own position. It is possible for us to brazen our way out, but should we?

This question can be answered from the standpoint of positivist International Law or Disability Human Rights law. As positivists, we can be Statists and point to the text allowing substitution in article 12(4) and disagree with the General Comment. However as Disability Human Rights lawyers we would be required to acknowledge that persons with disabilities and their organizations have been the driving force of this Convention. The right to participate and the right to be consulted as captured in the nothing

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40   See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch. aspx?Lang=en&TreatyID=4&DocTypeID=5

41   Ibid.

about us slogan has been their non-negotiable ethic through every stage of adopting the CRPD. Can a claim for substitution be ever supported by such a Convention? Even if a case is to be made for substitution, would it be in accord with the principles and values of this Convention to do so on the strength of positivist authoritarian logic? And if that route is not to be taken, then can engagement happen without dialogue?

Both the above legislations were drafted before the General Comment was settled[42]. Both legislations are still pending in Parliament; hence there is both time and opportunity to review and revisit. A case for review is also made out by the fact that there are proposals in the Indian legislative archives which are more in consonance with the Treaty Body's interpretation of Article 12. Also the Parliamentary Standing Committee on Social Justice and Empowerment has asked for the guardianship provisions to be reexamined. A case for reconsideration thus arises from both Municipal and International Law.

IV   Revisiting Abandoned Legislative Proposals

In this section I wish to dwell on those legislative proposals which were proposed but abandoned without any real deliberation. In so far as they are closer to the direction in which the treaty body is pushing the jurisprudence of legal capacity, another look at them, in this time of legislative limbo, may provide useful input to the forthcoming Parliamentary debate. Further it is hoped that an elaboration of these embryonic proposals may help push the boundaries of legal imagination.

A. Creating a Pathway to Support

In this section, I wish to put forth the various legislative options around support and the principles and policy reasoning which informed each of them.

Need for Transitional Spaces

The Treaty Body whilst considering the reports of several countries asked them to move from substitution to support. The countries that have formalized Guardianship Systems, very often have no other form of

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[42]   Though the Standing Committee on RPDB 2014 examined the legislation after General Comment No 1 was adopted.

support. In that situation to ask for phasing out of Guardianship, without having anything to take its place arouses understandable anxiety in parents and caregivers. It is therefore appropriate to think of staggered achievement, which I contend is distinct and different from progressive realization. The procedure of staggered achievement would require that we firstly add elements of support in existing substitution arrangements and thereby prepare the players to the impending altered relationship. The RPDB 2011 strategy of converting plenary guardianship into limited guardianship whilst preparing alternatives was a case in point.

Range of Legal Artefacts of Support

The other mechanism which can be employed to wean persons from support to substitution is to familiarize them with various legal artefacts of support and put in place facilitative procedures by which people can be pointed to the legal mechanisms of support. One such option was created in the NTA as part of the legal capacity reform process. The NTA carried a schedule which listed out a range of legal supports such as power of attorney; advance directive ; personal assistant; business agent etc. The schedule also elaborated upon the utility of each kind of support; advised on the advantages and disadvantages of registering the support agreement; and offered registration services. However the task of choosing the support subsequent to advice was with the person with disability. Registration was not compulsory though the statute required that persons with disabilities should be advised of the benefits[43].The purpose of inducting this provision was to create a menu card of legal support; familiarize people with the utility of each kind of support and accustom them to making choices. Whilst the legal artefacts were created by statute, the choice of using them and by what procedure was left to the person requisitioning the support. This provision was an effort at operationalizing Article 12(3) whereby the State by statute listed a series of supports but the choice of using or not using them was left to the people.

National Support Mission

There has been a disproportionate celebration of the independent human which has made dependency a lesser condition. The paradigm of

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[43]   The National Trust asked me as the Head of the Center for Disability Studies to examine how the NTA would need to be amended in order to bring it in harmony with the CRPD. We produced around six drafts for the Trust and some of these innovations were made by us in these drafts.

universal capacity with support floated by article 12 has been premised on human interdependence. In order to undertake dedicate awareness raising and network creation the NTA reform process had come up with the idea of establishing a National Support Mission. This institutional option was considered to be incorporated in the NTA to proactively draw upon the intersectionality of disability to create supportive communities. The idea was to see the universal presence of vulnerability as a resource to create mutually needed support. The Mission was to function under the auspices of the National Trust with the express obligation of creating conditions which allows for the organic growth of supportive environments.

B. Creating Non- Medical and Non Institutional Alternatives to Mental Health Care

General Comment No 1 seeks compulsory care to be prohibited and mental health care and treatment to be provided with informed consent. Pharmacological interventions and institutional detentions can be made against the will of a person. However non-medical interventions cannot happen without the active participation of the person seeking healing. Community support, peer to peer counselling, Family therapy cannot happen without for forming relationships of love and trust which cannot be forced. One of the suggestions for enhancing the voluntary component in mental health care and treatment was to build non-medical mental health interventions as first choice as also the relocation option for persons with psychosocial disabilities.

All of the above were live proposals. Some of them even made it into formal legal text. However since they were out of box proposals they were often either reflex rejected or misunderstood. This revisit has been made because I do think that these proposals, and others like them, could be part of the solution to launch the new paradigm of legal capacity.

V   Conclusion

In the first place this piece sought for a re-examination of the law on legal capacity only so that the Indian State makes the necessary move to harmonize Indian laws on legal capacity with the CRPD and thereby fulfil its international commitments. Without dismissing the significance of this positivist duty, this article is not asking for a reconsideration of the proposed legislations for that reason alone. This change needs to happen, because the demand for a change in the law on legal capacity and compulsory

commitment, has come from people who have been unwilling recipients of this beneficence. This demand has been made as the right to legal capacity is essential to persons with disabilities to set up their claim for disability human rights.

The jurisprudence of human rights is a jurisprudence of countervailing power. By retaining the institution of guardianship and compulsory care, the law in the name of best interest of vulnerable populations enhanced the authority of the State, the professional and the family. Even as each of these agencies have benefitted persons with disabilities in particular episodes or individual cases; the general rule and its operation is what disability rights is questioning. The CRPD Treaty Body has spoken for this excluded population when it asked for the ouster of substituted decision making; compulsory care and Impairment based discrimination.

Even as the law on its own may not be a vehicle of care; it can be an effective barrier to it. The inadequacies of the mental health system and the legal system may minimize the damage caused by both these systems; however, this controlled damage is not by plan but by chance. I am in this piece asking for a stepping back by the State, professionals and the family, by plan, and not by chance. Let a menu card of large number of services be created; but the freedom to access these services should at all time be with the so called beneficiary of the service. This can only happen if the law recognizes the universal legal capacity of all persons. The recognition of capacity or informed consent should not be viewed as license for neglect if that consent is difficult coming in particular cases. The absence of legal procedure cannot curb the humanitarian impulse; but compulsory care may rob care of its core kernel.

The Committee has invited State Parties to construct regimes of care, which are built on respect and dignity. In India, as the previous section showed, work has been undertaken on both imaginative services and innovative legal artefacts. The issuance of General Comment No 1 and the legislative limbo should be used to seize opportunity to throw doors closed by ignorance and prejudice. A timid beaten-track solution as enacted in the two legislations would be a betrayal of the very disability human rights the country has pledged to honour.

This article argues that India as a leading third world country should steady the wavering mind and work towards the inclusion of persons with

disabilities in both letter and spirit. Rightful thought has to precede rightful action and this tenet as much applies to States as to individuals. We should not close our discussion on legal capacity till such time that we have not deliberated on the matter with an open mind.

Striving for Governance Reform : The Need for Realigning Social Protection and Security Interventions for Persons with Disabilities in India

Deepa Sonpal*

Abstract

Living on the brink of profound exclusion, persons with disabilities require the support of social protection and social security measures to lead a dignified life. Persons with disabilities comprise of 15 per cent of the world's population as per the World Report on Disability 2011 (WHO). In India the estimates vary with about 2 per cent as stated by the Census and NSSO. The recent World Social Protection Report on Building Economic Recovery, Inclusive Development, and Social Justice 2014-15 (ILO), claims that only 27 per cent of the world's population enjoys access to full social protection and the coverage in India is likely to be even lower. Persons with disabilities are poorest of the poor and disability is both a consequence and cause of poverty. Poverty, low levels of literacy, barriers in the environment – socio-cultural, economic, and physical, limit access of social protection and social security services restricting the contribution of persons with disabilities in the development process. Hence, the policy environment along with the governance mechanisms need to be reformed so that persons with disabilities are able to lead a life on an equal basis with others as envisaged in the path breaking United Nations Convention on Rights of Persons with Disabilities (UNCRPD). Drawing on examples from field level interventions this article aims to emphasise on policy related as well as implementation level measures for reforming governance mechanisms to enable access of persons with disabilities to entitlements and rights.

Context

Enshrining equal citizenship rights constitutionally, enables the discriminated to seek recognition and justice, if, they have been so empowered

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to do so by exercising their self determination. Persons with disabilities have a long road to travel in this direction as there are inconsistencies related to the prevalence, extent and types of disabilities in the country leading to a denial of their rights as citizens. Poverty is found to be both a cause and consequence of disability worldwide; persons with disabilities account for one fifth of the global poor (Yeo 1995, Elvan 1999, DFID 2000). Development literature has illustrated the close links between poverty and disability and of these being cynical in nature. Extreme vulnerability and ill-health, as a result of poor access to nutritional and health services results in disease, impairment and disability, leading to low productivity and low participation in economic, social and political development process. This setting in of [exclusionary] process are a vicious cycle, not only exacerbating poverty but leads to further marginalisation and exclusion.

There are three official sources of nationwide disability statistics. - The Indian Census 2001, Government of India (GOI) estimates disability prevalence to be 2.13 per cent (21.91 million). The 58th round of the National Sample Survey Organisation (NSSO) 2002, estimates 1.8 per cent of the populations to be affected by disability. The recent Census 2011 indicates a marginal increase of 2.21 per cent. Alternate estimates from a variety of sources suggest a wide range from 4-8 per cent (World Bank 2007). The World Report on Disability however claims that 15 per cent of the population is affected by some form of disability with about 80 per cent residing in developing countries (WHO 2011). The recent Socio Economic and Caste Census (SECC) 2011 claims that 6.09 per cent of households comprise of persons with disabilities. The variance in enumeration is often due to limited understanding of disability definitions used for the purpose of enumeration, limited awareness and skill sets of the enumerators, social stigma attributed to disability and low awareness as to the need for data and statistics. The differences in enumeration of disability can be attributed to the reluctance of dominant forces in keeping [perpetuating] the invisibility of persons with disabilities, as employing appropriate counting measures will provide the required information and knowledge base for further policy research (Gill 2007) .

A large number of disabilities in India are preventable but a large proportion of children suffer from malnutrition. The NFHS-3 survey indicates that almost half of the children under age five are too short for their age, 20 per cent are too thin for their height and 43 per cent are under

weight due to chronic malnutrition. Access to health care during pregnancy and early child care is poor as three out of every five births in India takes place at home. In the three year preceding the National Family Health Survey-2, conducted by the central Ministry of Health and Family Welfare, 35 per cent of pregnant women received no antenatal care. Full immunisation coverage has declined from 59.2 to 48.5 per cent in 5 years. Access to delivery of health services remains an issue of concern due to reasons of awareness, attitude, physical access and poverty. The need for health services by persons with disabilities is much higher than non-disabled as they also tend to incur much higher expenditure. The arena of mental health is greatly neglected, both in terms of policy and implementation and there is very little data available on this issue. Despite a proliferation of health insurance agencies in the market, persons with disabilities technically do not get coverage under any kind of insurance schemes in the country.

As is with any other oppressed groups, educational status is one of the indicators that reflects or is one of the means to assess their status and empowerment. The share of out of school of children with disabilities is five and a half times the general rate (World Bank 2007) and in most cases are rarely able to complete primary education despite the focus on enrolment of children, under the agenda set in the Millennium Development Goals (MDGs) and as stated in the Right to Education Act, 2009 and its amendments specifically to include children with disabilities, inclusive education is a dream yet to be realised for children with disabilities. The World Bank Report, 2007, clearly identifies that this is due to several barriers of inter-agency/inter-departmental co-ordination like the Ministry of Human Resource Development as they are responsible for the education of children while the Ministry of Social Justice and Empowerment looks into the education of children with disabilities. The Rehabilitation Council of India, responsible for special education and the general teacher training systems is ineffective. The physical accessibility from home to school is a barrier, especially in rural areas as there may not be proper roads. Even if the children do manage to reach school, the premises are not barrier free with no accessible toilets, water points, trained teachers and learning material. The prevailing attitudes of the teachers as well as that of the parents and community members are particularly not encouraging towards inclusive education.

The level of education is directly related to employment, with poor educational background there will in any case be limited opportunities for

employment. Persons with disabilities are excluded from the labour market. Estimates from the 58th round of the NSSO surveys showed that only 26.3 per cent of disabled persons were employed in economic activities, saying nothing of the nature or conditions of employment (Mander 2014). The World Bank report 2007 and the WHO report 2011 has clearly stated that a large number of persons with disabilities are capable of productive employment with the support of aids and appliances. The employment rate is 60 per cent lower, on an average, than the general non-disabled population. There is a decline in the employment rate from 42.7 per cent in 1991 to 37 per cent in 2002 as reported by the NSSO survey as in the 58th round. The general prevailing attitude in society being that persons with disabilities are unproductive; hence they are compelled to stay at home and are not exposed to employment opportunities. In fact, often, it has been found that one another member of the household stays back at home to take care of the 'sick' or person with a disability. This adds to the double burden cost of disability. Despite a three per cent reservation on all public employments, only certain stereotyped jobs have been identified as suitable for employment leaving only 0.44 per cent of posts filled (World Bank 2007). Employment reservation in the government sector is applicable for only three types of disabilities – locomotor, hearing and visual impairments. The other types of disabilities however remain discriminated and excluded.

The intersectionality of caste, class and religious ethnicity, in the Indian society, further creates a nexus of an oppressive structure. This particularly affects the status, conditions and positions of women with disabilities as they experience triple burden on the basis of gender, disability and developing country status (Thomas 2003). Women in Indian society hold a subservient position and are victims of violence and discriminations. This is evident in the unequal sex ratio which is 933:1000 live births (Census 2011); low preference for girl child as is evident in the practice of female foeticide and infanticide. The health and nutrition of women is low and women and girl child experience discrimination with regard to sharing of food in the family and access to health services. In this scenario a girl child with disability is likely to face more discrimination in comparison to a boy with disability. In many cases the parents even admit that if a girl child with disability is fed less she would die sooner (Mehrortra 2004).

More men with disabilities are married and are able to find non-disabled partners while women with disabilities are more often single or married to

another person with a disability from a lower family status (Unnati 2004). Most often girls with disabilities are married in the same household as her sister to a consecutive brother or even to the same man as marriage are likely to protect her sexuality (Mehrotra 2004). Persons with disabilities are often not seen as normal human beings and are considered sexually incompetent, especially, women with disabilities are considered incapable of leading a normal family life and bringing up children. Disability after marriage, for a woman, leads to conflict and in many cases she is a victim of abuse and domestic violence despite working hard. A disabled woman from a lower class and caste background is likely to be more affected as being landless; the main occupation is agricultural labour and cattle rearing which require considerable physical work (Mehrotra 2004).

Globally, women make up three-fourth of the persons with disabilities in low and middle income countries and between 65-70 per cent of these live in rural areas (Thomas 2003). Conversely, the International Labour Organisation states that women are at an increased risk of becoming disabled through their lives due to neglect in health care, poor working conditions and gender based violence. However, there is very little research carried out in developing countries to understand the conditions of women with disabilities.

In a patriarchal society like India many of the gender related issues faced by women are also experienced by women with disabilities. The UNDP Human Development Report 1995 states that women with disabilities are twice as prone to divorce, separation and violence as non-disabled women. Women with disabilities especially with intellectual disabilities are more prone to sexual violence. It has also been frequently reported that hysterectomies are forcefully conducted on young adolescent girls by families and in government run institution to save them from unwanted pregnancies besides varied forms of violence inflicted on them. This has been clearly reported in the report prepared by Women with Disabilities Network in India and submitted to the CEDAW Committee in 2014. It has been observed that women with disabilities are not able to access the benefits of government services like health, education and vocational training due to their immobility. But they are also refrained from taking the benefits of rehabilitation programmes even if these are delivered at their doorstep through community based rehabilitation services if the CBR worker happens to be males (Thomas 2003).

Having flagged off the variety and complexities of issues faced by

persons/ women with disabilities, the next section elaborates the nexus of disability and social protection and social security while emphasising on its need and relevance.

Disability, Social Protection and Social Security

The recent World Social Protection Report on Building Economic Recovery, Inclusive Development, and Social Justice 2014-15, published by the International Labour Organisation (ILO), lays emphasis on social protection and security for realising the human rights, to reduce poverty, inequality and injustice for discrimination and promoting inclusive growth/ development. Limited access to social protection and security are a major barrier to economic and social development. Only 27 per cent of the world's population enjoys access to full social protection. Persistent low coverage of these benefits, especially among persons with disabilities, results in restricting their engagement as productive/ contributing members of society. Hence, the policy environment should aim at engaging the maximum number of persons with disabilities in gainful and sustainable employment. With globalisation and shrinkage in formal economies, largely, the unskilled or semi-skilled populations are caught up in the informal sector with limited guarantee to gainful employment and livelihood. Moreover with the State abdicating its role and responsibilities of a welfare state in the wake of globalisation vulnerable groups that includes persons with disabilities are left either to the mercy of society or market forces (Hiranandani and Sonpal 2010).

Social protection and social security have been granted in the Universal Declaration on Human Rights (1948) and other international legal instruments to enable human beings lead a life of dignity. Several UN Declarations have vested the responsibility to all States/ nations to extend social protection and social security to vulnerable population as a matter of right – to provide benefits in cash or in kind, to meet any exigencies that may arise due to insufficient income caused by sickness, disability, maternity, employment, injury, unemployment, old age, or death of a family member, access to affordable health care, insufficient family support, particularly for children and adult dependants giving rise to poverty and social exclusion (ILO 2014).

As contextualized in the previous section, it is seminally important that persons with disabilities are extended social protection and social security being the most vulnerable among the excluded. No nation can progress without investing in and enabling the vulnerable population access their entitlements

and rights. Amartya Sen in his argument for fairness and justice for persons with disabilities emphasises on the two types of handicap that is related to disability. One is the 'earning handicap' as a person with a disability may find it harder to get employment and may also receive a lower compensation. They may also be engaged in an employment not suited to or much below their level of skill and qualification. The other is the 'conversion handicap' as to live in some way or do the same things as a non-disabled, person with a disability may need more income – the disadvantage of converting money into a good living – like buying essential support services.

Understanding the historical processes to the approaches and models practiced for disability integration globally will be useful in shaping interventions and development of programmes and schemes. After World War II under the domains of a welfare state, the Medical Model/ Charity Model grew to address disability and informed policy decisions. Till date the impressions of this model is deeply embedded in our society. The emphasis in this is on service provision and rehabilitation, the basic premise being to treat the 'disease state' or the 'problem' requiring medical intervention in the form of treatments, cure and rehabilitation. Persons with an impairment is viewed as [abnormal], as a [patient] and as a dependent [object] requiring special medical help, care and at times segregation into special institutions [asylum], with the support of medical professionals to restore them back to [normal] functioning (Albert 2004).

The recent discourse on the Social Model, emerged as a critique, that considers disability as a social construct and a human rights issue. It is the interplay of social, cultural, economic, political and environmental factors that act as a [barrier] to the impairment, requiring change. Disability is thus not a pathological or health phenomena but about [discrimination] and exclusion (Albert 2004). This model, in any way, does not reject the requirement of the role played by rehabilitation intervention – prevention, cure, treatment, aids and appliances, access to basic social services (education, employment, transport) and barrier free built environment, but considers these as a basic right of all human beings.

Lately, the understanding on disability centres around the International classification of Impairments, Disability and Handicaps (ICIDH-1 and ICIDH-2) and the International Classification of Functioning, Disability and Health (ICF-WHO 2001) advocated by the WHO. This definition aims

to integrate the medical and social model and is sometimes termed as the [biopsychosocial] model of disability (World Bank 2007). This model begins with a health condition that gives rise to an impairment leading to activity limitation, consequently affecting the ability to participate due to barriers. Disability can be broken up into three components as is commonly used in applied disability research: impairments like visual, hearing, speech, mental and paralysis focuses on the intrinsic limitations; functional limitations refers to difficulties experienced in undertaking personal activities with bodily functions like seeing, walking, speaking, lifting irrespective of an impairment and; activity limitations are those that are experienced while carrying out activities of daily living such as bathing, dressing and participation limitations like going out to work, school, play or shopping (Mitra 2006). These two, impairment and functional limitations are consistent with the medical model and activity limitations relates to the social model. The definition of disability adopted informs all policy matters and decisions influencing practice.

The UN Convention on the Rights of Persons with Disabilities (CRPD) adopted in 2007 that is both path breaking and progressive offers the human rights perspective to disability. It defines disability as an 'evolving concept'. It clearly departs from the medical model to the social model as it recognises that disability arises as a result of the interaction of the impairment of the person with the various barriers that exist in society. 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (UNCRPD 2007). Being profoundly excluded efforts are required to be made by all stakeholders to reform governing systems and structures to guarantee social protection and social security to persons with disabilities for effective participation on an equal basis with others. Social protection plays a key role in meeting the specific basic needs of persons with disabilities that are gender sensitive – addressing income security, health, education, employment without discrimination on the basis of disability on equal basis with others thereby paying the way for social inclusion (CRPD 2007, ILO 2014). These guarantees could be provided through schemes in cash and kind and as non contributory and contributory schemes. All efforts must be made to offer employability of persons with disabilities gainfully and productively to live a life of dignity.

Actions with concrete and concerted efforts are required for

harmonisation of all laws and policies with the spirit and vision enshrined in the CRPD. Building a responsive bureaucracy for timely and effective delivery of services with a more compassionate and humanitarian outlook. Along with these facilitating civil society's role in building an enabling environment for accommodating diversity and invoking self representation for exercising agency by persons with disabilities.

Enabling Governance Reform

Drawing on examples from field level interventions, this article aims to suggest policy related as well as implementation level measures for reforming governance mechanisms to enable access of persons with disabilities to entitlements and rights that include social protection and social security. This piece is to be treated as one that is intended to provoke appropriate attitude, behaviour change on the part of each stakeholder in a reflexive process. Without our collective strength, individually, we are powerless and will not reach our objective of enabling persons with disabilities to live a life of dignity, where we respect ourselves and also demand/ command respect from others by fulfilling our duties and responsibilities as citizens. It is important to note here that disability is a cross cutting issue and anyone may be affected by it at any time of life, across all sections of society. Hence, it is also a cross cutting issue.

1.   Robust Legal Instruments

It is only after about 50 years of independence that a first progressive Act for providing equal opportunities for persons with disabilities was enacted called The Persons with Disabilities (Equal Opportunities, Protections of Rights and Full Participation) Act, 1995. Grounded in the medical model it has articulated seven major kinds of disabilities – blindness, low vision, leprosy cured, hearing impairment, locomotor disability, mental retardation and mental illness and the focus of the Act is on rehabilitation and obtaining entitlements. The Act is limited as it does not clearly define the concept of discrimination on the basis of disability and lacks monitoring mechanisms of enforcement that lead to an offence in case of non-implementation.

The Act however does mention that there is three per cent reservation in employment for certain disabilities and in all government schemes but without any enforcement mechanisms. As a result no attempt is specifically made by the state to reach out. For the private sector there is no quota system

that is followed, but the PWD Act 1995 provides space for an incentive policy. There are some examples of companies showing better performance where persons with disabilities (Mitra 2006, Unnati 2011) have been employed. The link between the national network and special employment exchange and private establishments is poor as a result of which the job placement ratio is low. The National Handicapped Finance and Development Corporation were established in 1997 but till 2005 it had managed to support less than 20,000 individuals (World Bank 2007). The limiting factors being low awareness and long gap in the loan disbursement procedure. The Vocational Training Centre offers stereotype options and no effort is made to update the skills in lieu of the changing demands. NGOs are entering the arena of imparting vocational training with no accreditation process being followed.

The implementation of this Act in the country is weak as there is no enforcement mechanism articulated and there is no designated enforcement authority appointed with adequate powers. The State and the Central Offices of Commissioner for Disabilities, based under the Ministry of Social Justice and Empowerment (MSJE) has quasi-judicial powers and very often tend to negotiate between parties for settlements of cases registered. Often the appointment of commissioners is a non-disabled person with an additional charge. In policy formulation and implementation persons with disabilities and their families have not been centrally involved. From 1998-2003 the total budget spending on the disability sector has ranged from 0.05 per cent to 0.07 per cent only (World Bank 2007).

The National Policy on Persons with Disabilities, 2005 has been approved by the central government. Although this too has been framed without the central involvement of persons with disabilities, it has progressive pointers for mainstreaming disability in education through the SarvaSikshaAbhiyan. As of now only a few states have formulated their disability policies. The other state still need to set their priorities for framing the state level policies on disability. Other constraints to implementation besides non-enforcement are low level of awareness, barriers in the environment for accessing the entitlements and attitude of the official. The resources and powers vested with the Ministry of Social Justice and Empowerment, as the nodal agency for implementing the Act, are limited as they are not in a position to co-ordinate implementations of certain sections of the Act without the support of other ministries. For special education and early identification it needs to work closely with other lead Ministries like the Ministry of Human Resource

Development and Women and Child Development (World Bank 2007).

Several other Acts, like the National Trust for Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999 that aims to address issues of guardianship for these categories and creating an enabling environment; Mental Health Act, 1987 and; the Rehabilitation Council of India Act, 1992 that aims to train manpower to provide rehabilitation services are also additionally operational. Advocacy is required to evolve/develop a comprehensive definition of disability including all types and with an overriding Act encompassing all the above Acts mentioned above, based on the principles of the social model, with clear modalities of implementation with the central involvement of disabled people's organisation (DPOs). DPOs must also work towards the enforcement and implementation of the CRPD (Unnati 2014). As India has ratified the UNCRPD in 2008 ensuring its implementation becomes all the more essential, not only for restoration of human dignity for persons with disabilities but also if the goals set in the MDGs is to be realised. The Convention specifically defines terms like discrimination on the basis of disability and offers justice on an equal basis with others. It also defines universal design covering the barriers in communication, technology, access to information and built environment. The concept of 'reasonable accommodation' has been introduced to address the specific needs of persons with all types of disabilities.

As part of harmonisation of all laws and policies in the country since 2010 a process of revisiting the PWD Act, 1995 was initiated after the ratification. As amendments to the old Act seemed impossible the process of formation of a new law on disability was initiated by the nodal department of MSJE and a draft law was prepared by 2011. Ironically and painfully so, the low emphasis on social protection and social security of persons with disabilities, in all the series of consultations on the Rights of Persons with Disabilities Bill, be it the 2011 version, drafted by the so-called expert committee on disability, or the 2012 version uploaded by the MSJE or the 2013 version that was placed in the parliament, sets one thinking as to what would be the fate of the large numbers of persons with disabilities residing in rural areas and rural areas of our country (Sonpal 2014).

The section on social protection in the Rights of Persons with Disabilities Bill, 2014 (RPDB) and make it the basis of strengthening the disability community, for it is the collective, comprising of all types of

persons with disabilities that need to be emancipated as a lot. A few powerful and well placed individuals with disabilities may leave a mark in history, but they are not in a position to change the face/ fate of the majority. More and more emphasis needs to be put on how to enable uneducated, semi-literate, and low-skilled persons with disabilities become part of the mainstream development process (Unnati 2008); (Sonpal 2014). It needs to be continuously explored how the skills of such individuals could be harnessed to make them contributing members of our society that would reduce the poverty gaps and promote inclusive growth. The CRPD is a strong human rights treaty that particularly aims to protect the human rights of all persons with disabilities. It is up to individual country representatives and disability rights advocates to dive deep into the existing conditions and lived realities of persons with disabilities, living in remote regions of the country, and then frame policies that will collectively emancipate us as a community.

Effective strategies need to be devised to systematically undertaken research that inform policy formulations. Advocacy also needs to be carried out so that existing policies can be implemented as the convention on the Elimination on of all Forms of Discrimination Against Women (CEDAW) has adopted the General Recommendation No. 18 on women with disabilities, requesting State Parties, to include reports on violation of rights for women with disabilities, but sample survey of periodic reports shows little consistent reporting on discrimination experienced by women with disabilities (Ilagan 2003). Incidentally, both the 2012 and 2014 versions of the RPDB have eliminated the section on women with disabilities under the garb that persons with disabilities comprise of women with disabilities also. If such was the case then there would not have been several anti-discriminatory legislations for women in general. As legislations related to women rights and disability rights have been enacted prior to the CRPD specific mention is called for in the RPDB.

2.   Reforming Bureaucracy to Offer Quality and Timely Services

There are several schemes that were formed after the enactment of the PWD Act, 1995. To avail the benefit of any specific scheme under this Act, a person with a disability needs to produce a disability certificate after undergoing a medical examination declaring that the person has 40 per cent disability. This benchmark has been drawn from the medical model with the rationale that benefits need to go to the marginalised. After the

disability certificate is obtained from the concerned authority, an Identity Card/ bus pass needs to be obtained from the Social Defence Department after submission of a series of other documents like Income Certificate or production of Below Poverty Line Score Card (0 – 16 or 0-28) as determined by the BPL Census 2002. Processes for schemes like scholarships, pension, loans, railway concession, are done separately and it is a Herculean task for a person with a disability due to several barriers in the environment discussed in the previous sections. First of all, reaching the camp or the nearest PHC for disability certificate is very difficult. Hence, often persons with disabilities are confined to the home deprived of any services. Several other bottlenecks are experienced in completing the procedures that are handled by officials who have no idea what disability is or the suffering and pain experienced by persons with different types of disabilities.

Simple tasks may become complex due to barriers and the family members tend to get tired or hopeless and leave it to fate or destiny. The procedures need to be simplified with a human face and sensitivity of officials needs to increase manifold. If the process of obtaining benefits of any scheme is prepared correlating the *'de facto'* as stated in the scheme and matched with the *'de jure'* process one could see that there are innumerable obstacles that need to be overcome. Any PHC has the authority to provide a disability certificate for obvious disabilities. But often the PHC doctors do not feel confident or do not want to take the risk of issuing a disability certificate. The next option is to go to a camp organised by the Civil Hospital. In Gujarat these are organised block/taluka wise. Most often due to low awareness people do not come to the camp. Transporting persons with disabilities to the camp site is very difficult and support needs to be provided. It must be ensured that all specialists are available at the camp. Often due to low literacy levels the persons with disabilities and their families may forget to get the passport size photograph or the BPL card that includes the name of the person with disability as member. Persons with hearing impaired an audiogram is required to be done before issuing a disability certificate. The facility of this machine is most often not available even at the district level and is available only at the State level civil hospital as it requires a sound proof room as well as the services of an audiologist.

Hence, first and foremost a protocol needs to be developed for issuing disability certificates through decentralised mechanisms where the administration makes efforts to reach out to the persons with disability at their

doorstep. Some suggestions have been outlined for issuing of the disability certificate, identity card and implementation/modification of schemes in Gujarat that may serve as an example to other States.

For Certification:

1. Conducting trainings on early identification of disability for service providers at village/panchayat/taluka and district level – anganwadi workers, ASHA workers, ANMs and other health functionaries specifically on ABC (attitude, behaviour, change).

2. Issuing a circular to all PHCs in the State/district to provide transportation support to persons with disabilities and their escorts (one accompanying persons in case of adults and 2 in case of children below 12 years). Either the vehicle used by the PHC doctor or by a vehicle should be hired from the Samiti (Rogi Kalyan Samiti or Village Health, Sanitation and Nutrition Samiti) fund to reach the nearest CHC on the day of the camp. The charges related to vehicle expenses may be as per the government norms. Alternately, the use of mobile vans/ ambulance services for medical, fire and police services – 108 could be used for escorting persons with disabilities and their escorts from the village/ panchayat to the PHC/ CHC.

3. Provisioning for offering appropriate incentives to the surgeons for issuing disability certificate to encourage certification at the earliest.

4. Outlining the role of the CHC for preparing and providing support to the visiting specialists before and during the camp and following up on patients requiring surgery/ treatment after the camp. Setting up of an audiometric room with a full time audiologist at the District Civil Hospital for facilitating assessment of persons with hearing impairment. This provision is to be made and announced for at least twice a month so that persons with hearing impairment could be certified.

For Issuing Identity Cards:

1. Arrangements for issuing the identity card by the Department of Social Defence need to be made on the day of the camp itself. The team should bring along a webcam and computer so that persons with disabilities do not have to produce photographs of various sizes (passport size for disability certificate and stamp size and postcard size for identity card).

2. A separate photo (stamp size as well as full body size) needs to be submitted for issuing identity cards by the SDO. As the disability certificate already has a photograph, this provision may be revised as the rural communities find it very difficult to get photos of different sizes. Perhaps the standard passport size could be maintained

3. The test for blood group for issuing an identity card must be conducted on the day of the camp as all PHCs are not equipped with a lab technician and this would save one round travel for persons with disabilities or this could be made optional.

4. The column for providing a bank account number needs to be made optional as a bank account is required only for those who may be receiving the benefit of a scheme like pension. On the day of the camp additional services of a banking correspondent (BC) as well as aadhar cards could be set up to facilitate ease and promoting single window service.

5. Arranging for taluka/block level camps for distributing aids and appliances for identified persons by various agencies and Social Defence department.

Suggestions for Implementation of Schemes:

1. Currently the pension scheme for persons with disabilities requires a BPL score of 0-16 with 80% disability in Gujarat. As persons with disabilities are profoundly excluded, it is suggested that the income limit of ₹ 2,50,000 per year may be considered as an criteria to any person with a disability certificate of 40%.

2. It may be considered to revise the pension amount per month to ₹ 1,000 per month as is in some States.

3. Simplify process of obtaining disability certificate and a host of other cards with a single card for eligibility criteria that would be valid throughout the country.

4. There is a clause that a training or experience certificate is required for the scheme on aids and appliances in Gujarat. As most persons with disabilities remain to be certified perhaps this clause needs to be reworked to enable persons with disabilities be productively engaged.

5. There is a GR dated 19.07.2003 issued by the Department of Food

and Civil Supplies in Gujarat that says that persons with disabilities are eligible to obtain the benefit of *Antodaya Anna Yojana.* In this scheme, persons with disabilities with a disability certificate are entitled to 35 kilograms of ration every month at subsidised rate from the Fair Price Shops (FPS) at the village level. But as the percentage has not been specified, at the implementation level, in Gujarat, in some talukas/ block it is issued on 80 per cent disability and in some talukas/block it is issued on 40 per cent disability. The percent of disability needs to be clarified and communicated up to the taluka/block level as often while implementation ambiguities cause inconsistencies and is left to the discretion of the official or sanctioning authority.

6.   The MSJE is the nodal Ministry for ensuring entitlements for persons with Disabilities. Hence this Ministry as well as the SJE departments at the State level could take the lead in providing a higher percentage benefit for all social security benefits for persons with disabilities to cover the cost of "conversion handicap", the extra cost incurred by persons with disabilities to access the services as explained in the previous section. Along with this specific focus needs to be provided for persons with disabilities within the schemes/benefits provided to schedule cast and schedule tribe and correspondingly disability and gender dis-aggregate data needs to be collected for each scheme to gauge who benefited and to what extent.

7.   Ensure that the offices of the Chief Commissioner as well as the Commissioners for persons with disabilities are accessible and that it is a post held by a person with a disability. This office should reach out to persons with disabilities at the district and taluka level for grievance redressal and implementation of various schemes.

8.   Arrange for *Jan Sunvais* at district or cluster levels for effective redressal of cases related to persons with disabilities.

9.   Promote accessibility in all sectors by formation and implementation of by-laws based on the criteria of universal design for all. Conduct access audits of all public buildings in a phased manner with the equal participation of technical staff trained for this purpose and with the participation of persons with all types of disabilities along with other stakeholders. Modifications could be financed through the scheme for implementation of PWD Act and under the newly initiated Accessible

India Campaign by the Ministry.

10. Facilitate disability responsive budgeting like gender responsive budgeting.

11. Ensure full utilization of budgets allocated for disability programmes and schemes. The unutilised budgets should not be shifted to other departments. Social audits of all schemes could be conducted to ensure three per cent utilisation.

12. The PWD Act clearly states that there is three per cent reservation in all schemes for persons with disabilities but in practice none of the Ministries/departments is aware or is making attempts for its allocation and utilisation. Often in practice the budget for disability is spent by the Ministry of Health and Family Welfare for prevention of disability and not for ensuring social protection that restores the rights of persons with disabilities. It may also be that the officials in these departments may not be aware of what needs to be done for mainstreaming disability. Hence, the MSJE could play the role of planning and monitoring.

3. Civil Society Role in Building an Enabling Environment

The rights and entitlements for and by persons with disabilities in the country cannot be realised unless and until the environment, a means through which these can be so realised is made accessible and barrier free. The provisions for creating a barrier free environment, especially, where access to public buildings is concerned, in the PWD Act 1995 are not mandatory and lacks accountability mechanism. The various government documents do provide for guidelines of access but the building by-laws are not mandatory and lack implementation. In this connection the initiative to conduct access audits by NGOs in collaboration with stakeholders (Unnati 2008, WHO 2011: 177) have proved to be a useful intervention. Broad basing the concept of universal design and accessibility needs to be developed as a strategy to include a larger section of the population like the elderly, pregnant women and children has also proved to be useful while promoting the concept of universal design with multi-stakeholders like builders, architects, designers and civil engineers. Both access to information and a barrier free environment are a prerequisite for providing opportunities to persons with disabilities to exercise self-determination, avail entitlements and citizenship rights and for fulfilling obligations. Although, the family and the community are the primary agency of oppression for persons with disabilities, it is also

the source which can provide the support and encouragement in overcoming the barriers. In India, most families are of an extended nature and with the culture of looking after the ill and the infirm. This attitude can be harnessed to recognise the need for compassion and care, at the same time working towards enabling persons with disabilities contribute towards their own welfare. Persons with disabilities also need to come out of this fatalistic attitude, where the theory of karma is used as a starting point of acceptance, develop the courage of conviction and make efforts for self-determination, to alter the situation. In this, through the media, highlighting models of best practices and documentation of persons with disabilities life stories bearing a testimony to their struggle against their oppression can be useful strategies (Sonpal 2014).

As emphasised by the social model persons with disabilities, their families and the community need to be enabled to understand that disability like gender and caste is a social construct and a change in mind-set is essential. This will not only enable persons with disabilities to positively contribute to the development process but also cut the development costs entailed.

4.   Self-representation for Exercising Agency by Persons With Disabilities

As is for other oppressed groups so it would be for persons with disabilities and family members to organise themselves, for their voices to be heard through what is popularly called disabled person's organisations (DPOs).

Persons with disabilities are the most disenfranchised lot (Oliver 1996) as most are confined to the home and do not even possess a voter's identity card that is an essential document that bestows citizenship rights. This clearly indicates that persons with disabilities have not yet been viewed as a significant vote bank. The construct of 'citizenship' is useful in consideration for the integration of the 'voices' of persons with disabilities to be put on the development agenda. In a right's mode of operation, it is persons with disabilities, their representative organisations and their families, through DPOs, that are best equipped to demand for their civil, political, economic and social rights (UNCRPD 2007, Sonpal 2014, Unnati 2014). As there is no proper enumeration, the goal of universal suffrages remains incomplete. The names of persons with disabilities need to be included in the voters list Thus, accounting the prevalence of disability in any society, for that matter of any

oppressed group, helps to 'centre stage' their contribution and informs and shapes policy environment for investment in capacity building to further enhance their contribution.

In India, the evolution and formation of DPOs is at a nascent stage and requires consistent motivation and nurturing; needless to say that the task ahead is full of hurdles (Unnati 2014). As examined in the previous sections, proper statistics are not available to substantiate the number of persons with disabilities in the country and the various types. The politics behind this representation has direct implications on their citizenship rights and on mobilising efforts. Any movement derives strength from its numbers, whereas in this case the scattered nature alone act as a deterrent. Hence an independent effort needs to be made to conduct a Disability Census.

Wherever DPOs exist, especially at the local level, there is paucity of conceptual thinking, leadership, and capacity to make strategic interventions for policy advocacy (Unnati 2014). More often than not they fall prey to the paternalistic role and are seen to be either obtaining disability certificates, pensions, distributing aids and appliances on behalf of NGOs or are a group of individuals gathered together to earn some livelihood by entertaining the community.

It is time now for persons with disabilities to be organised, for transgressing from being mere objects, recipients and beneficiaries of development/rehabilitation programmes, come out of the paternalistic and protective environment and provide insight for framing policies that will emancipate themselves while challenging the 'theory of karma' and enable them to lead a life of dignity (Sonpal 2013, 2014, Unnati 2014). This being a political process does not entail confrontations alone, but also engaging in persistent dialogue, contestation, interaction and orientation of and with other non-disabled stakeholders. Experience informs that fear, apprehension, and ignorance inhibit non-disabled members from interacting with persons with disabilities and thus a cause for not understanding their needs, aspirations, and capacities (Unnati & HI 2008).

Demanding not only voting rights but also space for political representations in the arena of local governance and at the state and national levels will facilitate the process of placing the demands in the right forums. Needless to say that at each stage representation is to be made by persons with disabilities themselves particularly individuals that are oriented from

a human rights perspective while maintaining a gender balance. To begin with access to environment both physical and information's base, along with changing mind set of people is a must, but at the same times enactment of stringent anti-discriminatory legislations are required as a vehicle for full realisation of citizenship rights.

Among the various groups of different types of disabilities in India, persons with visual impairment, for various reasons are most organised and articulate. But the challenge posed here is to inculcate adequate sensitivity by both disabled and no-disabled to incorporate the demands and needs of all types of disabilities in all age groups keeping the gender dimensions in view, particularly of the not so visible disabilities.

This requires a mind-set that challenges the dominant power structures, questioning the dominant development paradigm of the charity approach that aims at satisfying individual needs. What disabled people want is for their rights as ordinary citizens to be recognised (Coleridge 1993) This is equally applicable for persons with disabilities themselves as they too need to come out of their shell and self-pity mode and take charge of their lives. Make decisions and by self-determination take appropriate actions, be at the helm of all actions from disability studies to policy advocacy to action at the community level as role models, for other persons with disabilities to follow – reconstruct their identities by adopting the slogan of 'Personal is Political' and *vice versa* by emphasising the need of 'nothing about us without us'; by stressing on the need for all government departments to have a focus on disability instead of creating a separate department. All development programmes must focus on disability just as in the case of gender.

The question to ask ourselves as persons with disabilities is: why can't we come out of these medicalised terms of classifying our disability type and the percentages by a so called qualified doctor and have the choice of registering our disability at the panchayat level itself the way we do birth and death registrations? We should be the one to decide if we need the benefit of a scheme or not. We should be the one to claim our entitlements with wisdom, while maintaining our self-respect; we will certainly not claim what is not our right or does not lend us a life of dignity. It is disheartening to witness policy decisions such as the Socio Economic and Caste Census 2011 that mentions that the poor disabled persons living with able-bodied persons would not be considered to benefits entitled to persons Below Poverty Line. Now, which disabled person in our country would be living on their own

with a legacy of communities accommodating vulnerable members like the disabled, orphan children, single and widow women in whatever condition? As a mid-way progressive states campaigned for disabled persons to declare themselves as a single unit but information percolation was largely miniscule.

Another crucial aspect that is probably overlooked or less understood is that of political representation which, if formulated and implemented in the true spirit of empowering the disabled and including their perspective in the decision making process, will lend more visibility to the disability sector. It is not enough that we have access to accessible voting booths and voting machines, but we need to move beyond the first level of political participation. Primarily, we need to collectively assert our voting rights as citizens of this country and have access to voter identity cards that guarantees us the rights of citizens in the country. It is not that if we have a disability certificate all our miseries will end or that we will be able to access our entitlements as well as our rights. But in this way we should slowly seek reservation to be elected representatives and participate in the decision making processes in local and parliamentary bodies on an equal basis with others.

Summing Up

To conclude, persons with disabilities first and foremost, need to be acknowledged as citizens of this country and strive to establish our identity to represent politically and stand for elections. Ideally, we should be struggling and protesting for reservation and in the electoral process, advocating with political parties for including our demands/concerns in their manifestos and as responsible citizens demonstrating or setting an example to the community about the potential we have as contributing members. Such an approach may compel us to look beyond legal legislations and policies, press for moving the agenda for constitutional amendments, and build a more equitable future for the coming generations. This logically demands the strength of numbers and, to gather strength, we need to not only pull out disabled people compelled to reside within their homes for complex and multiple reasons, and pressurize for proper and more accurate enumeration on the prevalence rate of disability. Disability advocates need to rethink and re-strategize for reaching out to the last mile among persons with disabilities by extending social protection and social security as a primary need that will form the primary basis for our emancipation.

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Some Human Rights Issues Focussing on Persons with Intellectual and Development Disabilities

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Abstract

While contemporary shifts in thinking, move away from labels and address issues cross disability, in India we still need to focus on specific disabilities, as some are more marginalised than others. They have a huge stigma of incapacity and it is widely assumed that they only need protection and care.

The article focuses specially on the intellectual and developmental disabilities. As we move from disability being a charity and medical issue to a human rights and development issue, we may leave the above disabilities behind. They need both specific programmes and to be included in all mainstream developmental activities and schemes. They need focus on capacity building.

The article attempts to show the present situation and suggests future changes and action.

The United Nations Convention for the Rights of Persons with Disabilities (UNCRPD) is a path breaking document, with unprecedented ownership by the rights holders and their support networks. It very clearly sets out the new way of thinking. Disability has been defined that it includes those who have long term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The thinking has moved from the charity and medical models, where people with disabilities were either passive beneficiaries of charity or had a medical problem which was an individual concern, needing a search for a cure. Over the years, people with disabilities have begun to find ways to fulfil

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their aspirations and assert their identities as equal citizens. This led to what is termed as social and development models. It is now universally agreed, that without the participation of persons with disabilities, communities and nations cannot achieve their goals of development. Therefore, disability is both a development and a human rights issue. Persons with disability are part of the human diversity. During the making of the Convention, they gave the clarion call of 'Nothing about Us, Without Us'.

The National Scene

There is a huge paucity of data on disability in the country. Numbers are not reported by type of disability by most of the Ministries and in their flagship schemes. It is only in the last five years that disaggregated data on school going ages is available (DISE) because of the Right to Education Act 2009.

The Census of India had a question on disability from 1872 to 1931. However, after that it was discontinued till the 1981 Census, when three disabilities were counted. Once again the question on disability was dropped in 1991. It was only in 2001, with advocacy by people with disabilities that the question on disability resurfaced, and included five types of disabilities. The 2011 Census saw a concerted effort both by government and disability groups to ask the right questions, train enumerators and spread awareness in communities. Instead of the five impairment groups included in the census in 2001, we now have eight types of disability included. Some of the Census results are the following:

(A) Percentage of population of persons with disabilities to the total population has increased from 2.13 in 2001 to 2.21 in the 2011 Census. (These figures are extremely low, when compared to more developed countries where the percentage of people with disabilities may be 10 to 15 %. On an average it is considered that 10% of any population are people with disabilities).

(B) While the percentage of disabled population in the rural areas has grown from 2.21 in 2001 to 2.24 in 2011, it has increased significantly in the urban areas from 1.93 to 2.17.

(C) Although the number of men continues to be higher than women with disabilities, the decadal increase in numbers of women (1.87 in 2001 to 2.01 in 2011) is higher than men (2.31in 2001 to 2.41 in 2011),

(D) As much as 2.46% of the disabled population belongs to the Scheduled Castes while 2.05% belongs to the Scheduled Tribes, 2.18% belongs to the other social groups regarded as vulnerable in the country. Disability is a cross cutting issue.

Proportion of Disabled Population by Type of Disability India : 2011			
Type of Disability	Persons	Males	Females
Total	100.0	100.0	100.0
In Seeing	18.8	17.6	20.2
In Hearing	18.9	17.9	20.2
In Speech	7.5	7.5	7.4
In Movement	20.3	22.5	17.5
Mental Retardation	5.6	5.8	5.4
Mental Illness	2.7	2.8	2.6
Any Other	18.4	18.2	18.6
Multiple Disability	7.9	7.8	8.1
Source; Census of India, 2011			

Table shows break up of population by the eight types. The importance of this data for policy and practice should be recognised.

For example, data on children with disabilities belonging to already vulnerable groups in our country indicates that not only medical but also social and other factors must be taken into account when we strategise for education of children with disabilities. Our strategies have to be multi layered and recognise increased vulnerability.

As per the Census of 2011 there are 6.57 million children with disabilities in the school going age group (5-19). Of these, 20 per cent (1,278,764) are

children with hearing impairment, by far the largest percentage of all children with disabilities. Children with vision impairment account for 17 per cent (1,133, 152) while children with movement disability are 14 per cent (928, 330). Although children with speech difficulties are not recognised as a separate category of children with disabilities in our laws, both the Census and the DISE collect data on these children as part of children with special needs/disability. Children with speech difficulties account for 10 per cent (651, 241) of all children with special needs.

Children with multiple disability and intellectual disability (mental retardation) are 9 per cent (599, 790) and 8 per cent (545, 728) respectively. Another large group amongst these is children whose impairment is not known. These children account for 20 per cent (1,307,155) of the children with disabilities. (A large number of these children will be children with autism). Significantly for the first time, we have figures of children living with mental illness (127, 429) 2 per cent in the age group of 5-19. At present no thought has been given to provisioning for children living with mental illness within the education system of our country. (Alkazi 2015).

Moving Forward

As we move from charity to development and human rights, the paradigm shift should bring the following changes in our country:

1. From one age group to a life span approach: There has been a concentration of services, schemes and programmes for children in the six to eighteen years age group. We need to focus on the Life Span Approach and support all age groups, from the new born to the elderly. Rehabilitation manpower is trained for children, there is a great paucity of skills for supporting adults with disabilities. For example, there are no trained people who can work on assisted or independent living facilities.Personal attendants, a much-needed profession, is non-existent. This live support is vital for some persons with disabilities to be truly included in the community.

2. From single services to comprehensive services: Most services run by both the government and the civil society are special schools or homes for children, and these focus on education. There is a need to move away from single services to comprehensive services across the life cycle. Also, we do not need institutional homes for children, they should

live with their families as far as possible, or in case of destitution, in safe and secure facilities in the community. Most institutional homes tend to segregate children with disabilities from the community they live in. As far as possible children should study in their neighbourhood inclusive school. Special Schools should be the last option for most children, perhaps, they are viable for children with sensory impairments, because the schools can facilitate more rapid learning of braille, sign language and mobility training. These skills help with inclusion in the later years. For all disabilities, special schools can be effective resources for supporting inclusive education, especially with facilitating classroom transactions with mainstream school teachers. Services should range from early intervention to employment and all the requirements to live independently in the community.

3. From single disability to cross disability: There is an urgent need to move all services to provide for all disabilities. Services, Advocacy and Manpower has developed only for single disabilities, each one is supposed to be highly technical and both disabled people and professionals feel that they do not know enough about the other disability. To move forward, it is important to demystify each disability and ensure skills and knowledge along a cross disability spectrum. Each group should grow to advocate for issues concerning all disabilities. Progressive civil society organisations are now moving their work from single disability to cover all disabilities.

4. From service delivery to inclusion: While it is useful to have some stand-alone focussed services, it is important to ensure that people with disabilities are included in the work of all Ministries and in all flagship programmes. For example, The Department for Empowerment of People with Disability, Ministry of Empowerment and Social Justice is the nodal ministry, however all ministries must allocate resources and include people with disabilities. The Ministries of Human Resource Development, Health and Family Welfare and Youth Affairs and Sports have earmarked allocations for people with disabilities. Ministries of Rural Development, Urban Development, Women and Child, Housing and Poverty Alleviation, Labour and Employment, Communication and Information Technology have mentioned people with disabilities as their target group. Disaggregated data is not available in the latter group, as the guidelines do not focus on inclusion of people with disabilities.

Therefore, allocations and budgets do not reflect the intent or the impact. Other ministries are only concerned with the three per cent job reservations for people with disabilities.

5. From Urban/ Metro to Rural Areas: Services for people with disabilities have grown in the urban areas and more specifically in the metros. Almost forty percent of the services are in the metros and larger well-resourced cities. More than half the districts of the country have no services. With inclusion in all schemes and programmes, supports and opportunities will have a wider and more effective spread.

6. From Institution Based Rehabilitation to Community Based Inclusive Development: It is important to dismantle the large, old, colonial institutions which have been based on seclusion and segregation and replace them with community based rehabilitation and inclusion into all developmental processes. It is vital to implement Art 19 of the UNCRPD.

7. From Inaccessible infrastructure and systems to Universal Design: Buildings, products, communications, technology, services and systems are not always accessible to people with disabilities. They need to be redesigned along the principles of universal design. The Accessible India Campaign of the Government of India holds promise. Access now means more than ramp and rails. The transport systems, roads, pavements, trains and planes need to be disabled friendly. Talking books, braille, large print, sign language, Alternative and Augmentative devices, adapted curricula and examination are some examples. Reasonable Accommodations at work, schools, colleges, at home and at leisure for each type of disability are a right for full and effective participation.

8. Also, focus is required on the areas of concern and priority issues as outlined by the UN Special Rapporteur on Rights of Persons with Disabilities at the UN General Assembly on 2nd of February 2015.

    These areas have been grouped into three mutually reinforcing clusters:

    (a) Promoting citizenship: Supporting the active participation of persons with disabilities in all decision-making process affecting their lives, including through the right to equal recognition before the law, the right to freedom and security of the person, the right to live independently and to be included in the community and

other interrelated rights in the civil and political sphere.

(b) Combating poverty: Addressing the root causes of poverty among persons with disabilities that prevent them from enjoying their economic and social rights and being active contributors to their communities, including by supporting the development and implementation of social protection systems that are inclusive of persons with disabilities, by promoting access to inclusive education and employment, and by contributing to the inclusion of persons with disabilities in all national and international development processes and programmes.

(c) Promoting change in social perceptions about persons with disabilities. The Special Rapporteur, guided by article 8 of the Convention on the Rights of Persons with Disabilities and paragraph 2 (e) of Human Rights Council resolution 26/20, intends to challenge and to contribute to changing negative perceptions of persons with disabilities with a view to fostering respect for the rights and dignity of persons with disabilities, combating stereotypes, prejudice and harmful practices relating to persons with disabilities, promoting awareness of the positive contributions of persons with disabilities to society and informing persons with disabilities, their families and communities about their rights. Awareness-raising activities will be undertaken as stand-alone activities, such as social media campaigns and contributing to the visibility of the annual International Day of Persons with Disabilities.

While the Convention moves away from labels and naming disabilities, in our country, both for a clearer understanding and for entitlements, we still need to focus on specific disabilities. This paper attempts to highlight some of the issues of Persons with Intellectual and Development Disability. These disabilities are more marginalised than the other disabilities and face a strong attitudinal barrier of incapacity. While the capabilities and capacities of people with visual, hearing and orthopaedic disabilities is gradually being realised, others are still very much part of the paradigms of incapacity. For example, the three per cent reservations in Government jobs for people with disabilities is only for persons with visual, hearing and orthopaedic disabilities.

Persons with Intellectual (earlier termed mental retardation) and

Development Disabilities include all people who would have experienced a delay in their developmental milestones as children. These milestones are in the areas of motor, sensory, cognition, speech and communication, social and emotional areas. Human development milestones, in the above areas, for the early years and especially for the first year of life, are well known. A person may have a delay in one or more areas. The disabilities enumerated under the National Trust Act for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, come under the umbrella term of Intellectual and Development Disabilities. These are most often caused due to an insult in the brain or the central nervous system. This can happen before, during or after birth, because of a wide range of reasons. These can be either medical or environmental.

Persons with these disabilities cover a wide range and no two people are alike. The strengths and support needs vary widely, there is no medical cure and it is only through positive and dynamic training and management that children with delayed development can grow into contributing citizens of the country. This requires opportunities for early intervention, education, skills training, economic empowerment and most importantly to be recognized as a person, with all the same rights and duties as other citizens.

The UNCRPD in its General Principlesrecognizes the evolving capacity of children and their right to preserve their identities. In reality, on the ground, the label of intellectual or developmental disability assumes incapacity and that the person may be able to learn very limited skills.It is assumed that the child will plateau and may not succeed in lifelong learning, like the rest of humanity.Over a lifetime we grow and evolve in different ways, and so do people with the above disabilities.

Disability is an impairment in interaction with the environment.This may lead to a limitation in activity, which in turn restricts participation. Each one experiences disability in different ways.This depends on many factors like the socio-economic situation, gender, age, place of residence, the attitude and dynamics in the family and the type of impairment. Some people may experience high restriction in participation and may require multiple support.

People with intellectual and developmental disabilities, in general, have been limited by low expectations by their families and communities in theirability to participate and contribute to the wellbeing of people around them. This has led to low self-esteem and aspirations.

"Knowledge and attitudes are important environmental factors, affecting all areas of service provision and social life. Raising awareness and challenging negative attitudes are often first steps towards creating more accessible environments for persons with disabilities. Negative imagery and language, stereotypes, and stigma – with deep historic roots – persist for people with disabilities around the world. Disability is generally equated with incapacity. A review of health-related stigma found that the impact was remarkably similar in different countries and across health conditions. A study in 10 countries found that the general public lacks an understanding of the abilities of people with intellectual impairments. Negative attitudes towards disability can result in negative treatment of people with disabilities, for example: ■ children bullying other children with disabilities in schools ■ bus drivers failing to support access needs of passengers with disabilities ■ employers discriminating against people with disabilities ■ strangers mocking people with disabilities. Negative attitudes and behaviours have an adverse effect on children and adults with disabilities, leading to negative consequences such as low self-esteem and reduced participation. People who feel harassed because of their disability sometimes avoid going to places, changing their routines, or even moving from their homes. Stigma and discrimination can be combated, for example, through direct personal contact and through social marketing. Community-based rehabilitation (CBR) programmes can challenge negative attitudes in rural communities, leading to greater visibility and participation by people with disabilities. A three-year project in a disadvantaged community near Allahabad, India, resulted in children with disabilities attending school for the first time, more people with disabilities participating in community forums"(WHO, World Disability Report 2011).

The first General Principle of the UNCRPD, is "Respect for inherent dignity, individual autonomy including the freedom to make ones choices and independence of persons". People with Disabilities have taken forward the discourse aroundindependence and interdependence, especially with reference to aspirations of autonomy and self-determination. Particularly, people with intellectual and developmental disabilities are traditionally denied opportunities to learn skills in decision making. It is believed that they do not have the capacity to make choices and may not make the "correct choices". Parents, professionals and other non-disabled members believe that the decisions and choices they make on behalf of the person with disability will be what the person wants or should choose, but often they differ as can be

seen in the three stories below (1. Story of The Self-Advocates Forum of India.2. Story of Saleem, a person with autism.3. Story of Anju and Uma,two women with cerebral palsy). (names changed)

Decisions and Choices when there are windows of opportunities:

1. Self-Advocates Forum of India (SAFI) is of persons with intellectual and development disabilities. This is the initiative of Parivaar- The National Confederation of Parent Associations of Children with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. In compliance to the UNCRPD,they took the initiative to form self-advocacy groups of their primary stakeholders. The leaders prepared a Mentors Training Manual, which was translated into several local languages to facilitate the formation of these groups. Training programmes were held in different parts of the country.

    In October 2013, SAFI, held its National Conventions supported by National Trust, Ministry of Social Justice, Government of India and CBM South Asia Regional Office, Bangalore. The delegates were 155 self-advocates from the States of Andhra Pradesh, Bihar, Chhattisgarh, Delhi, Gujarat, Himachal Pradesh, Karnataka. Kerala, Maharashtra, Odisha and Tamil Nadu. State wise discussions ranged from personal experiences, both positive and negative, at home, in the market place, work place, during travel and at social functions to education and government policy and support. It was interesting to witness nine regional languages being spoken in the groups.

    The highlight was the elections for the posts of President, Secretary, Treasurer and the National Executive of SAFI. The election apparatus was well managed and planned, with ballot papers having photographs of the candidates for ease of the voter stakeholders. The results of the elections, however, were a big surprise.The elected winners, who enjoyed the confidence of their peers, were different to who the mentors and leaders had assumed will win.

    Given the window of opportunity, people with intellectual and developmental disabilities made their own very deliberate decisions.

2. Saleem, a person with autism excels in line drawings. It is amazing to see him draw, without raising his pencil, excellent caricatures of people in

front of him or from a photograph. He can also make the drawing to any size, keeping it to scale -- a small passport size photo can be enlarged to a poster size caricature in minutes. He has, however, not been able to learn to read or write. It was assumed by his parents and teachers that he would do best if sent to the College of Art once he is done with his schooling. After taking time to understand the condition, the College agreed to admit him.Arrangements were made for the reasonable accommodations that he may need, including an escort for travel. He however, did not like the place and came back to school instead. It took him one year to decide that he would like to learn weaving and of course, he continues to draw. He now has his own loom and weaves beautiful rugs, which are in great demand.

Given the window of opportunity, he found a satisfying vocation for himself.

3. Uma and Anju, are two women with cerebral palsy and are also wheelchair users. They have defied traditional wisdom to find vocations for themselves. The former, as she is from an economically disadvantaged background, was advised to learn mehndi and have a small business at home.She instead chose to study to be a lawyer. It has been a difficult journey, but, it is on the path of self-determination. Anju also has learning disability, with difficulty in reading and writing. However, she was able to finish school and graduate with accommodations of a scribe and reader. She has chosen to be a writer of children's stories, which she intends to dictate into a recorder.

They have made opportunities for themselves to enhance their capacities.

"Amartya Sen's capabilities approach offers a helpful theoretical underpinning to understanding development, which can be of particular value for understanding disability. It moves beyond traditional economic measures such as GDP, or concepts of utility, to emphasize human rights and "development as freedom", promoting the understanding that the poverty of people with disabilities, comprises social exclusion and disempowerment, not just lack of material resources. It emphasizes the diversity of aspirations and choices that different people with disabilities might hold in different cultures. It also resolves the paradox that many people with disabilities express that they have a good quality of life, perhaps because they have succeeded in adapting to their situation. As

Sen has argued, this does not mean that it is not necessary to address what can be objectively assessed as their unmet needs. The capabilities approach also helps in understanding the obligations that states owe to individuals to ensure that they flourish, exercise agency, and reach their potential as human beings" (WHO 2011).

In the schemes and programmes of the Government of India people with disabilities may not be adequately represented. In fact, people with intellectual and developmental disabilities are almost always left out. There are only two flagship programmes in which they have been included. These are for children and not adults, namely Ministry of Health and Family Welfare (MoHFW) - Rashtriya Bal Swasthya Karyakaram (RBSK) and the Sarva Shiksha Abhiyan: The Right of Children to Free and Compulsory Education Act, 2009 (RTE).

Flagship Schemes Which Include Children with Intellectual and Developmental Disabilities

Ministry of Health and Family Welfare (MoHFW) -Rashtriya Bal Swasthya Karyakaram (RBSK)

RBSK was started under the aegis of National Rural Health Mission (NRHM) in February 2013 and initiated by the Ministry of Health and Family Welfare to reduce child mortality and improve the overall quality of life of children, from birth to eighteen years.

It has put together a systematic approach to child health screening and early intervention. As per available estimates, 6 per cent of children are born with birth defects, 10 per cent children are affected with development delays leading to disabilities. This translates into more than 15 lakh new-borns with birth defects annually.

RBSK covers the four Ds: Defects at Birth, Deficiencies, Diseases and Developmental Delays including Disabilities.

Globally 200 million children do not reach their developmental potential in the first five years of life. This is due to poverty, poor nutrition and lack of early stimulation. This also leads to poor cognition and educational performance. Also, approximately twenty per cent of babies who are discharged from health facilities in India, are found to have developmental delays or disabilities at a later stage.

RBSK aims to roll out to cover 27 crore children from 0-18 years of age. Screening of the new-born, both at public health facilities and at home, is an important component of the strategy. Regular health screening of pre-school children up to 6 years of age using Aganwadis as a platform is another essential component. Moreover, children from 6 to 18 years of age studying in Government and Government aided schools would also receive regular health check-ups. All those children who may be diagnosed would receive follow-up referral support.

District Early Intervention Centre (DEIC) Under RBSK, confirmation, management, referral, tracking & follow-up, will be planned according to the age group of the child. The early intervention centers are to be established at the District Hospital level across the country as DEICs. The purpose is to provide referral support to children detected with health conditions during health screening, primarily for children up to 6 years of age group. A team consisting of Paediatrician, Medical Officer, Staff Nurses, Paramedics will be engaged to provide services. There is also a provision for engaging a manager who would carry out mapping of tertiary care facilities in Government institutions for ensuring adequate referral support. Thus, the DEIC will be the hub of all activities, will act as a clearing house and also provide referral linkages.

Early Intervention for children with developmental delays is vital and can be a very effective pathway to inclusion into schools and mainstream life. This needs a multi-disciplinary team to work and train parents in areas of therapy and stimulation. This is a long term programme, needing planning and follow ups over several years. The follow ups are simple and community based workers can be trained to ensure the learning of skills and formation of parent networks for mutual support. RBSK can fill this very important gap, which is the first step towards full and effective participation of people with intellectual and developmental disabilities.

Sarva Shiksha Abhiyan: The Right of Children to Free and Compulsory Education Act, 2009 (RTE)

The Right of Children to Free and Compulsory Education Act is the law that outlines how the fundamental right to free and compulsory education of children in the age group of 6 to 14 is to be implemented. Despite some shortcomings, it is seen as a landmark law envisioning fundamental changes to the education system and the way we have transacted education so far. There

are many aspects of the law that support the inclusion of many marginalized groups of children with children with disabilities being one among them. Some of these are:

Mapping of children

Clear responsibilities of the State to map children in their communities and ensure the enrolment, retention and completion of elementary education are an important one. For children with disabilities who face grave barriers not only from systems but also from society and community, a proactive local authority/state government can go a long way in enabling the child to go to school.

Setting up Schools at a one kilometre distance and the provision of transport

Section 6 of the Rules of the RTE Act, specify that primary school must be established within a walking distance of one kilometre of the neighbourhood. For children in classes 6 to 8 schools can be established within a walking distance of three kilometres. Added to this is the commitment in the Rules to provide transport to children with disabilities. Since physical access is a particularly important issue for children with disabilities, having schools within reach and the facility of transport to reach the school is critical.

Setting Standards

The move to formalise education and set standards with minimum requirements for infrastructure and parent teacher ratios (PTR) and training of teachers can go a long way in ensuring the inclusion of children with disabilities.

Further the requirement of schools to have of playgrounds, libraries, toilets and drinking water facilities and barrier free access can be extremely enabling for children with disabilities, especially if these basic facilities are based on the principles of universal design.

The commitment to having trained teachers by the end of five years gave the hope that teachers will know how to teach all children including children with disabilities.

Child Centred Education and Continuous and Comprehensive Evaluation

Major changes in the way education is transacted is another hallmark of the Act. A child centred education; a clear setting of curriculum,that enables the full physical and mental development of the child could have been used to enable a system where supports such as physical therapies, mobility training, positioning required by some children with disabilities could have been incorporated in the school curriculum.

A commitment to provide all teaching and learning materials required by children and continuous and comprehensive evaluation are important changes for the child with disabilities in school. It is well known that children with disabilities (and many other children) may flourish in other aspects of education than just the academic and there should be opportunities for children to explore and develop these skills.

The Involvement of Parents and Communities

The involvement of parents and others from outside the school in the School Management Committees (SMC) is an important aspect creating stakeholders for the education of children. The role of monitoring the implementation of the Act and the big responsibility of preparing school development plans gives important opportunities for families and communities to steer education.

An Acknowledgment of Discrimination

The RTE Act is one of the few Acts that actively acknowledges that discrimination is an important factor in full enjoyment of rights and the full participation of children in education. A sharp focus on non-discrimination and the understanding that some groups of children are vulnerable and need further protection is extremely important for inclusion. The specific mention and protection of children from disadvantaged groups and weaker sections is an important aspect of the Act. Added to this is further protection of children against corporal punishment and mental harassment. Discrimination overt and covert mental harassment are major factors affecting the retention of children with disabilities in education. A law thatexpressly prohibits both recognizes this.

In 2010 the RTE Act was amended. Among other important amendments

was the amendment with regard to children with disabilities.

The amendment specifically named children with disabilities under the disadvantaged groups of children but also added another clause to the Act. It gave children with severe and multiple disabilities the right to opt for home based education. As a result of this amendment:

a) Children with disabilities now come under the 25 per cent EWS category that private schools must admit

b) Parents of children with disabilities will now have to be included in all school management committees (SMCs). Given the requisite training and power, these parents can have a positive impact on the way school development plans are made.

If applied in their true spirit, these are real and important gains for the education of the child with disabilities in the general school system.

RTE and Inclusive Education: Emerging Issues

Five years down the line we seem to be battling to keep alive the great hope that our system of education will become more inclusive. Children with disabilities continue to be amongst the most excluded and the tide is not changing fast enough. The biggest reason for this is that despite the UNCRPD and despite the fundamental right to education our discourse on the education of children with disabilities has not changed. It has not been enriched by the guidance of the Convention and has therefore remained very narrow in scope.

The RTE that could and should have been the vehicle for inclusive education, remains almost a separate programme of the SarvaShikshaAbhiyan through which RTE works. This stand-alone programme which focuses only on children with disabilities, with a set of activities has led to the thinking that the rest of the system need not worry about the child with disabilities (Alkazi 2015).

Inclusion of children with disabilities in the disadvantaged group has not helped in ending discrimination. They either drop out or do not enter the system. Many families are not aware or believe that their children, especially those with developmental disabilities, do not have a right to be in the same school. There is self-stigmatisation by the families too.

At the national level, out of an estimated 20.41 crore children in the age group of 6 to 13 year, an estimated 60.64 are out of school. An estimated 21.30 lakh children (1.05 per cent) in the age group of 6 to 13 years have been identified as Children With Special Needs (CWSN). Among these 5.94 lakh children are out of school (NSSO 2014). Children with multiple disability and mental retardation are the largest group of children out of school, with 44 per cent and 34 per cent respectively. A recent report presented in the Meghalaya Assembly made news as it reported no CWSN out of school. However, out of 12000 CWSN children in the state, 2000 are in Home Based Education (HBE).

Many students with intellectual and development disabilities have been asked to opt for HBE. However, this programme has no clear guidelines or dedicated staff. At the time of planning, the Anil Bordia Committee had recommended HBE as a school readiness programme of not more than two years. However, with the Amendment of RTE it is considered a long term option with no plans, teaching learning materials or regular staff.

Many CWSN who are enrolled in the school are asked to come only on the days the special educator visits, this negates the entire attempt at inclusion. A special educator is an important support to the classroom teacher, but not there to divide the class as "my students and your students." Many times parents are also told that the CWSN child can only attend if they sit with the child. Most mothers cannot do this as they have to earn a living and in any case, once again the spirit of inclusive education is lost.

Barrier free schools have been interpreted as only needing ramp and rails, which in any case have incorrect gradients and surfaces. Toilets, drinking water facilities and mid-day meals are not accessible and the states are not committed to report on these. Transport for the CWSN was an important provision in the Act, which many states made a commitment to itin the Rules. However, on the ground it has not been actually operationalised. Discussion on teachers is always narrowed down to special educators and not on all the personnel required for inclusive education, like a teacher aide or other support staff. The training of teachers and School Management Committees (SMC) excludes these issues. The module for training SMCs does not include understanding the diverse needs of CWSN. Teaching Learning Materials are limited to supply of braille and large print books. Abandoned children who are put into institutions have no access to the mainstream school system.

The positives and the silver lining has been national level workshops and consultations by National Commission for Protection of Child Rights, UNESCO and UNICEF. Mainstream organisations like the RTE Forum and India Alliance for Child Rights are now including and addressing the issues of children with disabilities.

Other flagship programmes that include persons with disability, do not provide disaggregated data, by type of disability. There is also insignificant inclusion of persons with intellectual and developmental disabilities

However, over the years some statutory actions have been taken for persons with intellectual and developmental disabilities. The National Trust Act, 1999 tries to address the needs of adults forsupport, decision making and care, while the National Legal Services Authority gives specific attention to the issue through a scheme in 2010. In Part 11 it addresses concerns regarding intellectual disabilities (mental retardation)

Specific Action for Persons with Intellectual and Developmental Disabilities

The National Trust Act for welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities (1999)

This Act was enacted due to advocacy of parents of children of the above disabilities, who felt that the People with Disabilities Act 1995, did not adequately cover their needs. It did not answer the question, what happens to my child when I am no more? This is a major worry of parents.

The focus of this Act is the setting up of Local Level Committees (LLC) at the district level, with quasi-judicial powers to appoint, monitor and also remove legal guardians. Legal guardians can be appointed for body or property or both, however, it is not mandatory. This provision is for people with the above disabilities after completing eighteen years of age.

LLCs comprise of the District Collector, an NGO member and a Person with Disability. The functioning of these committees has been a challenge as the District Collector is an extremely busy person and these meetings are not considered priority.The two members from the civil society are volunteers and may not give enough time to understanding each applicant's needs and home visits may demand a lot of time, as most districts are geographically very vast. Most of the time the member with disability has another type of

disability, and may also stereotype the abilities and issues of the applicant. More than half the districts in the country have an NGO member who is from a neighbouring district, as there are no registered organisations in many districts. Meetings are called at short notice and they are not able to attend.

When the applicants are younger, the biological parents themselves are appointed as the legal guardian. This helps with bank accounts and property matters. However, as the person grows older and parents are also old, there are many issues in appointing a guardian. The parents regard the disabled person as a burden and don't know who to appoint as the legal guardian. The entire discourse is based on incapacity and the need for care, rather than the person with disability being an integral part of the family.

The National Trust runs several schemes to build on quality of life and supports for living in the community, within the family or as close to the family as possible. The Niramaya Health Insurance pioneered by the Trust was to enhance the quality of life, as most families either cannot or do not want to spend on the health needs of a disabled person. The Gharonda Scheme has helped to create some residential facilities for when the parents are no more or there is a crisis in the family. Most organisations want to run facilities only for children.

Independent Living is very much a focus of the Act, as also emphasised in Art 19 of the Convention. However, this is not only about housing, some of the precursors would be building capacities for economic independence, decision making and a good self-esteem to be able to interact socially, and find adequate supports that each may need.

Traditionally, people with disabilities are offered segregated institutions, however, now we need to have community services which are responsive to their needs.

Every person has the right to be included in the community, regardless of their need for support. "Every person has a right to receive the assistance to enable them to live in the community-including personal assistance, peer support and access to information regarding such support services. Every person is entitled to determine and direct the support they need. In no case shall support be imposed against the person's will. There is no "one size fits all formula" for type and level of assistance required. For some, monthly peer support sessions may suffice; for others, daily support may be required. All assistance, services and supports should be provided in a manner that

strengthens the autonomy, individuality and dignity of the person with disability (International Disability Caucus).

National Trust has done awareness raising through its Badhte Kadam campaign and advocacy for convergence with several programmes. It needs to increase impact through twin tracking, that is specific schemes for the mandated disabilities and inclusion in all development programmes.

National Legal Services Authority (Legal Services to the Mentally Ill Persons and Persons with Mental Disabilities) Scheme 2010, Part II

Matters to be Considered while Rendering Legal Services to Mentally Retarded Persons:

1) **Mentally retarded persons are not mentally ill persons –** There is a confusion even amongst the legal community that mentally retarded people are mentally ill. Mentalretardation of permanent nature is not curable. The statutory provisions for the welfare of mentally retarded persons are (i) Persons with Disabilities Act, 1995 and; (ii) National Trust Act, 1999. They also come under the purview of the UN Convention on the Rights of Persons with Disabilities (CRPD), 2008.

2) **Legal services to mentally retarded persons (MRs) –** The legal services institutions shall get in touch with the Social Welfare Department of the State Government and find out the different beneficial schemes for the MRs. Indian Railways and some State Governments have schemes for travel facility for MRs. The Income-Tax Act also gives some benefits to the parents of MRs. The legal services institutions shall attempt to make available the benefits under various schemes to the MRs and their family members.

3) **Legal services for ensuring the health care of MRs –** MRs like any other citizens are entitled to right to health services as a part of the fundamental rights.

4) **Legal services for ensuring the fundamental rights of MRs –** The legal services institutions shall provide assistance to the MRs for protecting their fundamental rights, equality and equal treatment.

5) **Right to education –** The policy in CRPD is an inclusive policy providing respect for MRs, evolving capacity of MRs, for preserving

their identity, respect their inherent dignity and individual autonomy. The Convention envisages the right of MRs to get education on the basis of equal opportunity and for the development of their mental, physical abilities and creativity to their fullest potential. Therefore, the Legal Services Institutions shall always attempt to safeguard the above mentioned rights of MRs whenever they are found to be deprived of such rights.

6) **Legal services for the benefits under PWD Act, 1995 –** Legal services institutions shall assist the MRs for obtaining benefits under the PWD Act, 1995.

7) **Prevention of exploitation and abuse of MRs –** MRs are one of the vulnerable groups likely to be exploited. Female MRs are the most vulnerable of the group. Therefore, the legal services institutions shall come to the assistance of MRs in preventing their exploitation including sexual abuse and also for taking legal action against the abusers and exploiters.

8) **Legal services for MRs for owing and inheriting properties and to have financial rights –** Legal services institutions shall come to the help of MRs in protecting the rights of inheritance, owing properties and enjoying financial rights.

9) **Appointment of guardians under the National Trust Act, 1999 –** Loss of both parents often leads to a situation that the MRs become orphans. Therefore, appointment of guardian as contemplated under National Trust Act, 1999 is of great importance. Legal services institutions shall come to the assistance of MRs in the matter of appointment of guardian.

10) **Need for setting up of a supported network –** The legal services institutions with the help of the Social Welfare Department of the State Government, NGOs, charitable trust, relatives of the MRs and social workers shall encourage to set up a supported network at the local level for the welfare of MRs. The supported network in each locality shall take care of the MRs to ensure that the MRs are not becoming destitute and their food, health and other essential needs are taken care of uninterruptedly.

11) **Creating awareness campaigns amongst the other school children–** It is important that the normal children are made aware of the fact that MRs and other persons with disabilities are also equally entitled to the rights provided by the laws and the protection of lawslike any other persons. Therefore, the Legal Services Authorities shall on the World Disability Day organize special awareness programmes in the primary schools to create awareness amongst the young children to change their mindset towards MRs. Video films, charts, picture, skits and thematic presentations can be used in such programmes.

12) **Awareness camps for educating the family members of MRs –** The legal services institutions in association with the schools in their locality shall organize awareness camps for the family members of MRs. Services of specialists in counselling, psychiatric, psychological, social work and lawyers also can be made use of in their programmes. Siblings of MRs also may be included in such programmes.

13) **Awareness programmes for the general public –** Awareness programmes may be conducted for the general public to educate the public that MRs and other disabled persons also have the rights on par with the other normal persons.

14) **Sensitization Programme for Judicial Officers and Lawyers –** Special sensitization programmes can be organised with the assistance of Judicial Academy and bar associations about MRs and their rights.

What Needs to be Done?

The above Scheme which was formulated five years ago should be implemented in the positive spirit it was made. Unfortunately, there is not enough awareness about it.There have been no reports if it has impacted any persons with the above disabilities. It is hoped that it includes all people with intellectual and developmental disabilities.

a)   Support networks and legal capacity

There is a move from substituted decision making, as in guardianship regimes, to supported decision making and the setting up of support networks. One of the most important messages that comes out of the Convention is the interdependence of human beings. Interdependence does not mean lack of independence. Human societies in general are built on the practice of

interdependence. Whether disabled or not, support is a part of the give and take, as well as the emotional fabric of human societies.

All of us create our own support circles, through relationships with family, friends, colleagues and many times also have professional support, like in financial or health decisions. People with intellectual and development disabilities live fairly secluded lives and may not have access to relationships to form a robust support circle.

The Convention places an obligation to create effective support systems for all persons, especially people with high support needs must not face barriers in supported decision making. The support should be according to the will and preference of the person. Unconventional modes of communication should not be a barrier in obtaining such supports.

The UN Committee on the Rights of Persons with Disabilities has affirmed in General Comment that legal capacity cannot be deprived on the person's actual or perceived mental capacity or decision making skills. The Committee in its Introduction on the General Comment on Art 12 states, "The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of economic, social and cultural rights. It acquires special significance regarding their health, education and work".

b)   Living independently and being included in the community

Most people with intellectual and developmental disabilities find themselves either homebound or homeless. The homebound, even if they have been to school, as adults do not have access to opportunities -- transport also becomes a challenge. There is a huge risk of being abandoned by the families, especially after the lifetime of the parents. Persons found on the streets who are homeless are generally sent to State run institutions. These institutions at most times are overcrowded, and do not have any opportunities for development or exiting.

Institutions are the only choices offered since it is assumed that all people with disabilities cannot live in the community and it is better to live in an institution and they will not benefit from living in the community. This

assumption isolates and takes away the autonomy and dignity of the person with the disability. A person cannot decide where or with whom to live, cannot leave the institution and at times has a jail like feeling. A person loses individuality and becomes part of a system that they have no control over.

The world over institutions have been closed down to create supported community living arrangements. This needs to be done in our country urgently.

Conclusion

People with intellectual, developmental and psycho-social disabilities are the last people in any community, village or slum. They have been last in the queue for all developmental benefits. For inclusion and participation it is important that they are part of all schemes and programmes. Issues of legal capacity support networks, de-institutionalisation and living in the community need to be resolved imminently. For a nation is judged by how it treats its last person.

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Community Mental Health Care – Indian Experience and Road Ahead

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Abstract

Community based mental health care, as part of the National Mental Health Programme, was launched in the country as early as 1982. The programme had the objective of providing mental health care in the community as part of general health care in primary health care setting. This was primarily done to ensure availability and accessibility of minimum mental health care for all, particularly to the most vulnerable and underprivileged sections of the population. Since then, the programme has seen numerous modifications/ revisions based upon lessons learnt during the course of the implementation. The introduction of the District Mental Health Programme under the National Mental Health Programme in 1996 was one of the decisive factors as it changed the focus of activities from the Central and State capital level to the district level. However, the implementation of the programme has lot of scope for improvement which can be achieved with better coordination between Central and State Governments.

Introduction

Mental health is an integral and essential component of health. Good mental health is a state of well-being which enables people to experience sustained joy of life and realize their potential, cope with the normal stresses of life, work productively and contribute to their communities. Mental well-being is a fundamental component of World Health Organization (WHO) definition of health that states – "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[1].

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[1]   See World Health Organization, Mental Health Action Plan 2013-2020, Geneva, Switzerland, p. 7.

Mental health, like other aspects of health, can be affected by a range of individual attributes such as the ability to manage one's thoughts, emotions, behaviours and interactions with others as well as social, cultural, economic, political and environmental factors like living in poverty, financial crisis, working conditions, exposure to substance abuse, maltreatment, neglect, violence, discrimination, violations, and other aspects. The predicament of mentally ill persons encompassing prevention, identification, treatment and rehabilitation thus requires all-inclusive strategies of mental health care including provision of treatment in community settings by developing community-based mental health care programme(s).

Community-based mental health care programme is a decentralized pattern of mental health care making use of the primary level health care system and goes much beyond it by including in its fold promotion of mental health and general well-being, removal of stigma, psychosocial support, rehabilitation, prevention of harm from alcohol, substance use and other associated risk factors. It is so designed that majority of the people in need are provided mental health care within the community and institution based in-patient mental health care delivered in hospitals is only necessary in fewer number of serious cases. This will reduce the burden on such institutions. Moreover, community mental health care services will be more accessible, lessen social exclusion and will have less possibility for the neglect and violations of human rights that often take place in mental hospitals.

As early as 1982, Government of Inida conceptualized and launched the National Mental Health Programme (NMHP) with the objective of providing mental health care in the community as a part of general health care in a primary health care setting. This was done to ensure availability and accessibility of minimum mental health care for all, particularly to the most vulnerable and under-privileged sections of the population. Since then, the programme has seen numerous developments and learnt many lessons. The introduction of the District Mental Health Programme (DMHP) under the NMHP was one of the decisive factors as it changed the focus of activities from the Central and State capital level to the district level. This gave the much required momentum to the programme. Despite this, the overall results are not encouraging as DMHP presently is in existence in 241 districts of the country only.

The paper makes an attempt to review the progress of implementation of NMHP and DMHP. In doing so, it first and foremost traces the historical

development of community mental health care in India that led to the development of NMHP and DMHP. It then goes on to describe the current status of these programmes, in terms of its achievements and failures. It also discusses the role played by the National Human Rights Commission (NHRC) in streamlining mental health care services across the country and then throws light on the way forward.

Origin and Evolution of Community Mental Health Care in India

Mental health care in India has come a long way. Earlier, mentally ill persons by and large were subject to custodial care, being sent to an institution called *'pagalkhana'* or 'lunatic asylum', which were usually isolated from the community. These institutions were housed in prison like buildings having stringent rules and regulations. Admission to these institutions was involuntary. All this was primarily based on the perception that the most appropriate way to care for mentally ill people could only take place in a protected and segregated environment, as the real objective was protection of the community from insane. Other than this, there was an inherent stigma attached to mentally ill persons which also resulted in their segregation. Such segregated care and treatment also posed hurdles to the reintegration of mentally ill persons in society even after they were completely or substantially cured. These institutions were devoid of specialized services including psychotropic medication.

In fact, most of the existing mental hospitals started as lunatic asylums. Even the National Institute of Mental Health and Neuro Sciences (NIMHANS), which today has developed into a modern institution and a centre of excellence, started as a lunatic asylum. As most of these institutions were bereft of specialized services including basic necessities of food and water leading to high death rates, few developments for the better took place in the first half of the twentieth century. Foremost among these was the change of nomenclature from 'lunatic asylums' to 'mental hospitals'. Their control and management moreover passed from the police officers to the civil surgeons/psychiatrists. Efforts were further made to train psychiatrists and other supporting para-medical staff in this area.

Despite these changes, the overall conditions of mental hospitals continued to remain dismal as one continued to experience difficulty in reintegrating mentally ill patients into the community after long-term

hospitalization. Furthermore, there was inadequacy of human resource or qualified professionals. At the same time, there was realization of the fact that para-professionals and non-professionals could, after undergoing simple and short innovative training, deliver reasonably satisfactory mental health care.

The early 70s thus saw a new approach in the form of primary health care in the area of mental health. Major community mental health experiments were undertaken to test the feasibility of shifting the care of mentally ill from the hospital to the "community" and from the mental health specialist to the primary care physician. Among them was a crash programme for community-based mental health introduced at NIMHANS. A "community psychiatry unit" was also started in October 1975. The unit simultaneously launched the following experimental programmes : (i) primary health centre (PHC)-based rural mental health care programme, under which a manual was prepared to train the multipurpose workers to recognize cases of severe mental illness and follow them up under the leadership of the PHC doctor. Another manual was prepared to train the PHC doctors. Experiment showed that after 15 days training, the PHC personnel were able to carry out the given task satisfactorily; (ii) general practitioner (GP) - based urban mental health programme, under which a manual was prepared to teach the GPs methods of treating common mental disorders. This too proved to be effective; (iii) school mental health programme, under which teachers were trained to diagnose children with emotional problems and counsel them and was evaluated with satisfactory results; (iv) home-based follow up of psychiatric patients, wherein nurses were trained to follow up patients in their homes through monthly visits. These patients performed better than those who were followed up as out patients; and (v) psychiatric camps, which helped reduce stigma against mental patients. The maximum focus was given to the development of the rural mental health programme and regular training programmes for 15 days were started at a health centre in the village of Sakalwada, near Bangalore. While these training programmes gave satisfactory results in terms of the knowledge gained by the PHC personnel, no long-term follow up was done in the natural PHC setting.

Soon after the community psychiatry unit in NIMHANS began, a rural mental health programme was started in the Postgraduate Institute of Medical Education and Research (PGIMER), Chandigarh with the help of the WHO. After carrying out studies to estimate the prevalence of mental

disorders, the psychiatry department in PGIMER also developed manuals of training for the PHC personnel. This programme too was a success but no exercise was carried out to examine the success in the PHC, where personnel who had been given short periods of training, actually carried out their work.

The above two initiatives coupled with few other initiatives in community mental health resulted in the National Mental Health Programme in India.

National Mental Health Programme

The Government of India officially launched the National Mental Health Programme (NMHP) during the Sixth Five Year Plan[2], in 1982 to be precise, to ensure availability and accessibility of minimum mental health care for all, particularly to the most vulnerable and underprivileged sections of population. The other objectives included were to encourage the application of mental health knowledge in general healthcare and in social development; and to promote community participation in the mental health service development as well as to stimulate efforts towards self-help in the community.

The plan of action aiming to achieve the above objectives consisted of set of targets and detailed activities as outlined in Table 1 below.

Table 1 : NMHP Goals

To be achieved within one year :

- Each State to adopt the present plan of action in the field of mental health.

- The Government of India to appoint a Focal Point on Mental Health Action in the Ministry of Health.

- A National Coordinating Group to be formed comprising representatives of all States, senior health administrators and professionals from psychiatry, education, social welfare, and other related professionals.

- A Task Force to work out the framework of a curriculum of mental health workers identified in different States as the most suitable to apply basic mental health skills, and for medical officers working at the level of PHCs.

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[2] There is no reference though about the NMHP in the Sixth Five Year Plan or its Mid-term Review.

To be achieved within five years :

- At least 5,000 of the target non-medical professionals to undergo a two-week training programme on mental health care.

- At least 20% of all physicians working in PHC to undergo a two-week training programme in mental health.

- The creation of the post of a psychiatrist in at least 50% of the districts.

- A psychiatrist at the district level will visit all PHC settings regularly and at least once every month, for supervision of the mental health programme for continuing education. This programme to be made fully operational in at least one district in every State and Union Territory and in at least half of all the districts in some States.

- Each State will appoint a programme officer responsible for the organization and supervision of the mental health programme.

- Each State will provide additional support for incorporating community mental health components in the curricula of teaching institutions.

- On the recommendation of the Task Force, a list of appropriate psychotropic drugs for use at the PHC level to be included in the list of essential drugs in India.

- Psychiatric units with in-patient beds will be provided at all medical college hospitals in the country.

The programme clearly envisaged making use of the primary health care structure to provide basic psychiatric and mental health services. This meant that at least at the grassroots level of health care, mental health will be totally integrated into the general health care delivery system. It also called for close cooperation of mental health professionals with other providers of care. In fact, it visualized that mental health consciousness will become an integral part of all health and welfare endeavours in India along with a strong linkage of the programme with the education sector.

There were, at the same time, some inherent weaknesses in this otherwise

sound model. For instance, the entire emphasis in NMHP was on curative rather than preventive and promotive aspects. Community resources like families were not accorded due importance. Ambitious short-term goals took precedence over pragmatic long-term planning. Furthermore, no adequate funding was made available to the programme in the Sixth, Seventh and Eighth Five Year Plans[3] of the Government of India. It is only from the Ninth Five Year Plan onwards that substantial funds were made available. The biggest irony has been that the much awaited funds when allocated were not fully utilized. All these shortcomings had major long-term consequences.

District Mental Health Programme

Realizing that the NMHP was not likely to be implemented at the national level without demonstration of its feasibility, the NIMHANS in 1985 developed a community based mental health care model and field tested in Bellary district of Karnataka between 1986-1995 with the objective of (i) providing sustainable basic mental health services to the community and to integrate these services with health services; (ii) early detection and prompt treatment of patients with mental illness; (iii) providing domiciliary mental health care and reducing patient load in mental hospitals; (iv) community education to reduce the stigma attached to mental illness; and (v) treatment and rehabilitation of patients with mental illnesses within their family setting. The "Bellary Model" was adopted as the District Mental Health Programme as it showed that mental health care delivery was possible in the primary health care setting; primary care physicians could be adequately trained to provide such care; and appropriate supervision and support from the programme officer or the psychiatrist would empower the public health care system to provide pertinent mental health care to the population.

Based on the "Bellary Model", the District Mental Health Programme (DMHP), a flagship mental health intervention programme of the Government of India under the NMHP, was launched in 1996 on pilot basis in four districts – one district each in Andhra Pradesh, Assam, Rajasthan and Tamil Nadu. The programme was extended to seven more States during 1997-1998 – the States of Arunachal Pradesh, Haryana, Himachal Pradesh, Punjab, Madhya Pradesh, Maharashtra and Uttar Pradesh. During 1998-

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[3]   The Seventh Five Year Plan also makes no reference about NMHP. It is only from the Eighth Five Year Plan onwards that one comes across references about the NMHP.

1999, the programme was subsequently expanded to one district each in the States of Kerala, West Bengal, Gujarat and Goa and the Union Territory of Daman and Diu. It was next extended to Mizoram, Manipur, NCT of Delhi and Union Territory of Chandigarh during 1999-2000, and in Tripura and Sikkim during 2000-2001. Kerala and Assam initiated the programme in their second district during 1999-2000. Andhra Pradesh took up their second district during 2000-2001 and Tamil Nadu too started the programme in two more additional districts during the said year, thus taking the total to 27 districts in 20 States and 2 Union Territories spread across the country by the end of the Ninth Five Year Plan.

The programme, envisaged a decentralized community based approach to mental health problem with the objective of (i) providing sustainable mental health services to the community and to integrate these services with other services; (ii) early detection and treatment of patients within the community itself; (iii) ensuring that patients and their relatives do not have to travel long distances to go to hospitals or nursing homes in cities; (iv) taking pressure off mental hospitals; (v) reducing the stigma attached towards mental illness through change of attitude and public education; and (vi) treating and rehabilitating mentally ill patients discharged from the mental hospital within the community.

As such, the district programme endeavoured to provide services to the needy mentally ill persons and their families through district level out-patient services, a 10 bedded in-patient service at the district hospital[4], liaison with primary health centers, referral services and follow up services. Its other major focus was to impart district-based training in essential mental health care to all health professionals so that psychiatric care is provided in all health care facilities, remove stigma of mental illness by creating awareness and if feasible, carry out a community survey.

In addition, it envisaged outreach services through satellite clinics at the CHCs/PHCs along with targeted interventions like life skill education and counselling in schools and colleges as well as work place stress management and suicide prevention services.

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[4]   Providing for appointment of one programme officer per district, who is a medical officer with at least five years of experience and trained for three months in mental health care/education and then six months in two years as a programme officer.

Given the reach of the programme, the Ministry of Health and Family Welfare, Government of India visualized the expansion of DMHP in 100 districts of the country during the Tenth Five Year Plan for which the Expenditure Finance Committee(EFC) recommended an evaluation of the pilot district mental health programme implemented during the Ninth Plan period. The task of evaluation of the DMHP was entrusted to NIMHANS by the Ministry of Health and Family Welfare, Government of India[5]. While there were no specific terms of reference for the evaluation, NIMHANS was asked to provide suggestions, if any, for improvement of the programme.

The findings of the evaluation revealed that given the varied background characteristics in the districts where the programme was being implemented, several centres faced a variety of problems in recruiting personnel for the DMHP based on the prescribed staff pattern of the scheme. While delays occurred in recruitment in some of the centres, most of them were unable to have the full staff. The pattern of appointments varied depending on the rules of the State Government. In many centres, some or all of the staff were deputed from the regular Government service to work in the DMHP, in others they were recruited on 'contract basis'. Recruitment rules, minimum required qualifications, rules regarding reservations, availability of persons with requisite qualifications and frequent turnover of staff were reported as major bottlenecks in availing the services of the prescribed number of staff for whom funding was provided. In general, a minimum range of essential medicines used commonly for treatment of mental disorders were available in adequate quantities in most district clinics. However, availability of medicines in taluk hospitals and PHCs varied. While the budget provided for medicines was adequate, many centres reported difficulties in obtaining approvals and sanctions for purchase of drugs and various time consuming formalities had to be gone through. In spite of these difficulties, few centres had purchased a long list of various non-essential as well as non-psychiatric medicines.

Case records of various types, starting from the simple to the most detailed were maintained, particularly for patients seen at the district clinic in different centres. There was no standard reporting format followed at any centre. Information, Education and Communication (IEC) activities of

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[5]   The Report of Evaluation of DMHP can be seen at https://mhpolicy.files.wordpress.com/2011/05/nimhans-report-evaluation-of-dmhp.pdf. This link was accessed on 1 September 2015.

varied nature were carried out by most of the centres. Out-patient clinical services were well-established in 15 of the 27 centres, at the district hospitals. In many of these district hospitals, no mental health cure of any sort existed prior to the starting of the DMHP. In eight of the centres, the out-patient clinic was conducted daily, while in the rest, the clinic was held either on alternate days or once in three days. The number of new patients seen during the first year of the clinic varied from a low 4 to 2,500 and the number of follow-ups during a year varied from 10 to more than 17,000. The availability of mental health services closer to their homes including free drugs for patients added to the value of clinical services. The family members also reported improvement in functioning and coping of their sick relatives and improvement in the overall quality of life of the whole family. Fourteen of the 27 centres had established 10 bedded in-patient facility. The starting of this facility at the district hospital seems to have substantially contributed towards reduction of stigma in mentally ill persons. Out-patient services at taluk level hospitals and/or primary health centres were established only in six of the 27 centres. None of the centres were able to carry out community surveys of mental disorders due to their involvement in setting up the service component of the scheme effectively.

Taking into consideration the objectives of the DMHP scheme and the various components prescribed by the scheme to achieve these objectives, the overall performance of the DMHP was found to be functioning at different levels of efficiency thereby contributing to different levels of outcome and effectiveness. A variety of factors were responsible for this – motivation and commitment of the nodal officer and the programme staff, and interest and administrative support of the State Health Authorities, like senior officers of Directorate of Health Services, Directorate of Medical Education, Principal of Medical College, Head of the district hospital, etc. Funds, by and large, never proved to be a constraint though certain centres experienced difficulties in accessing funds.

All this gave an indication that at the centres where the programme functioned adequately, the objectives of the DMHP were primarily achieved. That is, mental health services had been decentralized to the district level if not to the level of PHCs, from mental hospitals and medical college hospitals, with partial integration of these services with the general health services. Further, mental health services had started in places where none existed. The possibility of early detection and treatment of patients within

the community was enhanced in all the districts where the programme was being implemented. The distances to which patients and their relatives had to travel reduced considerably and the case load of mental hospitals located in States gradually declined. However, the community rehabilitation facility for chronic mentally ill who are discharged from mental hospitals need to be developed in all the programme sites. Further, all the States where the programme was being implemented, having gained experience needed to plan and improve mental health services in their States.

NMHP, DMHP and Tenth & Eleventh Five Year Plans

Based on the evaluation conducted, the NMHP was re-strategized during the Tenth Five Year Plan (2002-2007) and from single-pronged it became multi-pronged programme for effective reach of mentally ill persons and their families. Not only was the DMHP expanded to 100 districts all over the country but emphasis was laid to strengthen 37 government mental health institutes by way of modernizing them, up-gradation of the psychiatric wings of 75 government medical colleges/general hospitals, focus on IEC activities, education, research and training in mental health for improving service delivery. By the end of the Tenth Five Year Plan, DMHP was extended to 110 districts, 23 mental hospitals were modernized and psychiatric wings of 71 medical colleges/general hospitals were up-graded.

During the Eleventh Five Year Plan (2007-2012), an allocation of ₹ 1,000 crores was made for the NMHP and it was envisaged to integrate it with the National Rural Health Mission (NRHM) for optimizing maximum results. The programme was divided into two parts. Part I of NMHP focussed on human resource development, spillover schemes and continuing 123 DMHPs. Establishment of at least 11 Centres of Excellence (CoEs) of mental health and neurosciences within the Plan period by up-grading existing mental health institutions plus strengthening a number of institutions for human resource development. Part II of NMHP pertained to comprehensive expansion of DMHPs from 123 districts to 325 underserved districts and this was to be initiated on the basis of the findings of an evaluation of the ongoing DMHPs in 123 districts of the country.

The Eleventh Plan thus witnessed the evaluation of the DMHP by the Indian Council for Market Research (ICMR), New Delhi. For the given purpose, the ICMR identified 20 DMHP districts and 5 Non-DMHP districts. The DMHP beneficiary districts were chosen from Ninth and Tenth Five

Year Plan period and the assessment highlighted startling findings. It was found that funds received for the DMHP in the selected districts were not utilized uniformly. For instance, one-third of the districts under the Ninth Plan utilized over 99% of the received funds, another one-third utilized 63% to 91% and the remaining utilized 37% to 47% of the total amount received. The reasons cited for this were administrative delay, difficulty in recruiting and retaining qualified mental health professionals and low utilization in training and IEC components. In case of districts under the Tenth Plan, most of the districts had received only the first installment under the DMHP. Of the grant received, one-third utilized more than 90%, half of the districts spent 51% to 87% and in the remaining districts the programme had just begun. The reasons given for these were similar to those already stated above. Most of the districts were not able to utilize the full amount for training due to delay in implementation. The expenditure on training and IEC components was found to be low in most of the districts mainly due to lack of organizational skills in the DMHP team, low community participation in the programme and lack of coordination with the district health system. Moreover, there was lack of clarity with regard to the goals of DMHP. About 85% of the health personnel stated that 'spreading awareness' was the main purpose of the DMHP, 69.9% felt it was 'integrating mental health and general health services'. For the Psychiatrists and Clinical Psychologists, it was 'capacity building of the health system for mental health service delivery'[6].

Regarding availability of drugs, 25% of the districts reported that there was regular inflow of drugs. Rest of the districts faced difficulties in maintaining regular availability. This primarily was due to lack of dedicated drug procuring mechanism for DMHP and financial authority to the nodal centre. About 61% of the beneficiaries accessed the district hospital as their first point of contact. The percentage of patients accessing Community Health Centres (12.7%) and Primary Health Centres (11.5%) were found to be low. Eighteen per cent of the total respondents confirmed that they were referred to district level for treatment.

Comparative analysis of satisfaction with quality of service provided under DMHP revealed that on 1 to 10 scale, district Madurai in Tamil Nadu

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[6]   For details, see Evaluation of District Mental Health Programme, Final Report Submitted to Ministry of Health and Family Welfare, Government of India by Indian Council for Market Research, New Delhi, 2008, pp. 2-4.

attained the highest score at 9.6. The other districts that rated higher than the average of 7.3 were Raigarh in Maharashtra, Tinsukia in Assam, Navsari in Gujarat, Delhi, Nagaon in Assam and Buldana in Maharashtra. Awareness about the different types of mental illness was found to be significantly higher in DMHP districts in comparison to Non-DMHP districts. Likewise, there was difference in approach of respondents of DMHP and Non-DMHP districts to deal with mental illness. For example, consulting occult practitioners was suggested only by 47.3% of respondents from DMHP districts as against over 70% of Non-DMHP respondents[7].

Thereafter, another review of DMHP was carried out by NIMHANS in 23 DMHP districts of four southern states. Its findings, the findings of two evaluations conducted earlier and the document prepared by the Planning Commission Policy Group for the XII Plan District Mental Health Programme in June 2012 by and large signified that despite being active in 123 districts, it was barely functional in most districts. While the performance of the programme was not entirely satisfactory in most districts, there was an emerging pattern of the programme functioning better in some States while in others there were no districts where the DMHP was implemented. The method of selection of the 123 districts itself resulted in a skewed distribution of DMHP districts with certain parts of the country (south and west) enjoying many DMHP districts while the north, central and north-east States having comparatively fewer districts. Shortage of health human resource and their inadequate training for mental health, lack of community engagement, little primary care work force participation, poor governance, fragmentation of mental health in key Ministries and Departments, and overall lack of leadership and technical capacity contributed to the implementation failure in many districts.

Continuing with the same approach would mean slow progress in realizing the basic human rights of persons with mental illness. It was thus suggested that DMHP should be redesigned and revitalized by evolving better collaborative arrangements with strong community participation, linkages with voluntary sector, civil society and academic institutions from inter-disciplinary backgrounds. Besides, it should make use of the private

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[7]   The final report of the "Evaluation of DMHP" conducted by ICMR and submitted to the Ministry of Health & Family Welfare can be accessed on https://mhpolicy.files.wordpress.com/2011/05/evaluation-of-dmhp-icmr-report-for-the-ministry-of-hfw.pdf. This link was accessed on 10 October 2015.

sector knowledge and skill base with adequate safeguards against commercial interests prevailing over public interests[8].

Twelfth Plan and Latest Guidelines

Presently, DMHP is being implemented in 241 districts of the country. The Ministry of Health and Family Welfare, Government of India has recently issued very comprehensive guidelines regarding the programme for its effective implementation. As per the new guidelines for implementing district level activities under the NMHP during the Twelfth Plan period, the components of DMHP will mainly be - (i) service provision for the management of mental disorders through OPD and IPD services at district hospitals as well as OPD and outreach services at CHC/PHCs; (ii) training of DMHP team at the nearest medical college/centre of excellence; (iii) training of medical officer of CHC/Taluk hospital and PHC at the district hospital for managing common mental disorders and referral services and sensitization of community health workers and elected representatives of community; and (iv) community awareness through IEC activities. The guidelines also envisage strengthening/creation of inter-sectoral linkages besides provision of mental health helplines.

The guidelines would be useful as far as they give details about the services to be ensured at the district hospital and taluk/PHC level, the training to be carried out as well as community awareness efforts to be carried out, financial assistance available, etc. However, it may be stated that there is still ambiguity regarding appointment of the staff in DMHP districts as much is left to the discretion of the State authorities[9].

Other activities to be undertaken during the Twelfth Five Year Plan period include establishment of 10 more centres of excellence in mental health for which adequate allocation of funds has been made. Currently, 11 mental health institutes have been funded for developing into centres of excellence in mental health. Likewise, at present, 27 Post-graduate departments

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[8] See the XII Plan District Mental Health Programme document prepared by the Planning Commission Policy Group in June 2012. It can be accessed at https://mhpolicy.files.wordpress.com/2012/07/final-dmhp-design-xii-plan2.pdf. This link was last accessed on 26 October 2015.

[9] For details, see Guidelines for Implementing of District Level Activities under the NMHP during the Twelfth Plan Period issued by the Ministry of Health & Family Welfare, Government of India on 24 June 2015. Also, see Guidelines for Implementing Tertiary/Central Level Activities under the NMHP during the Twelfth Plan Period issued by the Ministry of Health & Family Welfare, Government of India on 24 June 2015.

in mental health specialties, viz. Psychiatry, Clinical Psychology, Psychiatric Nursing, and Psychiatric Social Work are being supported by the Centre for their establishment/upgradation. The Twelfth Plan envisages providing similar support to another 93 Post-graduate departments. Funds have also been provided to support Central and State Mental Health Authorities across the country to help them in performing duties entrusted upon them in the Mental Health Act, 1987 and the proposed Mental Health Care Bill[10].

Significant Initiatives of National Human Rights Commission

In the year 1997, the Supreme Court entrusted the National Human Rights Commission (NHRC) with the supervision of the functioning of three mental hospitals in Agra, Gwalior and Ranchi. Since then, it has been undertaking visits to these hospitals for bringing about overall improvement in its administration and management. In the process, the admission and discharge of patients in these hospitals has been streamlined in accordance with the provisions of the Mental Health Act, 1987 and the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare; incidence of deaths of mentally ill patients has come down; diagnostic and therapeutic facilities in all the three hospitals have been upgraded and their impact is visible in the rate and speed of recovery of patients; the three hospitals are also engaged in expanding mental health services at the community level; a significant feature has been the establishment of Half-way Homes for the cured patients before they are finally discharged; a special drive has been initiated to restore a number of cured patients to their respective families, who had earlier been reluctant to take them back; an expert group was constituted to deal with the rehabilitation of the cured patients who were either destitute or had been abandoned by their families; for rehabilitation of long-staying patients, Project-Maitri was launched by Action Aid, India with financial support from NHRC. As per the project, sensitization workshops for attendants and nursing staff of the three hospitals were organized.

Simultaneously, the Commission in collaboration with NIMHANS in Bangalore undertook a research project on "Quality Assurance in

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[10] The NHRC too has commented on this Bill. The comments made by it have been forwarded to the Ministry of Home Affairs, Government of India in January 2015.

Mental Health" in 1997-1998. The project team was headed by Dr. S. M. Channabasavanna, former Director, NIMHANS and the team worked under the guidance of Justice Shri V. S. Malimath, former Member of NHRC. The report was finalized in June 1999 and sent to all the mental hospitals as well as to the Union Ministry of Health and the State Governments & Union Territory Administrations for necessary follow-up action. The States and Union Territories were requested to apprise the Commission on the progress of implementation of the report.

In 2003-2004, another research project "Operation Oasis – A Study Related to Mentally Ill Persons in West Bengal" was undertaken by the Commission in collaboration with Kolkata based NGO. The objective of the project was to determine the percentage of mentally-ill and mentally disabled among the inmates of jails and other custodial homes in West Bengal; and assess their living conditions so as to find out whether the human rights of inmates are adequately protected or not. In 2008-2009, the NHRC brought out the status report on mental health entitled "Mental Health Care and Human Rights". The status report gives the latest developments in mental health care in India since the initial involvement of the NHRC through the "Quality Assurance in Mental Health" report. In 2012, it brought out a publication titled "Care and Treatment in Mental Health Institutions : Some Glimpses in the Recent Period".

In addition, a video documentary in Hindi and English was prepared highlighting various issues in the comprehensive care of the mentally ill in hospitals. The documentary emphasizes the responsibilities of all levels of care-givers in the mental hospitals. A Core Group on Mental Health was further constituted by it. While ensuring better functioning of the three mental health institutes, the NHRC with the gradual passage of time also took upon itself the responsibility of monitoring all the 43 odd public mental hospitals located in various parts of the country on the basis of NHRC and NIMHANS report entitled "Quality Assurance in Mental Health". Besides urging the Medical Council of India and the Ministry of Health & Family Welfare to augment their efforts for meeting the demand of adequate manpower in the field of mental health, it has monitored the plight of mentally ill persons languishing in jails, religious places, kept in chains and has formulated guidelines on reporting of deaths in mental hospitals.

Moreover, it asked the Director Generals of Police and Chief Secretaries of all the States and Union Territories to take appropriate steps to ensure

implementation of the Mental Health Act, 1987. The Commission, in particular, has recommended for implementation of Section 23 of the Mental Health Act, 1987, which lays down powers and duties of police officers in respect of certain mentally-ill persons. Under this section of the Mental Health Act, the police have an obligation to take into protective custody a wandering or neglected mentally ill person, inform his/her relative and also produce such person before the local magistrate for issue of reception orders within a stipulated period of time.

The Commission has now filed a petition in the Supreme Court vide CRLMP No. 8032/2013 in W.P. (Crl.) No. 1900 of 1981, Dr. Upendra Baxi vs. State of U.P. & Ors. apprising the Apex Court of the improvements made and shortcomings still remaining.

Way Forward – Important Issues Needing Attention

As observed earlier, the focus of the NHRC as regards mental health care in the country was largely on improving the conditions prevailing in mental health hospitals/institutions. After several years of efforts made in this direction, the Commission filed a petition in the Supreme Court vide CRLMP No. 8032/2013 in W.P. (Crl.) No. 1900 of 1981, Dr. Upendra Baxi Vs. State of U.P. & Ors. apprising it of the improvements made and shortcomings still remaining. The NHRC sought its intervention in the form of appropriate directions to concerned authorities for removing the remaining shortcomings. It was only when the matter was before the Supreme Court that the Union Ministry of Health and Family Welfare filed an affidavit, which highlighted various issues which were hindering the effective implementation of the NMHP and the DMHP. In fact, a thorough review of the entire mental health care system has been initiated thereafter, under the supervision of Supreme Court and with the effective support of NHRC.

During the recent period, the NHRC has also organized two conferences on the subject involving various stakeholders as well as experts in the field. The deliberations in these conferences have highlighted that as far as the DMHP is concerned, there is huge variance in the quality as well as extent of implementation of the programme across States. As a result, the goals set under the programme have not been achieved substantially. During the course of discussions, various problems which have been coming in the way of effective implementation of the programme and other significant issues were highlighted, and which if addressed by the concerned authorities, especially

in States which are lagging behind, will go a long way to create conditions of effective mental health care in the community under the DMHP. These are discussed below in subsequent paragraphs.

Firstly, utilization of funds under the DMHP is an important area of concern. It is understood that the Medical Officers concerned with the implementation of the programme do not have sufficient financial autonomy as the funds are controlled by the higher authorities in the Headquarters of State Department. As such important decisions for expenditure to be carried out remain pending for want of approvals. Therefore, the control of funds needs to be decentralized. In fact, decentralization of funds to the maximum extent possible, even up to the District Mental Health Officer will help overcome such problems. The problem of non-utilization of funds can be illustrated with the case of Odisha, where between 2003-2004 and 2004-2005, Government of India sanctioned substantial funds for each of the eight DMHP units at Mayurbhanj, Puri, Bolangir, Dhenkanal, Koraput, Keonjhar, Khandamal and Khorda districts towards remuneration of staff, purchase of equipments and medicines, training of doctors and para-medical staff, and IEC activities under the scheme. Most of these districts took more than seven to nine years to utilize the amount. In some districts, there are still funds lying unspent. Tracking of funds would be useful for their better utilization.

Secondly, the most important issue concerning poor implementation of DMHP relates to the dearth of trained manpower in the area of psychiatry, clinical psychology and psychiatric nursing. The States need to address this problem with lot of vigour and perseverance. It has been seen that while some of the States have made huge progress in this area, some of the other States have done virtually nothing.   For instance, in Tamil Nadu, it has been observed that the State Government has conducted professional training in mental health for the Medical Officers, para-medical staff working in Government Hospitals and in the Primary Health Centers as also for the non-medical workers of the Districts. As per a report prepared by the Directorate of Medical and Rural Health Services, Tamil Nadu and the Center for Public Health, NIMHANS, 1,223 Medical Officers, 2,558 para-medical staff and 5,296 non-medical workers had been trained by 2013. Till date, as per the State official sources, a total of 1,432 Doctors have been trained in Tamil Nadu. And, it is also understood that each of the 25 districts which are implementing the DMHP are having a Psychiatrist. All the sanctioned

posts in the districts have been filled up. In Delhi, the Institute of Human Behaviour and Allied Sciences (IHBAS) is the nodal center for implementation of DMHP. As per its Director, around 200 health professionals including Medical Officers, para-medical and non-medical personnel have been trained since 2000. It is understood that IHBAS has its own GP Training Module to suit the local needs. In Madhya Pradesh, tertiary care hospitals are involved in giving training to the medical professionals on mental health care. In Odisha, according to official sources, trainings are being conducted under the aegis of the Mental Health Institute and SCB Medical College and Hospital, Cuttack and about 2,000 personnel have been trained. However, as per the recent report of the Special Rapporteur of the Commission, there is still acute shortage of psychiatrists in the State who could be posted in the districts and placed incharge of DMHPs. In fact, according to the Special Rapporteur, as against 84 posts required/approved for the DMHPs, only 15 are filled up at present. There is, therefore, need for the Medical Officers from other streams as well as the para-medical and other ancillary staff to be imparted training in psychiatry. It has been observed that medical officers, who are not trained in psychiatry, are having less confidence to handle the mentally ill patients. Hence, there is need for training them to carry out this job. In fact, it needs to be ensured that adequate funds are available for training of manpower in this field and at the same time, the training resources/facilities available at the central institutes located in Bengaluru and Tezpur and other centres of excellence are made use of by the concerned State Governments.

Thirdly, there is also a related issue of the para-medical and ancillary staff working on very low wages on the basis of contractual appointments. The social worker is paid a salary as low as ₹ 1800 to ₹ 2000 per month. Hence, they have little incentive to work and most of them try to find other opportunities and leave the jobs whenever possible. Same is the case of nurses. Delays in approval of funds and their subsequent release lead to irregular payment of salaries which, coupled with anomalies in pay scale vis-à-vis the regular State employees lead to poor retention of the professionals and supporting staff. In addition, poor infrastructure and lack of logistic support compound the problems. There is a suggestion that in order to arrest these trends, such staff should be appointed on the basis of permanent posts created under the State Government with reasonable pay scales to retain the professionals in the field. There is also a threat that the Central Government funds will not be available permanently and hence the State Government needs to provide for the possible void. In fact, it would be advisable for the Central Government

to continue the financial support under the programme. There is further need for clear guidelines regarding roles and responsibilities as sometimes, the medical officers in charge are not aware of their responsibilities.

Fourthly, there is a need for laying emphasis on rehabilitation of the cured patients. This is an area which is very closely integrated to the concept of community care of the mentally ill persons. States like Tamil Nadu have made huge strides in this area. Avenues for rehabilitation have been created in activities like bakery, laundry, running of departmental stores through creation of self-help groups. Job placement fairs for persons with mental disabilities are held in the State. Under the Mahatma Gandhi National Rural Guarantee Act (MNREGA), job opportunities at every village are being provided for mentally ill and they are assured a salary of ₹ 183 per day for 100 days. Vocational training of three months duration is being provided in the area of animal husbandry for the mentally ill through collaboration with the Tamil Nadu Veterinary and Animal Sciences University. In Kerala, rehabilitation centers are being run by community based organizations in addition to the rehabilitation services being provided by institutions like NIMHANS, Kozikode. Kerala is a pioneer in community based rehabilitation. Maharashtra too has a psycho-social rehabilitation programme at its regional mental hospital, Yerwada, Pune.

Fifthly, it is felt that IEC activity should be carried out vigorously and continuously under the programme. In Tamil Nadu, for instance, six-days counseling and psycho-educational skills training for college Professors is being carried out. Besides, efforts are being made to sensitize the religious faith healers. In fact, a 50 bedded rehabilitation institute in Erwadi Dargah has been set up with the active support of the Dargah Committee. IHBAS in Delhi is also organizing regular IEC activities at the district level which include awareness and sensitization camps, street plays, posters, exhibitions and pamphlet distribution. It would be useful if other States carry out such activities. In addition, there is need for life-skills education in schools in this area.

Sixthly, the idea of running satellite clinics as carried out in States like Jharkhand and Delhi should be replicated across the country. Jharkhand with DMHP being implemented in only four out of a total of 24 districts is effectively utilizing the facilities at RINPAS in Ranchi, which is running satellite clinics as community outreach programme. It is understood that a team of mental health professionals visits outreach community centers at

different destinations like Jonha, Khunti, Saraikala and Hazaribagh. They also provide counseling services in jails on monthly/fortnightly basis. Similarly, IHBAS, Delhi carries out community outreach programme though its mobile mental health units which were started in 2011 to fill the treatment gap in the area of mental health.

Seventhly, there is a need for more active involvement of NGOs along with the State authorities. In a State like Jammu & Kashmir, it is understood that only one NGO is working in the area of mental health care. NGOs can play an important role in the housing of the homeless mentally ill as in Gujarat where 15 NGOs have been identified for this purpose. NGO activity is seen in Maharashtra as well where some of them are involved in the efforts to improve the quality of life of long stay patients. BANYAN in Chennai is another example providing services to destitute women for their reintegration with the society.

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Disability and Access to the Internet : From Rhetoric to Human Rights

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Abstract

When disability rights icon Jacobus tenBroek argued nearly fifty years ago for the right of people with disabilities "to live in the world,"perhaps no one could have contemplated its extensionto a virtual world created by the Internet. Nevertheless, tenBroek's call to attain participatory justice for persons with disabilities by 'integrationalism' could not have been more relevant than in the Internet age.The progressive articulation of the Internet as a symbol of a new and more democratic frontier of civilization makes access to the Internet a prerequisite for meaningful participation in the community. Whereas it is widely acknowledged that the Internet holds 'limitless potential for new forms of individualism, self-determination and social progress' for the disadvantaged and marginalized groups in the community, access to the Internet is rarely examined as a human right issue. This paper lends ahuman rights perspective to the discourse ondisability rights and access to the Internet. It is argued that augmentation of substantive equality and participatory goals for persons with disabilities compels recognition of accessibility rights of persons with disabilities to the Internet as a human right.

I.   Introduction

Even as persons with disabilities were entitled to a range of civil, economic, political, cultural and social rights, they were denied most of these rights and discriminated against across the world. The perception of disability as a medical condition was deeply entrenched in the society. Thus, rooted in the bodily impairments of persons with disabilities, prevalentsocietal attitudes and legal responses saw disability as a medical problem that left an individual unable to cope with society at large or at least for most life activities (Breslin &

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Yee 2002). Consequently, the state and society adopted a welfarist approach towards disability. This led to further segregation and isolation of persons with disabilities from the mainstream and deepened the belief that persons with disabilities were unequal and less worthy humans. With growing discrimination and marginalization, disability rights movement began its crusade to break free from the stranglehold of medicalised perception. The quest to attain participatory justice for persons with disabilities led to the development of social model of disability. According to the social model,disability was a social construct created through a myriad of exclusionary social barriers. This model views disability as a social disadvantage that results from physical, cultural or social barriers that limits the opportunities accorded to persons with disabilities to participate in the community.

There was a progressive realization that concerns about exclusion, discrimination and rights of persons with disabilities, the largest minority in the world,is a human rights issue rather than a social welfare issue. The paradigmatic United Nations Convention on the Rights of Persons with Disability (CRPD) voiced this growing concern in a more assertive manner. In a major departure from traditional form of charity model and medical model of disability that perceived persons with disabilities as objects of charity requiring medical treatment, CRPD brings a paradigm shift in the way disability was being conceptualized by adopting a social model of disability within human rights framework. Persons with disabilities are considered as 'right holders' and 'subject of rights', being the key decision makers of their lives and participating in the formulation and implementation of policies that affect them, thereby ensuring greater autonomy to persons with disabilities.

CRPD has neatly put in place, globally accepted legal standards so far as disability rights are concerned by clearly laying out the content of rights, their application, monitoring, implementation and application. In other words, CRPD provides an authoritative text with reference to disability rights by clearly identifying these. It seeks to focus on eliminating barriers created in society by way of physical, environmental and infrastructural limitations that hinders persons with disabilities from enjoying their human rights to the fullest extent and asserts that given the same opportunities as others, people with disability can also make an equally valuable contribution to society. In order to ensure independent living and full participation of persons with disabilities in all aspects of life, CRPD recognised accessibility as a cornerstone for attainment of rights of persons with disabilities. CRPD

mandates removal of barriers which in interaction with impairments hinder full and effective participation of person with disability in society on an equal basis with others.[1] In the present time, participation and inclusion of persons with disabilities and effective realisation of their rights enshrined in CRPD has to be attained both in the physical world as well as the virtual world.

We live in an age where the Internet has become natural and unquestionable feature of modern life. With the rapid growth of online services- everything from paying bills, reading newspapers, filling applications for jobs and education, writing exams, mailing, socializing, the real world activities have migrated to the virtual world. Since most of activities of the human community are carried out on or through the Internet, there is a pervasive change in the way we interact and operate. Owing to the unique characteristics of the Internet - its openness, its global interconnectedness, its decentralized nature, it was thought that the Internet may hold "limitless" potential for new forms of individualism, self-determination, and "social progress(Shapiro 1999)." The Internet offered a means by which marginalised and disadvantaged groups could obtain information, assert their rights, and participate in public debates concerning social, economic and political changes to improve their situation. Proliferating digital revolution and online mode of operation comprised renewed promises to persons with disabilities. For persons with disabilities, the Internet was largely perceived as an equaliser that would overcome barriers witnessed in physical world and offer opportunities of inclusion that were denied in physical world.

However, as technology advanced, the Internet developed into two distinct civilizations - those living inside the electronic gates of cyberspace and those living on the outside. Today the world can be seen as starkly divided between those with the technology to obtain and use information and those without. The digital divide exists on several fault lines including geography, economics, gender, race and disability. While those with access to information take strides in socio-economic and political, cultural realm, others without access remain lagging behind.[14]All the same, a constantly expanding and inaccessible Internet creates new barriers for people with disabilities and new

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[1] Article 9 stipulates : "toenable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas."

opportunities for everyone else. Further since its public development over the last two decades, virtual technologies and the Internet continues to take shape every day and any denial to access places persons with disabilities in an even more 'digitally' disempowered position.[2] Unless attention is given to accessibility, the inevitable result will be shifting the exclusion of people with disabilities from physical spaces to virtual ones (Jaegar 2012).

It is in this backdrop that this article set out to lend human rights perspective to the discourse on disability rights and access to the Internet. It is argued that augmentation of substantive equality and participatory goals for persons with disabilities compels recognition of accessibility rights of persons with disabilities to the Internet as a human right. The argument is set out as follows. Part I briefly introduces converging tracks of disability rights and access to the Internet. Part II explores emerging disability rights jurisprudence and its agenda for the Internet. Part III examines the Internet as a symbol of a new and more democratic frontier of civilization which calls for a close scrutiny of the right to access the Internet. This partexplores deeper connects between human rights endorsed and enshrined in the existing framework of treaties and conventions and access to the Internet. It argues that effective realisation of human rights in the Information Society necessitates lending human rights perception to access the Internet. Part IV appreciates the compatible agenda on accessibility set up at international fora pertaining to the Internet Governance and underscores that its implementation requires forging stronger ties with goals of CRPD and concludes.

II   Emerging Disability Rights Jurisprudence

Owing to the medicalised perception of disability, the subordinate status of persons with disabilities was thereby ascribed to their innate bioligical inferiority (Hahn 1996). Non-disabled members of society historically neither viewed persons with disabilities as a part of societal norm nor made any attempts to avoid barriers physical or attitudinal in the very creation of social framework. Thus, the real world was not created by or for persons with disabilities. Rather it was set up around the needs of the non-disabled, leading to exclusion of persons with disabilities. While forms of exclusions in the physical world are apparent, those prevailing in the virtual world more subtle. For instance, exclusive reliance of stairs in buildings rather than ramps

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2   Ibid.

presumes that presence of people who cannot climb stairs-for instance, wheelchair users-are not expected or desired. A media-rich website where images or sounds are inaccessible erroneously presumes that those who cannot see those images or hear sounds are not expected to be present online.

As opposed to medical model, social model of disability makes a compelling case for modifying social systems or policies to enable persons with disabilities to participate and benefit from the opportunities commonly enjoyed by non-disabled members of society (Crossley 1999). Some fifty years ago, Jacobus tenBroek had argued that it is the conditions created by the modern world which in combination of impairments restrict the functionality of persons with disabilities. He eloquently argued that nothing could be more essential to personality, social existence, [and] economic opportunity than the physical capacity, the public approval, and the legal right to be abroad in the land (tenBroek 1966)." tenBroek advocated that persons with disabilities have a right to live in the world and to have equally meaningful contact with the population and community at large. Accordingly, the right to live in the world entails not only physical access to areas of public accommodation,[3] but even more appreciably "a basic right indispensable to participation in the community, a substantive right to which all are fully and equally entitled."[4] Towards this end, tenBroek propounded 'integrationism'- that is a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so.

Resonating the sentiment of participatory justice, CRPD calls for equality and non-discrimination and participation in the society including the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities. Based on the concepts of justice, human dignity and autonomy, CRPD seeks to promote a rights based regime for persons with disabilities. It essentially entails that society ought to perceive disability as a part of human diversity and towards that end make a major departure from formal equality to substantive equality.[5] Unlike the

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[3]   Ibid p.848.

[4]   Ibid p.858.

[5]   A formal equality model is based on an idea of 'sameness' or a 'symmetrical approach', assuming that all persons should be treated in the same way or are 'symmetrical' irrespective of the unequal consequences of this treatment. This approach is formal in character, in the sense that it does not require a substantive or a normative test of the contents of the treatment as long as there is consistency in treatment. It therefore does not address structural disadvantages facing persons belonging to certain groups and consequently equality sought to be achieved by disregarding a certain characteristic.

formal approach to equality that places emphasis on prohibiting distinctions on the basis of personal characteristics, CRPD endorses substantive approach to equality. A substantive vision of equality aims to ensure "respect for difference (Chalmers & Davies 2011)." The concept of human dignity plays an important role in ensuring substantive equality (Fredman 2001). It is concerned with tackling "systematic" forms of discrimination rooted in society and with securing social inclusion for underrepresented groups[6] which stress on removing obstacles in society so as to allow full participation of persons with certain characteristics.

In the Information Age, participation and inclusion of persons with disabilities also needs to occur concurrently in the Internet. Thus, right to live in world encompasses right to live in the virtual world (Gibbons 1997)[7] which necessitates access to the Internet (Bradley & Stein 2015). Clearly, persons with disabilities were mostly invisible when the construction of the physical world was undertaken. Hence, the state and community at large failed to make accommodations for them in the existing infrastructure. This resulted in the first round exclusion for persons with disabilities since the world was simply not designed for them. It is apprehended that the exclusion and marginalisation of persons with disabilities will replicate in the virtual world, if norms of accessibility are not observed whilst constructing the virtual world. Unlike physical world, virtual world is still under construction and it is therefore imperative to avert a second round of exclusion of persons with disabilities.

While CRPD has addressed the issue of accessibility, it has not really engaged with the nature of this right. The mandate under CRPD, therefore, assumes criticality in setting out agenda for the Information Society. It would be a worthwhile exercise to analyse and connect articles of CRPD to create a mosaic of accessibility rights for persons with disabilities. CRPD identifies accessibility as one of the preconditions to attaining full and effective

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6   Supra note 12.

7   Different terminologies are in vogue to address this space-virtual world, cyberspace, information society, information highway; often explanation of one term leading to evolution of the other. Virtual world or cyber space which represent not a physical or tangible, but rather a giant network which interconnects innumerable smaller groups of linked computer net- real works....The resulting whole is a decentralized, global medium of communications – or 'cyberspace' - that links people, institutions, corporations, and governments around the world. What results is a seamless web of communications networks, computers, databases, and consumer electronics that will put vast amounts of information at user's fingertips.

realization of participation and other substantive rights. Thus, the Preamble recognizes the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms. Conscious of the attitudinal and social barriers in society towards persons with disabilities, CRPD seeks to dismantle the same and advance a disability inclusive citizenship.

In order to ensure independent living and full participation of persons with disabilities in all aspects of life, CRPD by virtue of Article 9 clearly mandates that State parties shall take appropriate measures to ensure that persons with disabilities have access to that persons with disabilities shall have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity.[8] The focus is no longer on legal personality and public/ private nature of those who own buildings, transport infrastructure and vehicles, information and communication services. As long as goods, products, services are open or provided to the public, they must be accessible to all, regardless whether they are owned and/ or provided by a public authority or by a private enterprise. Persons with disabilities should be able to access equally all goods, products and services that are open to the public in a manner that ensures effective and equal access, in a way that respects the dignity of persons with disabilities.[9]

The very scheme of CRPD entails reading specific rights in combination with general obligations laid out in Arts. 3 to 9. For instance, when Art. 19 of CRPD guarantees the right of persons with disabilities to live independently and to be included in the community, the said right necessarily extends to the Internet and its implementation in an inclusive manner which respects diversity. In a similar breath, the right to be educated in an inclusive and non-discriminatory manner under Art.24 entails ensuring that education opportunities, information, admission process, online examinations are made available to persons with disabilities on an equal basis with others. Accordingly,

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8   Article 9 "toenable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas".

9   Committee on the Rights of Persons with Disabilities Draft General Comment on Article 9 of the Convention-Accessibility.

where a denial of the access to the Internet leads to any exclusion or restriction on grounds of disability and has the effect of impairing or nullifying the enjoyment or exercise of human rights; it amounts to discrimination and a breach of obligation under the CRPD.[10]

Take for instance a situation where a user with visual impairment interacts with websites with the aid of a screen reader inbuilt in computer and derives range of information including education, employment or social networking. The screen reader reads aloud text or magnify image on the screen or provide Braille, but this tool alone cannot do the job unless the digital information provided on the website or e-book is accessible. Thus, if the user could not have access to website say for example pertaining to education on an equal basis with others, it amounts to discrimination and inequality; denial of rights guaranteed and a breach of international obligation by the State. In a progressively technological advanced world where real world individuals are expected to make transitions to the virtual world for their basic civic transactions, including education, banking and finance, accessing public information, compiling health information; does not interference with or denial of access to the Internet become a human rights issue? Is it not troublesome when technology results in jeopardizing the universal and the indivisible core to the most basic and primary human rights?

Thus, notions of substantive equality and human dignity would call for a proactive approach in altering the structural barriers faced by persons with disabilities in accessing the Internet. Evidently, when "access to technology is one determinant of who can participate in the social, cultural, political and economic facets of a society," failure to ensure access, amounts to a breach of international human rights obligation (Gregg 2006). It, therefore, becomes a human rights issue as well as a social justice issue to ensure participation and inclusion of persons with disabilities to the Internet. Yet examination of such a vital issue as the right access the Internet is rarely undertaken from a human rights perspective and hardly under disability lens. The discussion that follows examines the framework within which the right to access the Internet has occurred.

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[10]   Article 2 stipulates: Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. Note that the preambular paragraphs of the CRPD reference equality and non-discrimination and Article 1 declares the purpose of the CRPD, and Article 3 articulates non-discrimination as a general principle

III Nature of Right to Access the Internet

From its beginnings in the early 1970s to its massive worldwide expansion in the 1990s and 2000s, the Internet has evolved from a research project to being an integral part of the human community. A narrow and simplistic explanation of the Internet is often expressed as a mass of lines that connect computers worldwide. Thus, when approached from a highly technical angle, the Internet is viewed as a global infrastructure provided by private parties. Close to the infrastructure metaphor, another popular perception of the Internet stems from its references as a medium to facilitate communication. However, it was soon realised that unlike other traditional mediums of communication, the Internet had a global reach, dialogic interaction and plurality of contents which led to creation of an open-ended space. This was a space which enabled participants not only to passively receive information but also actively engage in dialogues and discourses beyond local and regional contexts. The emerging publicness was further harnessed to mobilize political opinions, expression, and diversity of voices. As virtual communities became central to everyday activities of the connected individuals; they created a richer choice of communities to which they may belong, and that online spaces potentially revitalize the notion of community. Thus, based on the transformation of space, work and economic activity, culture and communication, what emerged is a new social structure, the Internet, as a global network society, characterized by the rise of a new culture and community.

The Internet as an architectural framework of the Information society has been deeply affecting and fundamentally reshaping almost every aspect of human so much so that access to the Internet impacts advancement or retardation of several human rights.[11] Whilstaccess to the Internet can be empowering, denial to the same can lead to marginalisation and exclusion. It thus occupies a central position in empowering people to claim their basic rights. The decentralized associations and loose networks formed through the Internet enable change in authoritarian regimes (Faris & Palfrey 2015). Yet

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[11]   For an excellent and detailed impact assessment of internet on several human rights conventions and rights guaranteed thereunder see Human Rights and The Internet: A Review of Perceptions in Human Rights Organisations, David Souter, Report to the Association for Progressive Communications (APC), available at http://www.apc.org/en/system/files/HumanRightsAndTheInternet_20120627.pdf. Last visited 17th August 2014.

such regimes are simultaneously becoming more sophisticated in blocking, tracking, and limiting Internet access and online expression. Governments have used blocking or filtering technologies to limit access to specific websites or to completely halt access to the Internet in order to quash undesired communications. Governments also have employed the law as a means to control online speech.[12]

It was in the backdrop of political uprisings and repression of access to the Internet that examination of nature of right to access predominantly occurred under freedom of speech and expression paradigm.Since most international human rights instruments are open textured; the same have been read extensively to be referring to access to the Internet. Recently in his 2011 report to the United Nations General Assembly, the U.N. Special Rapporteur on Freedom of Expression, Frank La Rue, suggested that ensuring access to the Internet should be a 'priority' for states, and reminded government 'of their positive obligation to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet.'[13] The Special Rapporteur underscores Article 19 of the Universal Declaration of Human Rights (UDHR) which states that everyone has the right to 'hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers. It is suggested that such explicitly reference to the right of expression through any media amounts foresight of the UDHR so as to include and accommodate future technological developments.

However, it needs to be appreciated that right to access the Internet has negative and positive implications for several human rights. Those who have access to the virtual world find themselves better situated to seek, exercise, claim, and receive their needs and get to define the economic, social, and political landscape.Evidently, today a person cannot be expected to live independently and exercise full range of other rights as freedom of assembly, and the right to privacy; the right to education and even the right to live in a community; unless one is ensured access to the Internet. Consequent

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[12]   Ibid.

[13]   Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on Key Trends and Challenges to the Right of all Individuals to Seek, Receive and Impart Information and Ideas of All Kinds Through the Internet,* Human Rights Council, U.N. Doc. A/HRC/17/27.

to exploration of deeper convergences between the Internet and human rights, discussions surrounding access to the virtual world have slowly gained momentum around the world in recent years.[14] Whereas the existing framework of international human rights law is relevant and applicable to new communication technologies such as the Internet, it needs to be contextualised in terms of human rights issues other than just freedom of speech and expression. If the Internet is a requirement of modern living so much so that non-access tantamount to non-existence, one must inquire into the nature of this right. What is then the right to access the Internet?

Evenas significance of the access to the Internet is largely conceded, opinion about its exact nature remains deeply divided.It is often argued that human rights ought to be clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation(Donnelly 1982). According to this view those rights which are not natural arenot human rights. Under the highly popular perception of the Internet as a medium of communication or an infrastructure, access to the Internet is seen as a civil right. Sceptics relegate the right to access the Internet to a mere civil right. Human rights claims to the right to access the Internet are often criticised as frivolous and exaggerated, touted as merely aspirational.

However, it has been realised that diverse range of human rights are resistant to compartmentalization and characterisation. United Nations recognises no hierarchy of rights, and all human rights are equal and interdependent, the right to development cannot correctly be viewed as either a "super-right" (i.e., an umbrella right that somehow encompasses and trumps all other rights) or as a "mini-right" (with the status of a mere

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[14] These developments are witnessed in academic exercises, domestic legislatures as well as international fora. *See generally* Steven Hick, Edward Halpin & Eric Hoskins, Human Rights and The Internet (2000); Michael L. Best, Can the Internet Be a Human Right?, Human Rights & Human Welfare 23, 24 (2004); Alberto J Certa Silva, *Internet Freedom is not Enough: Towards an Internet based on Human Rights,* 18 SUR - International Journal on Human Rights 17 (2013). At domestic level, refer to law on access to the Internet access as a right in Estonia and Finland. In April 2014 Brazil passed a groundbreaking legislation touted as Brazil's 'Internet Constitution' that guarantees equal access to the Internet and protects privacy of Brazilian users. The French online copyright infringement law known as HADOPI passed in May 2009which gave power to a government agency to cut off people's Internet access for repeated copyright infringement ran into difficulties. A month after passing the law, the country's Conseil Constitutionnel, or national constitutional court, found this power to cut off Internet connectivity an unconstitutional restriction on citizens' right to "freedom of expression and communication. In New Zealand, back in 2008, Internet access was likened to a basic human right by key government officials. At international level, range of charters and principle initiatives are emerging in international bodies and regional bodies such as IGF, the Council of Europe.

political aspiration).[15]

Human rights, therefore ought to be conceptualized as a means of ensuring general human flourishing (Stein & Stein 2007). Hence, a more realistic and wholesome perception to the Internet may help demystify such criticism. It is important to comprehend that potentials of the Internet to provide a level playing field in terms of opportunities, participation and inclusive growth, necessarily entwines it with other human rights. This makes the right to access the Internet and human rights co-dependent. The Internet has become so foundational to everyday human functioning that failure to provide access to the Internet defeats the other human rights. Explored from this perspective the right to access the Internet may not be limited within freedom of speech and expression framework alone. Rather in order to fully appreciate the nature of the right to access, it has to be contextualised within a composite framework of all universal human rights.

Thus, references to the UDHR principles of equality, non-discrimination, social justice, realisation of the right of people to self-determination in political, economic, social and cultural dimensions as a prerequisite for realisation of all human rights and fundamental freedoms can be successfully read to include right to access the Internet. For instance, Art. 2 of the Universal Declaration of Human Rights[16] that stipulates that 'everyone is entitled to all the rights and freedoms....without distinction of any kind....,' becomes relevant when persons with disabilities are distinguished and excluded by denying them access to the Internet and their rights and freedoms thereto. It also impinges on the limitation of access to informational resources when denial to the Internet can increase underprivileged status of persons with disabilities. Similarly, when Art.26(1) of the UDHR guarantees that everyone has the right to education and further stipulates that higher education shall be equally accessible to all on the basis of merit; such right to education cannot be ensured unless read in conjunction with access to the Internet. While most opportunities of education, scholarship, research, admissions, and examinations are progressively taking place online; the right to access to study components and other processes has to be available to all in an accessible

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[15]   Realising the Right to Development, United Nations Human Rights, Office of High Commissioner http://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf (last visited on 20th September, 2015).

[16]   Universal Declaration of Human Rights, G.A. Res. 217A (III), art.26, U.N. Doc.A/810 (Dec. 10, 1948).

manner otherwise the same would amount to inequality in opportunities and result into not only discrimination but also denial to the very development.

Thus, when read in the light of the right to development, access to the Internet assumes vitality. While the right to development is considered to be relatively new concept, one may argue that human rights and human right to development share a common goal of attaining 'human freedom' based on the well-being and dignity of human beings everywhere.[17] In a narrow sense, the right to development comprise of an individual's right to the development of the personality, as well his economic and social rights. According to Mohammed Bedjaoui "the right to develop is nothing other than the right to an equitable share in the economic and social well-being of the world (Bedjaoui ed. 1991)." On the other hand, Amartya Sen argues that development is not merely a right; rather, it should be seen as a freedom. Sen notes that freedom is the overarching objective of development. Under a broader conception as expressed by Amartya Sen, development may be understood as a process of expanding the real freedoms that people enjoy (Sen 1999). Right to access the Internet defines the scope and opportunity to development, irrespective of the approach to the concept of development. Whereas it is often criticised that the very concept of development is fluid and vague, the United Nations Declaration on the Right to Development conveniently combines both the approaches aforementioned. The UNDRD defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."[18]

With the economic and social opportunities shifting on the online world, access to the Internet plays a significant role, if development means ensuring equitable share in economic and social well-being, as suggested by the narrow approach. When development is expressed as promoting freedom, access to the Internet again assumes vitality if the political, economic, social and cultural functions are predominantly occurring through or from the Internet. In other words, when the dignity, self-reliance, and autonomy of individuals

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[17] UNDP Report 2001, Partnerships to Fight Poverty. www.undp.org/content/dam/undp/library/corporate/UNDP-in-action/2001/English/complete.pdf (last visited 20th September, 2015).

[18] See *Declaration on the Right to Developmnent,* U.N. GAOR, 41st Sess., Annex, Agenda Item 101, 97th plenary meeting. at 1, U.N. Doc. A/RES/41/128 (1987) Art.1.

in the Information Age aredefined by access to the Internet, the right to access takes human rights overtones.

IV Towards the Creation of an Inclusive Internet

As one concedes that the Internet has introduced an egalitarian platform for creating, sharing and obtaining information on a global scale; the same presupposes accessibility for all in order to retain its truly egalitarian character. Further the promises of the Internet to attain emancipation for persons with disabilities cannot be realised unless accessibility is ensured. Shutting out persons with disabilities from the virtual world implies denial of opportunity of living an independent life with dignity and self-respect. When disability rights icon Jacobus tenBroek argued nearly fifty years ago for the right of people with disabilities "to live in the world," perhaps no one could have contemplated its extension to a virtual world created by the Internet. Nevertheless, tenBroek's call to attain participatory justice for persons with disabilities by 'integrationalism' could not have been more relevant than in the Internet age. While CRPD calls for ushering a rights-based regime for persons with disabilities, it cannot serve its purpose of mainstreaming persons with disabilities from marginalization unless it fully realises the potentials and implications of the access to the Internet.

Whilst philosophical, political and legal consensus is yet to emerge regarding the exact status of rights to access to the Internet, concerns to ensure access have been doing rounds in the corridors of the Internet governance fora. Interestingly, international dialogues and negotiations involving stakeholders have been emphatic on creating an accessible virtual world. The World Summit on the Information Society (WSIS)[19] while developing and establishing the foundations of information society in the form of the Declaration of Principle recognized that the Internet should ensure equitable distribution resources and facilitate access so to accelerate the social and economic progress of countries, individuals, and communities[20].

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[19] Endorsed on January 31, 2002 by the UN General Assembly in Resolution *56/183* before 2002, most nations lacked an understanding of the significance of internet governance. While internet governance policies were discussed in the United States as early as 1998 most notably by the Internet Assigned Numbers Authority (IANA) and later by the Internet Corporation for Assigned Names and Numbers (ICANN) - the World Summit on the Information Society elevated this discussion to the global stage.

[20] WSIS, The Declaration of Principle, Document WSIS-03/GENEVA/DOC/4-E, 12 December 2003 available at http://www.itu.int/wsis/docs/geneva/official/dop.html (last visited 20th September, 2015).

It declared its *"desire and commitment to build a people-centered, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life."* WSIS defined 11 action lines to push forward its agenda of inclusive information societies including several specifically addressing the situation of persons with disabilities.[21] The WSIS Plan of Action represents the first global acknowledgement by the United Nations Member States on the need to ensure that persons with disabilities have complete access to knowledge and services based on digital technologies, whether education, employment, e-government or leisure.[22] Adopting a participatory tone, accessibility of ICTs for persons with disabilities was defined as a condition for persons with disabilities to fully participate in society and enjoy all fundamental freedoms.[23]

Elaborating access to the Internet, UN Special Rapporteur Frank la Rue in his special report underscores two dimensions: a) access to online content, without any restrictions except in a few limited cases permitted under international human rights law; and b) availability of the necessary infrastructure and information communication technologies, such as cables, modems, computers and software, to access the Internet in the first place. The Special Report makes cross references to the mandate of CRPD to underscore that the needs of persons with disabilities should be taken into account when designing and implementing Internet infrastructure at all levels. With a compatible discourse surrounding accessibility in the Internet Governance fora and connections drawn between access and disability, it

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[21]   See Action line C2 on Infrastructure, C3 on Access to information and Knowledge, C4 on Capacity building, C7 on ICT applications benefits in all aspects of life, and C8 on Cultural diversity and identity, linguistic diversity and local content, and outlined a series of steps to be implemented by public and private institutions.

[22]   It is noteworthy that several articles of the Convention on the Rights of Persons with Disabilities (CRPD) contain similar language to the WSIS Plan of Action, in particular action line C2 #9 (f) on product development and Universal Design, and C3 #10 (c) Access to Information and Knowledge on research and development.

[23]   As a follow-up to WSIS, the *Partnership on Measuring ICT for Development* launched in Tunis by UNESCO, ITU, several UN agencies and the OECD to assess the progress of the WSIS lines of action, selected ten targets covering the information infrastructure, the availability of ICTs, the installed base of devices and number of subscribers to services. Few metrics, however, were selected to measure actual ICT usage patterns and none covered the specific issues of accessibility for persons with disabilities.

seems the things are moving in the right direction. Yet one still requires to forge stronger ties between the agenda chalked out in these international stakeholders dialogues and the mandate under CRPD. The rhetoric to create an inclusive, participative, accessible and emancipatory Internet and a rights-based world for persons with disabilities is to become reality, it necessarily has to be read in terms of human rights.

Unless right to access the Internet is fully appreciated as foundational to attaining development and freedom in the Information Society, reiteration of rights of persons with disabilities will prove meaningless. As Quinn and Degener have rightly described - "Recognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake and a claim on society that must be honoured quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others. This view militates strongly against the contrary impulse to rank people in terms of their usefulness and to screen out those with significant differences (Quinn & Degener 2002)."

The rise of the Internet points towards future issues, for society, for architects of virtual society and persons with disabilities (Paul & Bowman 2005). While the Internet has become such an integral part of everyday functionality that a life without the Internet is unimaginable, it is nevertheless relatively young. It is critical to engage with the scope and nature of the right to access the Internet to avert a second round of exclusion and marginalisaton of persons with disabilities. This paper has attempted to examine right to access the Internet and contextualised its understanding with regards to persons with disabilities. Such examination of the right to access to the Internet under disability rights jurisprudence opens up a complex discourse. Our understanding about the Internet and arguments on right to access continue to evolve and pose newer legal, technological and social challenges. The idea is to deepen the discourse surrounding access by exploring questions likely to be propelled by emerging disability rights jurisprudence. While definite answers may be far to seek, framing the right questions and contexts are critical in attaining the overall goals.

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IV – Diversity Pluralism and Human Rights

Globalisation : Diversity and State Responsibility

*A.S. Narang**

Abstract

Contrary to the widely believed understanding that in the process of modernisation traditional identities will disappear and a culturally homogenous society will emerge there has been a resurgence of ethnic and cultured identities. The accelerated process of globalization, inspite of almost total emphasis on science, technology, economy, common values, etc. has increased the identity consciousness. The reasons for this, according to observes, include end of cold war, greater consciousness of racism associated with the rights revolution, differential impacts of modernization, relative deprivation etc. Yet, it seems, that most states do not take the issue of diversity seriously. The paper discusses some approaches, particularly the liberal theory that recognizes only individual as citizen and claimant of rights and provides a critique of the same. It, instead, supports the views of value pluralists for recognition of communities and group rights. What is required is not only tolerance but a positive attitude of cultural pluralism by the state and larger society.

Today in the age of globalisation, so called era of liberal modernity, we live in an increasingly heterogeneous diverse society. According to some estimates, the world's independent states today contain over 600 living language groups and 50,000 ethnic groups. Globalisation, has not resulted in the erasure of localized, communal identities, but rather in their transformations. In the changing nature of the world, there have, in fact, developed two powerful, thoroughly interdependent, yet distinct and often actually opposed motives: the desire to build dynamic and efficient national or even supranational modern states, and the search for distinctive identities. According to Raoul Blindenbacher and Ronald L. Watts (2003 : 7), the former is generated by the goals and values shared by most Western and non-Western societies; a

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desire for progress, a rising standard of living, social justice, influence in the world arena, participation in the global economic network and a growing awareness of worldwide interdependence in an era which makes both mass destruction and mass construction possible. The latter arises for smaller, directly accountable, self-governing political units, more responsive to the individual citizen, and from the desire to give expression to primary group attachments – linguistic and cultural ties, religious connections, historical traditions and social practices – which provide the distinctive basis for a community's sense of identity.

Observers and scholars provide various reasons and theories for the emerged trends including end of cold war, greater consciousness of racism associated with the rights revolution, differential impacts of modernization, relative deprivation, so on and so forth. Here it is neither the concern of this paper nor the place to discuss and analyse those. One thing, however, is clear, that identity consciousness remains a fact as it has always been, rather it has enhanced.

II

There have been and remain sharp differences among scholars regarding identity. The egalitarian liberals conceive the individual as a freely choosing, autonomous, self engaged in the maximization of his/her own utilities (Mahajan, 1994: 353). Discussing the views of such liberals like S. Lancy, Roberts (2003: 145) brings out that they argue that the self, rather being determined by the community of which it is a part, participates in its own creation. The argument is that communities do not define or determine identity. Individuals, to some degrees, make themselves. Therefore, the only kind of social and political bond that can exist between such atomized persons is a contractually one, based on individual needs and interests which can ensure the conditions necessary for realization of individually defined goals and ends. There are, in that sense, no shared ends that are collectively pursued in society (Mahajan 1994 : 353).

Communitarians dispute this conception of the 'autonomous individual'. As Kymlicka (2001 : 18) points out, they view people as 'embedded' in particular social roles and relationships. Such embedded selves do not form and revise their own conception of good life, instead, they inherit a way of life that defines their good for them. Rather than viewing group practices as the product of individual choices, they view individuals as the product of social

practices. Moreover, they often deny that the interests of communities can be reduced to the interests of their individual members. Privileging individual autonomy, therefore, is seen as destructive of communities.

Peri Roberts (2003: 14) at the same time brings out that communitarians never claim strict cultural determination. They agree that self, of course, is creative to some degree. Of course, individuals can shape their own identities. The communitarians argue instead that admitting a degree of individual identity creation does not show that there is necessarily a significant disjuncture between the self and shared communal understandings. However, as Bikhu Parekh (2000: 122) argues that as members of cultural communities human beings acquire deep and powerful tendencies and dispositions which constitute a culturally specific nature. As individuals these dispositions are inseparable and ineradicable from their being … and constitute … their nature. Again, cultural sentiments 'strike deep roots and become an inseparable part of their personality'.

While the enlightenment rationalism or individual autonomy is not denied it is no exaggeration to suggest that humans are identity seeking creatures. T.K. Oommen (2009 : 36) points out the tendency to concentrate on one identity as the master identity, be it class, citizenship, race, nationality or region and to treat other identities as secondary is common and a persistent problem. Thus, both Marxists and modernists tend to concentrate on class, peasantry, or occupational identity as the central identity while primodialists focus on nationality, religion, caste or race. However, it is necessary to insist that individuals and collectivities have multiple identities and no one of these can acquire primacy in all contexts. Oommen (1990: 66) reminds us that it is useful to keep in mind two points. First the human need is not only for impersonal ties with entities, such as political parties and bureaucratic state, on the one hand and for privatised ties, provided by primary groups such as family and his group, on the other, but also for intermediate structures which blend and balance the two. Therefore, while egalitarian liberals argue of universal human needs and interests, pluralists not insensitive to this fact, believe that norms for these manifest themselves in various ways each historically and culturally specific. Therefore, our common humanity partially determines our nature.

Indeed for a long time one prominent concept of modernisation has been the emancipation of individuals from ascribed roles and identities. It

was widely believed that modernisation is a cauldron in which traditional identities will disappear and a culturally homogenous society will emerge. The transition from tradition to modernity was theorized as a unlinear tendency (Oommen, 2009: 26). For both liberals and Marxists in the nineteenth century, the great nations, with their highly centralised political and economic structures, were the carriers of historical development. The smaller nationalities were backward and stagnant and could only participate in modernity by abandoning their national character and assimilating to a great nation (Kymlicka 1995). The overall assertion was that religion, in particular, would fade and disappear with the triumph of science and rationalism. This has not happen anywhere. In fact the accelerated process of globalisation, inspite of almost total emphasis on science, technology, economy, common values, etc. have brought about a resurgence of identity.

As said above, this has been explained by scholars in many ways. These include assertion by some religio-cultural groups, a reaction to spread of western consumer culture threatening the survival of other, particular minority identities. Many of these, as Eisenstadt (2007: 244) points out dissociate Westernisation from modernity. They deny the monopoly or hegemony of Western modernity, and the acceptance of Western modern cultural programmes as the epitome of modernity. This highly confrontational attitude to the west or rather to what is conceived as 'Western' according to Eisenstadt (ibid : 244) is clearly related to their attempts to appropriate modernity and the global system on their own non-western, often anti-western, modern assumptions. The processes of globalisation including international communication, trade, mobility of people, have also accelerated the general awareness of plurality of religions and identities. Within another framework of globalisation, encouragement to human rights and civil society movements, have also given impetus not only to individual rights but also community or group rights of ethnic, religious and linguistic communities.

Whatever the differences, identity consciousness remains a fact. While the forging of unity through political organisation subsumes the autonomy of the individual and sanctity of his choice in owing allegiance to whatever structures he/she prefers, there pre-exist certain socio-cultural structures which the individual is born into and shapes his/her beliefs, orientations and behaviour patterns. People invariably retain attachment to their own ethnic group and community in which they were brought up. There is interdependence between the individual and collective processes of identity

formation. Thus, individuals expect some consistency between their private identities and symbolic contents upheld by public authorities, embedded in the social institutions and celebrated in public events. Otherwise individuals feel like social strangers; they feel that the society is not their society (Breton, 1987: 461). Minorities are more prone to this alienation as their cultures are often vulnerable to economic, political and cultural pressure from the larger society. The members of the majority culture do not face this problem (Kymlicka at 1995: 146). Minorities, therefore, look towards state for protection and promotion of their identity.

III

As far as State is concerned, it seems that most States do not take the issue of diversity seriously. As Fleiner, et.all (2003: 200) point out culture is either denied or ignored or is so central to the nation that all other cultures are excluded. Almost all constitutions, proclaim universal values. Underlying them, however, are varying concepts of nationhood, all of which exclude multicultural diversity. Either they ignore it, deny it or eliminate it. The historical reality is that the process of so-called nationhood in general becomes monolithic nationalism. In the formation of national identity preference to majority religion (or culture) somehow become an integral component of nation-building process.

In some States as Riis (2007: 262) points out religious pluralism, at societal level has hitherto been challenged by politics either of monism or secularism. Monism occurs as one religious community seeks for domination over the religious field, while secularism represents a political strategy to restrict or eradicate the religious field. In societies which follow the western, democratic paradigm, these confrontations have ended with a proclaimed victory for religious pluralism. However, the meaning of pluralism is not clarified. Therefore, new discourses concerning contradictory understanding of pluralism arise. According to Riis (ibid: 263) different forms of pluralism may stress religious toleration, denominatisation or individual freedom of different degrees. Nathan Glazer and Michael Walzer, bring out two models – non-discrimination and group rights.

Under non-discrimination model, Danchin (2002: 7) points, out members of religious groups are protected against discrimination and prejudice and they are free to maintain their religion as they wish, consistent with the rights of others. Religion is, however, 'privatised' and while state does not oppose

the freedom of people to express their particular culture or religion, neither does it nurture such expression. Rather in the words of Glazer it responds with 'benign neglect'. The central premise of second model, that of 'group rights' is the use of public measure to promote or protect the religious or cultural beliefs and identities of specific minority groups. It is argued that this model constitutes a more robust form of non-discrimination as it requires the state to provide the same sort of rights to minorities that are taken for granted by majority (Danchin, ibid: 7).

In general almost all liberal democratic states have followed the first model supported by egalitarian liberal scholars and international community. As liberal political theory is based essentially on the relationship between the individual and the polity, according to egalitarian liberals like Barry the enlightenment model of unitary citizenship which endows all citizens with an identical set of common citizenship rights can adequately respond to ethno-cultural diversity. As Barry (2001) notes, 'the liberal commitment to civic equality contains that laws must provide equal treatment for those who belong to different religious faiths and different cultures'. On the unitary model, such equal treatment is best achieved by removing religious and cultural differences from the political arena. Thus, the state should not employ its powers to promote a particular religion or way of life, but should seek to adjudicate fairly between the conflicting demands of various groups that constitute the polity. That is to say, the state should remain impartial. Hence all citizens should enjoy the same rights and be subjected to the same constraints. For advocates of a unitary model, the fundamental rights of individual citizens typically protect universal interests shared by all human beings (Baumeister 2003: 111). Therefore, members of minorities, once they attain citizenship, are entitled to equal opportunities with all other citizens. They have a right to protection by laws banning discrimination, whether this be in the labour market the housing market or provision of government services.

In accordance with the above mainstream liberal views in the Post Second War period, the international community also accepted that the guarantee of human rights and good relations between states constituted adequate general solutions to minority issues (Fenet 1989: 39). Indeed since the Second World War, the issue of ethnic minorities has been down played within the U.N. system and it has mainly been reduced to a question of individual human rights (Stavenhagen 1990: 41). As Danchin (2002: 12) brings out, emerging

from the ashes of second world war there was a general consensus among the main powers to replace the minority protection treaties (pre-war), with a human rights regime more directly centered on individual rights. It was thought that one reason for the failure of the League system was its emphasis on the differences between minorities, and the use of "special protections" for different groups, which ultimately led to greater tension and opposition between groups.

Accordingly, neither the charter of the United Nations nor the Universal Declaration of Human Rights (UDHR) contains express provisions providing for minority protection. The United Nations refused to insert an article on minorities in the UDHR, and to extend the December 9, 1948, Convention on the Protection and Punishment of the Crime of Genocide to cover cultural genocide. The vision of human rights, thus, was based fundamentally on two premises on equality and non-discrimination. However, there also were vocal and serious voices against discrimination in the enjoyment of the rights guaranteed by the UDHR, both in general and specifically by ethnic minorities. These resulted in adoption of numerous covenants and conventions, many of those treaty based. Particularly important for minorities were International Convention on the Elimination of All Forms of Racial Discrimination, and International Covenants on Civil and Political Rights (ICPPR) and Economic, Social and Cultural rights (ICESCR). Later in 1981 was adopted U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief. Out of these Article 27 of the ICCPR was considered the most important global treaty standard. This reads:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

It is clear that Article 27 of ICCPR, is phrased in the negative, that is, minorities shall not be denied rights by the State. Danchin (2002: 13) makes two observations on Article 27 as it relates to the protection of religious minorities. First it does not protect "group rights" as such, rather it speaks of rights for "persons belonging to … minorities". Ermacora has described Article 27 as a right of individuals premised on the existence of a community, or as an individual right collectively exercised – a "group protection

provision". In this respect, the Article reflects the general concern of the ICCPR for individual rights while simultaneously recognizing the importance of community to the realization of individual rights.

Second, Article 27 treads a narrow line between the foundational liberal values of "tolerance" and "autonomy". On the one hand, the article may provide some justification for restrictions imposed by groups on their own members on the grounds of religious beliefs or practices, including toleration of "non-liberal" groups (presumably provided there is an adequate right to exist). On the other hand, the article may alternatively be premised on the basic liberal value of "autonomy", which requires the state to ensure that all persons have "the liberties and resources needed to make informed decisions about the good life including the right to question and revise traditional practices (Danchin, ibid).

Thus, after the failure of minority protection scheme of the League of Nations, the claims of national minorities from the post-war international law context, were replaced with a new focus on "human rights". As Will Kymlicka (1995: 123) brings out, national minorities who wanted something more than, or other than, the protection of their individual civil and political rights received little support from international law for their claims. In effect, international law provided only two unsatisfactory options for such minorities: they could appeal to Article 1 of the U.N. Charter, which says that all "people" have a right to 'self-discrimination'; or they could appeal to Article 27 of the ICCPR, which says that 'members of minorities' have the right to 'enjoy their own cultures in community with other members of their group.

IV

In due course, this liberal approach of universal, values, autonomy of individual and maximum tolerance did not work much and minorities in many states remained discriminated or marginalized. Limitations of the ideas of tolerance, universal reason, state neutrality etc. have been critically pointed out by communitarians and liberal value pluralists on the basis of historical and present empirical ground realities. Baumeister (2003: 111) analyzing the works of Liberal Value pluralists such as Stuart Hampshire, Richard Bellamy, John Gray and Bikhu Parekh brings out that they reject the liberal preoccupation with universal reason. For these writers, moral life is characterized by a plurality of values which cannot be harmoniously

combined in a single life or a single society. Thus, in contrast to universal human needs and interests they view human identities as inherently diverse, each expressing a distinct set of values and virtues. For value pluralists, therefore, political life is characterized not by the search for a common standard, but by the inevitable conflict among incommensurable cultures and values. Consequently, they are attracted to a 'differentiated citizenship', which acknowledges the political implications of cultural memberships and recognizes a broad range of group-differentiation rights.

In this context, Bikhu Parekh (2000) says that no impartialist theory has as yet acquired universal consent. He claims that the impartialist perspective is incoherent in the way it presumes that there must be one right ordering of human society and the good life despite the great variety of different views and practices throughout human history. For Parekh, the idea of one single right way is merely one further example of the fundamental monism of modern liberalism (Kelley 2003: 99-100). Elaborating the point Kelly (ibid : 100) points out that critics of liberalism and multi-culturalist theorists such as Will Kymlicka, James Tully, Iris Marion Young, Charles Taylor and Michael Walzer, all suggest that the liberal approach reinforces relationship of dependence and domination and fails to take account of the cultural specificity of the original norm of equality of opportunity.

The second point of critique by value pluralists is that of what they call false neutrality or ethno-cultural blindness of state. Will Kymlicka (2000 : 43) calls it a policy of 'benign neglect' of ethnic and national differences and finds it manifestly false. According to him what appears on the surface to be neutral system of common rights turns out, on inspection, to be a system that is heavily weighted in favour of the majority group. It is the majority's language that is used in public institutions; the majority's holidays that are recognised in the public calendar; the majority's history that is taught in schools; and so on. According to Kymlicka (Ibid) these examples of the privileging of the majority's cultural and culture cannot be seen as minor or accidental deviations from the ideal of ethno-cultural neutrality; they help define the very structure of the liberal state, which in turn shapes to structure the larger society.

Thus, the states, as Fernand De Varennes (2007: 123) points out, contrary to what is sometimes presented as a theoretical acquis, are not simply the sum of preferences of all their citizens. On the contrary, try as much as

they may, states can never be entirely neutral in ethnic term. Proponents of 'benign neglect' ignore the fact that minorities cultures are often vulnerable to economic, political and cultural pressures from the larger society. The viability of their communities may be undermined by economic and political decisions made by the majority. They could be outbid or outvoted on resources and policies that are crucial to the survival of their communities. The members of the majority's culture do not face this problem. Moreover, state policies regarding language, education, citizenship and government employment systematically privilege the majority's language and culture and disadvantage the minority, in some cases demonstrating, definite cultural, linguistic or religious preferences.

Persons belonging to minorities, therefore, find themselves in a double dilemma: they have interests in the electoral process and the political sphere but tend to be out-voted and under-represented. Minorities tend, therefore, to suffer disproportionately from a 'democratic deficit' in terms of numbers and influence in many if not most political systems (Varennes 2000 : 12). Even in most western democracies, despite the success in providing formal institutions of political justice for their citizens, it remains distressingly clear that some groups within these politics, have not experienced the same level of social or material (and sometimes even political) benefits enjoyed by the dominant groups within the same societies. The fact that some groups have statistically remained relatively disadvantaged in the face of ostensibly fair and neutral principles, according to Varennes (ibid) has increasingly led theorists to question whether it is out of perception of what constitutes "fair and neutral" which has reaccelerated the marginalisation of certain identifiable groups.

T.K. Oommen (2009: 37) states the above argument succinctly suggesting that (a) there is a qualitative difference in the nature of inequality in different types of societies; (b) the nature of individual-based equality is conceptually inadequate to cope with the complexity of heterogeneous, hierarchical and plural societies because cultural identity assumes considerable salience in these societies; (c) the identity assertions of dominant and dominated collectivities are qualitatively different: if that of the first is hegemonic, that of the second is emancipator; (d) the challenge that heterogeneous, hierarchical, and plural societies face can be tackled only by combining the individual-based equality with inter-group equality and group identity assertions by the weak which will in the long run foster inter-group harmony.

In view of the above value pluralists, like Kymlicka (2001 : 26) suggest that we need to replace the idea of an "ethno-culturally neutral state" with a new model of a liberal democratic state – what he calls the 'nation-building model'. According to Asbjorn Eide (2000: 5) what is required is not only tolerance but a positive attitude of cultural pluralism by the state and the larger society. Required is not only acceptance but also respect for the distinctive characteristics and contribution of minorities in the life of the national society as a whole. Protection of identity, according to Eide (ibid) means not only the state shall abstain from policies, which have the purpose or effect of assimilating the minorities into the dominant culture, but also that it shall protect them against activities by third parties, which have assimilatory effect. For this communitarians view minority rights as an appropriate way. As Stavenhagen (1990: 7) suggests, liberty, equality, fraternity, one-man one-vote, these are the watch words (and catch words) of the modern liberal democratic political system. Indeed, these watch words represent a major achievement in human history; they are the result of endless struggles, conflicts and sacrifice by many generations. But the idea of democracy arising of these liberal values cannot simply amount to be majoritiarian winner-takes-all sum game in linguistic, religious or cultural terms.

V

No doubt that under international law the states are obliged to ensure that all members of society may ensure their human rights equally. But as Hannum (1990: 290) suggests linked to the principle of equality is the notion that members of minorities are to be equal members of the majority in fact as well as in law. This concept borrowed from the decision of the Permanent Court of International Justice in the Minority Schools in Albania case, implies not only that minorities must enjoy formal legal equality but that they have the right to effective equality of opportunity or result vis-à-vis the majority community. The court expressed a twofold objective: 'to secure for minority groups the possibility of living peaceably alongside the rest of the population and cooperating amicably with them at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs'. It held that these two characteristics are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being a minority. The Court, therefore, held that:

"Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatments in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which, equality of treatment of the majority and the minority, whose situations and requirements are, different, would result in inequality".

To avoid the sort of injustices, the minorities are prone to, states have an obligation to encourage conditions for the promotion of identity that goes beyond mere protection and requires special or positive measures to ensure equal enjoyment and development of the rights of minorities in fact as well as under law. (Holt and Packer 2007: 129). Therefore, as Henrard (2007: 180) suggests two essential pillars of minority protection can be distinguished: 'more specifically the pillar of individual rights in combination with the prohibition of discrimination, and the pillar with special measures for members of minorities'. The normative force of this approach rests upon the argument that what is essential to foster and protect the identity (understood philosophically as a strong sense of selfhood that is worthy of respect) of individuals within such groups cannot be guaranteed through the universal liberal rights generally espoused by western democracies. Rather, this conception of identity or selfhood depends, in its own way, upon certain cultural values and practices the protection of which may violate what may consider to be universal human rights (Fierlbeck, 1996 : 3). To respect individuals within distinct cultural groups may in this way require differential rights; rights which protect cultural or group-specific traditions and institutions prior to the uniform rights propounded by the proponents of a more traditional democratic liberalism. Stavenhagen (1990: 72) points out that if minority cultures have any role to play in the contemporary world, then their rights must be actively fostered and not only passively and reluctantly protected. Universal human rights are not enough and, without specific provisions obligating states not only to abstain from interfering with the collective rights of minorities but also to provide active support for the enjoyment of such rights, minority groups will always be disadvantaged within the wider society.

Of course, the foundational principles of human rights must at all times be respected in the process. One of these foundational principles is that of non-discrimination between individuals. The state is obliged to respect and ensure to every person within its territory and subject to its jurisdiction

without discrimination on any ground including race, ethnicity, religion or national origin, the rights contained in the instruments to which that state is a party (Eide 2000 : 2). It is only in the light of these principles that minority rights are to be appreciated.

Another point is that as a group, a minority possesses an internal life structured by its own relationships of forces. This practical regulation of social life on the vital bonds of unity makes the minority a juridical order. This order may be loose, but it still exists so long as effective representations of the unity in images of authority subsist (Fenet 1989: 26). Therefore, both individual and collective human rights derive from the fundamental nature of human kind as a species. Individual human rights represent the principle of biological unity, the oneness of all human beings as members of humankind. Collective human rights represent the principle of cultural diversity, the distinctiveness of the diverse ethno-cultures developed by different ethnic groups within the human species. Together individual and collective human rights represent the twin global principles of human unity and cultural diversity.

As specified in the International Bill of Human Rights and related covenants, protections for individual and collective human rights essentially represent international moral guidelines, the global standards to which the laws of ratifying states should conform. What this means is that human rights principles are prior to law; laws themselves may violate or endorse them. When laws endorse human rights principles, then human rights become legal rights that can be claimed by individuals or groups who can provide evidence to show that their human rights protection allows those whose rights have been violated to bring forward claims for legal redress and recompense (Kallen 1990: 77). Equally important is the fact that conflict and tensions are inherent in society and so are differences in individuals and cultures. A fundamental state obligation under international human rights norms is to eliminate discrimination, not to destroy all differences.

In this background while initially the United Nations deliberations did not feel the necessity of declaring Rights of Minorities in due course through various deliberations and studies the Sub-commission on Prevention of Discrimination and Protection of Minorities recommended that a declaration on the rights of members of minority groups be drafted within the framework of the principles set forth in Article 27 of ICCPR. Finally

on 18 December 1992, the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The UN Declaration, of course, is inspired by the provisions of Article 27 of ICCPR illuminating further its meaning and contains provisions beyond Article 27. Expanding on existing provisions, it contains progressive language related to minority participation in the political and economic life of the State. More important it obliges states to create favourable conditions for promotion of minority cultures. Here it may be mentioned that before the adoption of UN Declaration on Minority Rights the Human Rights Committee already had began to expand the scope of Article 27 of ICCPR stating that positive measures by state may be necessary to protect the identity of minority. If minority rights are threatened, positive measures of protection are required not only against the acts of the state party itself, but also against the acts of other persons within the state party (Hannum 1990: 283). Again taking note of U.N. Declaration the Human Rights Committee in 1994 in its general comment on Article 27 stated:

> "Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture or religion. Accordingly, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion in community with other members of the group (U.N. Declaration CCPR General Comment 23 : 8 April 1994)."

In his commentary on the U.N. Declaration, former Chairman and Rapporteur Working Group on minorities Eide (2000: 5) wrote:

> "Identity is essentially cultural and requires not only tolerance but a positive attitude of cultural pluralism by the state and the larger society... Crucial in these regards are the language policies and the educational policies of the state concerned. Denying minorities the possibility to learn their own language or instruction in their own language, or excluding from the education of minorities transmission of knowledge about their own culture, history, tradition and language, would be a violation of the obligation to protect their identity. Promotion of their identity requires special measures intended to facilitate the maintenance, reproduction and

further development of the culture of the minorities. Cultures are not static, but minorities should be given the opportunity to develop their own culture in the context of an ongoing process."

Thus, both in academic circles and international community's understanding, there seems to be a shift towards viewing minority rights not just as a matter of discretionary policies on pragmatic compromises, but rather as a fundamental justice. 'Minority rights are increasingly being considered precisely as "rights", the violation of which can be an assault on the basic dignity and respect' (Kymlicka 2001: 81). While the proponents of Minority (group) rights make it clear that espousing of identity-based rights is not to suggest the exclusion or importance of individual rights, questions have been raised about the compatibility of collective rights with the liberal commitment of individual rights as also the utility of those for communities themselves.

VI

Critics of Minority rights begin with challenging the key assumption of what is variously referred to as 'the politics of difference', the politics of recognition' or 'multiculturalism' (Baumeister 2003: 112). They often describe minority rights as forms of 'special status' or 'privileges' and ask why these pushy and aggressive minorities are demanding concessions and advantages from the state. John Porter (1990: 297), for instance suggests that the organisation of society on the basis of rights or claims that derive from group membership is sharply opposed to the concept of a society based on citizenship, which has been such an important aspect in the development of modern societies. The individual makes claims as a citizen, a status common to all members. It is pointed out that citizenship rights are essentially universalistic whereas group rights are essentially particularistic. Members of cultural minorities, once they attain citizenship, are entitled to equal opportunities with all other citizens. Opponents of minority rights observe that individual human rights have their basis in the common needs of all human beings, in which all people of liberal outlook can agree. However, cultural minorities rarely have common needs that are generally agreed upon by members of the larger societies within which they live. Spokesmen for the minorities may not even agree among themselves about what their needs are (Birch 1989: 57). There also is a view that recognition of such rights may harm those they are designed to benefit. By privileging community rights

over the principle of equal rights, minority rights often reinforce existing hierarchies and gender inequalities within the group by restricting individual choice in the name of cultural integrity (Hasan 2000: 286).

Other arguments include that there is the possibility that if minorities are given too much leeway, collective rights may lead to demands for autonomy, self-government, self-determination and even political secession or independence, which may threaten the territorial sovereignty or even the very survival of a state. This is particularly expressed by newer states that the recognition of minority rights may encourage fragmentation or separatism, thus undermining national unity and the requirements of national development. Despite the fact that international law has insisted that the minorities have no right of self-determination and has never defined a legal right to secession, states fear that recognizing differences among ethnic communities or any form of group rights might make it possible to forge a larger multi-cultural unity which encompasses all the state's citizens (Hannum 1990: 284). Some theoreticians like Brian Barry see into it threat to very idea of liberal democracy. As Moore (2003 : 160-161) points out for Barry liberal democracy is a relatively rare and fragile form of government in the world, and that there are certain conditions that must obtain for it to flourish. He identifies three such conditions. Firstly, general acceptance of a concept of political and moral equality of persons is essential to a flourishing liberal democracy. Second it is important that there should be a narrow spread of income in society. And finally, and most significantly, Barry argues that the citizens of a just liberal democracy must share ties or bonds of solidarity towards one another and sentiments or patriotism towards the polity that is their common project. Therefore, for Barry the liberal commitment to civic equality entails that law must provide equal treatment for those who belong to different religious faiths and different cultures.

Supporters of minority rights and multi-culturalism such as Will Kymlicka, James Tully, Iri's Marion Young, Charles Taylor and Michael Walzer all suggest that the liberal criticism only reinforces relationship of dependence and domination and fails to take account of the cultural specificity of the original norm of equality of opportunity. According to Kelly (2003: 96) their first point is that the liberal model entails a centralised juridical state as the distributive agency dispensing justice. As such, liberal egalitarianism cannot take seriously the important political function of associations and groups in constituting moral and political goods. The second dissatisfaction is with the

apparent cultural blindness or false neutrality of liberal norms of justice and inclusion.

According to Kelley (Ibid : 96) it is argued by multi-culturalist critics that the form of liberal norms of inclusion is already culturally biased, in that they prescribe equality of opportunity in terms of having and exercising certain primary goods. These goods are things one needs, whatever else it is that one wants or values – such things are civil and political rights, the minimum conditions of self-respect and some level of economic well-beings. As general headings these may well seem fair enough – who possibly could object to civil and political rights? The problem arises with the specification of these rights and goods. If these rights are premised on a liberal conception of autonomy, then they may well run up against the internal norms of a culture which, whilst it values freedom, does not privilege autonomy as a source of a good life. In view of this Will Kymlicka (2001 : 82) says that human rights and minority rights must be treated together, as equally important components of a just society.

Multi-culturalists or value pluralist liberals do not deny the possibility of some kinds of minority rights undermining rather than supporting individual autonomy. Kymlika (2001 : 22) for instance agrees that, 'some national minorities – like some majority nations – are illiberal, and so restrict the choice of their members'. But the way out is not the assimilation of such minorities. Bikhu Parekh finds this criticism of violation of individual rights overstretched and diversion from the many benign aspects of cultural practices that are rendered unduly costly by liberal societies. Parekh in fact suggests for turning our critical faculties inwards on own cultures when contact with alternative cultures alert us to the fact that human life can be understood and organized in several different ways and that their own is contingent and challengeable (Roberts 2003: 152). While in a multicultural society the recognition of diversity may entail granting some minorities a range of legal exemptions and group rights designed to accommodate demands for deep cultural diversity for Parekh a different citizenship must be accompanied by an open-minded, morally serious dialogue between the majority and minority. Such dialogue must search for common ground and aim at mutual adaptation. In this search neither majority nor minority can expect all its existing cultural practices to remain unchanged. (Baumeister 2003 : 121).

The communitarians argue that admitting a degree of individual identity creation does not show that there is necessarily a significant disjuncture between the self and shared communal understandings. Kymlicka (1995: 35), therefore, suggests that the rhetoric about individual versus collective rights is unhelpful. He suggests to distinguish two kinds of claims that ethnic groups might make. The first involves the claim of a group against its own members; the second involves the claim of a group against the larger society. Both kinds of claims can be seen as protecting the stability of national or ethnic communities, but they respond to different sources of instability. The first kind, according to Kymlicka is intended to protect the group from the impact of external decisions (e.g. the economic or political decisions of the larger society). To distinguish these two kinds of claims he calls the first 'internal restrictions' and the second 'external protections'.

Both of these according to Kymlicka (ibid: 35) get labeled as 'collective rights', but they raise very different issues. Internal restrictions involve intra-group relations – the ethnic group may seek the use of state power to restrict the liberty of its own members in the name of group solidarity. This raises the danger of individual oppression. Critics of 'collective rights' in this sense often invoke the image of theocratic and patriarchal cultures where women are oppressed and religious orthodoxy legally enforced as an example of what can happen when the alleged rights of the collectivity are given precedence over the rights of the individual. Here, given the commitment to individual autonomy, Kymlicka (2001 : 22) agrees that liberals should be skeptical of claims to internal restrictions. According to him individual members must be free to question and reject any inherited or previously adopted identity, if they so choose, and have an effective right of exit from any identity group; these groups must not violate the basic civil and political rights of their members; and multi-cultural accommodation must seek to reduce inequalities in power between groups, rather than allowing one group to exercise dominance over other groups.

Baumeister (2003 : 122-23) suggest that there can also be transformative accommodation: the establishment of clearly delineated choice options. At pre-defined several points, individuals are to be given the choice whether to remain within the jurisdictional authority of the original powerholder. On this model, individuals are justified in 'opting out' if the current powerholder in a particular sub-matter systematically fails to address their concerns. Such reversal options according to Baumeister (ibid: 123) also allow individuals to

bring pressure to bear on the groups that represent them and thus create a strong incentive for powerholders to address in-group problems. He further points out that as the groups have a strong incentive not to risk alienating their members they may decide to reinterpret the existing rule to accommodate the concerns of disaffected members.

The common liberal assumption that recognizing collective rights is incompatible with the liberal commitment to individual rights, thus, is not correct. As Kymlicka (2001 : 22) puts it, 'to oversimplify, we can say that minority rights are consistent with liberal culturalism if (a) they protect the freedom of individuals within the group; and (b) they promote relations, of equality (non-dominance) between groups'. He agrees that our aims should be two fold: (a) to supplement individual human rights with minority rights, recognizing that the specific combination will vary from country to country; and (b) to find new domestic, regional or transnational mechanisms which will hold governments accountable for respecting both human rights and minority rights. The minority rights supplement, rather than diminish, individual freedom and equality, and help to meet needs which would otherwise go unmet in a state that clung rigidity to ethno cultural neutrality (Kymlicka 2001: 24). It is not a question of choosing between minority rights and human rights, or of giving priority to one over the other, but rather of treating them together as equally important components of justice in ethno-culturally plural countries. Kymlicka (ibid) argues for a conception of justice that integrates fairness between different ethno cultural groups (U.N. Minority Rights) with the protection of individual rights within majority and minority political communities (via traditional human rights).

VII

In the age of globalisation where because of the fear of erosion of minority cultures and identities and other aspects, already discussed, far-reaching resurgence of identity consciousness is taking place, the states need to understand the dynamics of identity in relation to other social forces and to build a national identity and consciousness out of diversity needs to move beyond tolerance towards promotion and protection. This, according to Eide (2000 : 5 – 6) is based on four requirements: protection of their existence, non-exclusion, non-discrimination and non-assimilation. A corollary of non-assimilation is to protect and promote conditions for the group identity of minorities. The basic principle behind 'collective human rights' according

to Kallen (1990: 78) is the right of ethnic communities as collectivities to legitimately and freely express their cultural distinctiveness. The distinctive elements of ethno-cultures may be expressed in language, religion, politico-economic design, territorial links, or any combination of these and/or other defining group attributes. Kallen, emphasises that regardless of the specific cultural attributes emphasized at any given time, in so far as a people's ethno culture is in itself consistent with human-rights principles, every ethnic group has the collective rights to develop, express and transmit through time its distinctive design for living.

Analysis of emergence and growth of extremism in many parts of the world makes it clear that mere presence of religion-cultural pluralism does not lead to conflict. It is the denial of minorities a dignified existence that alienates them and pushes to extremism. There is hardly any evidence to suggest that minority rights erodes social unity. In fact as Rajeev Bhargava (2000: 46) points out that those societies that grant equal recognition to groups at an opportune moment avoid the majority-minority syndrome and therefore, have no need for a majority-minority framework. However, once they miss this opportunity and a syndrome bedevils them, the only ethnicity, defensible option then is to live with a minority-majority framework.

In 2001, UNESCO member states adopted unanimously the Universal Declaration of Cultural Diversity, by which a new ethnical approach to respect for diversity has been formulated as a guiding principle for democratic societies. Its basic idea is that only when cultural diversity is in balance with social cohesion, can we find ways of democratic participation and peaceful coexistence.

Sane (2007 : XI) brings out that although the declaration has received strong support in member states throughout the world, its principles still need to be translated into actual policy-making under specific local and regional conditions. It is time the statesmen realize the importance of respecting and protecting diversity. Integration does not mean elimination, assimilation or denial of human differences such as religion, language, culture, etc. It is rather in appreciating them and engaged in.

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Pluralism and Fraternity in Constitutional Law

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All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[1]

Abstract

The articulation of fundamental rights in the Indian Constitution owes much both to the sentiments and values of the French and American Revolutions as well as to the United Nations Universal Declaration of Human Rights. These rights have been instituted in some form or another in societies committed to democracy, including in India. On the other hand, political philosophy has tended to largely disregard the concept of fraternity. Various members of the Constituent Assembly considered fraternity as profound applicable to an India divided by so many differences of various kinds. The Supreme Court has employed the principle of fraternity in certain cases, not only in the context of educational institutions but also other domains of social life. This paper examines these issues in detail in the light of Constituent Assembly debates and recent Supreme Court decisions.

Introduction

The articulation of fundamental rights in the Indian Constitution owes much both to the sentiments and values of the French and American Revolutions as well as to the United Nations Universal Declaration of Human Rights. At the same time, the emphasis on human rights tends to elevate the principles of liberty and equality, particularly in the domain of justice. Thus, we have the ideas of the 'inherent dignity and of the equal and inalienable rights of all', rights to life and liberty, freedom of speech and belief and equal rights to protection of the rule of law. These rights have been instituted

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1 Article 1 of the Universal Declaration of Human Rights 1948.

in some form or another in societies committed to democracy, including in India, and they are also the subject of a considerable wealth of scholarship in political philosophy and allied disciplines.

On the other hand, political philosophy has tended to largely disregard the concept of fraternity, though contemporary research in some parts of the world seeks to align it with the notion of 'horizontal solidarity' or position it in congruity with the value of 'justice'. In India, more recently, fraternity has been mentioned in law but continues to be denied attention by the social sciences. As the paper shows, various members of the Constituent Assembly considered fraternity as profoundly applicable to an India divided by so many differences of various kinds, in particular as an idea that would encompass notions of pluralism and the accommodation of difference and diversity. Subsequently, the Supreme Court employed the principle of fraternity in certain cases, particularly but not only in the context of educational institutions. At the same time, the paper argues that though there are possibilities for invoking fraternity in another domain of social life – housing equality – the application of fundamental rights and Constitutional principles has thus far been deferred therein, if we go by the relevant Supreme Court case of 2005.

Fraternity, Solidarity and Justice

In recent years, attempts are being made to reinstate fraternity in the literature and assert its contemporary relevance. Previous to this, interest in democracy's original trinity, liberty, equality and fraternity, had reignited in those countries around the time of the bicentennials of the American and French Revolution. However, because it has strong roots in the Christian tradition and appears vague in itself and incompatible with the concepts of liberty and equality, which are essentially individualistic in character, French thinkers have treated fraternity with a degree of suspicion and seen it as unsuitable as a political idea (Baggio 2013) regardless of the relevance it might have in the socialsphere (Munoz-Dardé 1999). In the US, Tocqueville's (1966) 'associationalism' and Putnam's (2000) ideas of 'trust' and 'social capital' are both deeply connected with fraternity. Through them, fraternity has had a role to play directly in social theory and indirectly in political philosophy, if volunteerism and associationalism are perceived as the basis of a broader definition of democratic citizenship (Baggio 2013: 42).

More than any other American thinker in recent times, it was John Rawls (1999: 90) who embarked on the effort to give concrete sense and function to the idea of fraternity. He acknowledged that fraternity is sometimes believed to have to do more with attitudes and sentiments which cannot be demanded of the members of wider society with respect to one another. Sometimes, fraternity is equated with social solidarity or equal self-worth. Whichever is the case, it is certainly true that fraternity has been considered the most light-weight and insubstantial of the three formative principles of democratic theory. However, Rawls promises the possibility of being able to link fraternity with the far more tangible idea of justice. This he does through the 'difference principle' which 'seem[s] to correspond to a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off'. Thus, Rawls relocates fraternity firmly within the domain of political philosophy.

In sum, scholarship on fraternity as a viable political category today seems to veer between two perspectives. It becomes clear that restricting fraternity to sentiments and feelings alone is largely discarded among academics. On the one hand, fraternity is thought of as a form of 'horizontal solidarity' (Baggio 2013) which stresses the principle of inclusion and co-existence within liberal, plural frameworks and has, ultimately, a universal relevance. On the other hand, Munoz-Dardé perceives of fraternity within a framework of justice, along the lines of John Rawls, and not limited to an 'emphasis on community or care' (1999: 81). Fraternity becomes a contractualist notion conceptualizing persons as individual subjects of law (rather than in a mass or in terms of a community) who extend towards each other an ethic of 'individualized impersonal concern' (1999: 93)within a participatory political body.

The new scholarly engagement with the concept of fraternity has not somehow included India. This paper seeks to search out traces of the idea of fraternity in debates in the Constituent Assembly and in relevant judgments of the Supreme Court. What was the context in which 'fraternity' was included in the Preamble to the Constitution and how was it related to the values of pluralism and accommodation in a diverse society? What meanings and associations was fraternity given and was it conceived as a political or merely a social category? Drawing from suggestions in the Constituent

Assembly debates that fraternity is part of both the formation and exercise of citizenship within society, the paper puts forward the idea thatresidential neighborhoods and educational institutions must be the primary loci wherein present and future citizens of democratic India learn to live with and understand each other as members of one nation in a spirit of tolerance and cooperation. Thus, it enquires into the use put by the Supreme Court to the idea of fraternity in cases relating to access to educational institutions and housing discrimination.

Fraternity in a Plural Society : Constituent Assembly Debates

Fraternity was not part of the Objectives Resolution prepared and moved by Jawaharlal Nehru on 13 December 1946 and adopted by the Constituent Assembly on 22 January 1947 as the basis of the Preamble of the Constitution.[2] The Drafting Committee, under the Chairmanship of Ambedkar, inserted the word 'fraternity' later. While submitting the Draft Constitution to the President of the Constituent Assembly Rajendra Prasad on 21 February 1948, Ambedkar wrote that the Committee had added a clause about fraternity in the Preamble even though it had not been part of the Objectives Resolution because it felt that 'the need for fraternal concord and goodwill in India was never greater than now, and that this particular

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[2]   The Resolution read: 'This Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent Sovereign Republic and to draw up for her future governance a Constitution :(2)WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and (3)WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to law of the Constitution shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom, and

(4)WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and (5)WHEREIN shall be guaranteed and secured; to all the people of India justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and (6)WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and (7)WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations; and (8)this ancient land attain its rightful and honored place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind'.

aim of the new Constitution should be emphasized by special mention in the Preamble' (Rao 1968, 3: 510).

The debates following the introduction of the Draft Constitution did not involve much discussion around the concept of fraternity as a separate principle. Yet, on the 6th of November 1948, Thakur Das Bhargava explicitly expressed his 'sense of gratitude to Dr Ambedkar for having added the word 'fraternity' to the Preamble'.[3] When deliberations on fraternity did take place, they usually linked the concept to liberty, equality and, on occasion, justice, but did not take up the term for consideration separately. It appears that the three concepts together summarized and captured for the Assembly the revolutionary values of modern democracy, though there was some critique regarding undue reliance on these Western concepts.[4] On the other hand, others felt that the ideals of the Preamble had been part of ancient Indian philosophic traditions and ideas of just rule.[5] Some members of the Assembly did speak about the concept of fraternity in particular, including making reference to its ambiguous, unenforceable and unattainable character.[6] Fraternity was associated with 'brotherhood' and 'mutual love', with 'accommodation' and 'cooperation' and with 'non-violence' as well as with 'social justice': indeed, all the values and ideals that one might think of in relation to pluralism.[7]

In fact, fraternity either on its own or in juxtaposition with other concepts was spoken of in relation with class, caste and religion, all of which divided the nation. Firstly, fraternity was mentioned in regard to the abolishment of the princely order and the affirmation of the aspirations and belongingness of the proletariat.[8] Fraternity was mentioned by Syed Muhammad Sa'adulla of Assam in respect of his plea for the preservation of the democratic autonomy of the Khasis and other tribal groups of north-east India. It was also called

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[3] Quotations from Constituent Assembly debates are either from http://parliamentofindia.nic.in/ls/debates/debates.htm or from http://164.100.47.132/LssNew/constituent/debates.html. The search engine set up by Vivek Srinivasan http://viveks.info/search-engine-for-constituent-assembly-debates-in-india/ has also been utilized.

[4] Dr Raghu Vira (19 November 1949).

[5] Seth Govind Das speaking about the AdiVakya or Preamble on 17 November 1949.

[6] Sardar Hukam Singh (21 November 1949) and M R Masani (17 December 1946).

[7] Algu Rai Shastri (20 January 1947), Seth Govind Das (17 November 1949), Joseph Alban D'Souza (6 November 1948), J B Kripalani (17 October 1949) and B G Kher (18 November 1949).

[8] Tajamul Husain (25th November 1949), Dr P S Deshmukh(22nd November 1949) and Dr Raghu Vira (8th November 1948).

upon to register protest against the abolition of zamindari property without adequate compensation.[9] Secondly, fraternity assumes importance in the context of religious differences. One might mention that Ambedkar, though his own references to fraternity were framed largely by his views on caste distinctions, included the concept in the Preamble just after the assassination of Mahatma Gandhi and the savagery of Hindu-Muslim violence wrought by Partition.

In early debates when separate electorates for religious minorities were still being contemplated, fraternity was invoked to argue against these. Less than a fortnight after Independence in 1947, Govind Ballabh Pant asserted that freedom had come at a price and separate electorates would only encourage 'disruptive tendencies' without bringing about unity. He said: 'I want this synthesis of cultures to go on so that we may have a state in which all will live as brothers and enjoy the fruits of the sacrifices of those who gave their all for the achievement of this freedom, fully maintaining and observing and following the principles of equality, liberty and fraternity' (emphasis added). Though Thakur Das Bhargava thanked Ambedkar for the inclusion of the word 'fraternity', he expressed his strong opposition to reservation of seats either for minorities or Scheduled Castes because 'such a system tends to perpetuate the psychology of separation and the majority community is bound to consider that the reservation being there they are not bound to do anything further and the word fraternity which has been added in the last sentence by Dr Ambedkar will lose its significance'.

Joseph Alban D'Souza spoke about the need for 'a keen spirit of fraternal accommodation and cooperation' especially in the context of majority-minority relations so that 'peace, harmony and goodwill will be the hallmarks of our varied existence individually as well as collectively'. On 17th November 1949, B G Kher mentioned fraternity against the background of the communal violence and chaos in the country and congratulated the House for following Gandhi's footsteps in framing a Constitution espousing such values. Shankarrao Deo on 21 November 1949 spoke of adult franchise as expressing Gandhian teachings because it would promote peace and fraternity and constitute a 'guarantee against the fissiparous and disruptive forces and tendencies in this country'. Sardar Sochet Singh appealed to Sikhs on the 23rd of November 1949 to overcome 'imaginary fears and suspicions against the majority', end the 'mutual distrust and hostility' and not 'indulge

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[9]   Kameshwar Singh (12th September 1949).

in militant communal ideas' but rather alter the atmosphere to one of justice, liberty, equality and fraternity.

Jaspat Roy Kapoor spoke about fraternity as promoting unity and overcoming religious and caste divides. He made an interesting intervention with regard to Article 20 (a) which later became Article 26 (a) of the Constitution: 'Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes'. According to him, the words 'and charitable' should be excluded because 'to concede it as a fundamental right that any religious denomination or section thereof can maintain a charitable institution exclusively for its own benefit and deny its benefit to any other section of society is certainly repugnant to the idea of fraternity and common nationality'.

According to him, the inclusion of the words 'and charitable' implies:

'that there can be a Christian hospital where only Christians may be admitted and a non-Christian, however badly he might need medical service and even if he were lying at the door of the Christian hospital dying there, may be refused admission in the Christian hospital. It means that the upper class Hindus shall have it as a fundamental right to establish a piao, refusing at the same time water to members of the Scheduled castes. It means… that the Muslims in a Muslim sabil may impose restrictions for the service of water to non-Muslims…Our society already stands disunited today. There are so many castes and creeds and communities in it. We have been tolerating these communal institutions and we may have to tolerate them for some time more. The deletion of the words 'and charitable', let there be no mistake about it, will not take away the existing right or the existing concession. This is not a right. This is rather a concession to the weakness of the society. So, let this concession continue until society as a whole voluntarily realizes that this is something which is against the interests of the country as a whole, something which is against the unity of the nation and something which is against the idea of fraternity and brotherhood. Until society voluntarily realizes it, let the concession remain. But the question is must this right or concession hereafter be recognized by a statutory law, and not only recognized as a right, but be granted also the sanctity, the glory and the dignity of fundamental right?'

Kapoor's amendment was not voted on, and there were others who mentioned the need for fraternity to surmount the heterogeneities, separations and antagonisms of caste and religion such as H V Kamath (5th November 1948) and Annie Mascarene (18th November 1949). Even so, his intervention is important because he clearly understood it as a constitutional commitment to de-legalize as well as de-legitimize distinctions of religion and of caste. Further, he connects the Preambulary idea of fraternity with the section of the Constitution dedicated to fundamental rights. In doing so, he expresses one of the crucial intents of the Constituent Assembly, also asserted by Kripalani and Ambedkar: that the Preamble was part of the Constitution and must be taken as seriously as justiciable rights; indeed it must be understood as their source and foundation.

In his speech on 17th October 1949, Kripalani linked fraternity and democracy and both of these to non-violence. He reiterated that democracy was inconsistent with the caste system and even with classes, but also spoke expansively on fraternity as the brotherhood of Indians, particularly of diverse religious faiths. In other words, for him, fraternity and pluralism are deeply connected. Ambedkar made a connection between equality and fraternity, both of which he thought were missing in Indian society. In 1949, on the 25th of November, he said:

We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life…These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.

On fraternity, Ambedkar said:

"What does fraternity mean? Fraternity means a sense of common brotherhood of all Indians – of Indians being one people. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve…[H]ow difficult it is for Indians to

think that they are a nation. I remember the days when politically-minded Indians, resented the expression 'the people of India'. They preferred the expression 'the Indian nation'. I am of opinion that in believing that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not as yet a nation in the social and psychological sense of the world, the better for us. For then only we shall realize the necessity of becoming a nation and seriously think of ways and means of realizing the goal. The realization of this goal is going to be very difficult...In India there are castes. The castes are anti-national, in the first place, because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than coats of paint."

Rather than perceiving fraternity as pulling against liberty and equality, Ambedkar gives the idea specific content by making it the foundation of the other two more individualistic notions. It is also suggested that the entry of the concept of fraternity gives a social rather than merely a political dimension to the idea of democracy. Fraternity makes democracy a part of lived experience, a way of life and not merely an idea of political theory. This is essential because without the realization of equality and fraternity in social as well as economic life, the structure of political democracy so carefully constructed is at risk of being threatened by those suffering from inequity and a lack of a sense of worth. Simultaneously, the background against which Ambedkar locates the need for fraternity is not primarily religious or even specifically class differences, but mainly divisions of caste.

The members of the Constituent Assembly tried to construct a principle of fraternity that spoke to the Indian situation of diversity and their understanding of fraternity links it very closely with an attitude of pluralism and tolerance of difference. In contrast to the general diffidence of earlier Western thinking on the subject, there is a suggestion that fraternity has political relevance because of its significance at the social level rather than despite it. Thus, critically, the idea of fraternity, as with the Preamble as a whole, is seen as intrinsically connected with the fundamental rights guaranteed by the Indian state. At the same time, it is accepted that fraternity

or brotherhood is part of the exercise of citizenship at a social level, as citizens interact and engage with each other in society.[10]

Moreover, caste, tribe, class and religion emerge as the principal frameworks in which the work of fraternity, at a social level, is invoked as a conscious principle of pluralism, accommodation, inclusion and cooperation allied with equality and the recognition of human dignity. At the same time, these contexts constitute the background against which fraternity becomes important as a political category, wherein it is critically linked to the individualizing democratic notions of 'equality' and 'liberty'. This was clear in the Preamble which saw fraternity not merely as a uniting principle but one which unites individuals of equal esteem ('Fraternity assuring the dignity of the individual and the unity of the nation').[11] Finally, rather than splitting fraternity between the perspectives of horizontal solidarity[12] or social justice, the Constituent Assembly members appear to have deemed both aspects to be relevant for the concept.

Fraternity in the Supreme Court

Unlike equality or liberty, fraternity been little called upon by the Supreme Court in its deliberations and judgments. However, some significant judgments use the idea of fraternity.[13] *Indra Sawhney and Others referenced* 'fraternity assuring the dignity of the individual' as relevant in the context of discussing inequality and extreme caste disabilities.[14] The continued presence of immense substantive inequalities rendered unity and fraternity unattainable, which in turn threatened formal equality before the law. The judgment connects equality and fraternity, especially of castes and socio-

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[10] At the same time, the fundamental duty 'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities' (Article 51A {e}) was a later addition to the Constitution.

[11] The words 'and integrity' were added to the Constitution by the 42nd Amendment.

[12] Baggio (2013), uses this term and sees it as finally extending universally; however, its transformative possibilities, firstly, for inclusion within a diverse and divided nation should not be lost.

[13] Shetty and Sanyal (2011) speak of these as well as some other cases in a paper on the use of fraternity in Nandini Sundar vs State of Chattisgarh. They can be found at http://indiankanoon.org/doc/1363234/, http://indiankanoon.org/doc/60799/, http://indiankanoon.org/doc/400294/ and http://indiankanoon.org/doc/920448/.

[14] The judgment usually referred to is the one delivered by Justice B P Jeevan Reddy on behalf of four judges. However, Justice T K Thommen, Justice Kuldip Singh and Justice R M Sahai delivered separate judgments. The judgment by T K Thommen also contained significant references to fraternity.

economic classes, but also perceives the policy on reservations as a link connecting the ideals of equality and fraternity with real social, economic and political justice.[15] However, it acknowledges that perpetuating reservation and upsetting the mandate of equality would ultimately threaten 'liberty and fraternity' and all the basic values enshrined in the Constitution.

Raghunathrao Ganpatrao etc, deciding on the constitutional validity of the 26th Amendment to the Constitution abolishing the privileges and privy purses of former rulers of Indian states, argued that distinctions between erstwhile rulers and the citizens of India must be put to an end if there is to be common brotherhood. It was said that 'fraternity and unity of the nation transcending all the regional, linguistic, religious and other diversities… are the bed-rock on which the constitutional fabric has been raised'. The Court held that fraternity was a basic objective of the Preamble of the Constitution and emphasized that the unity and integrity of India can be preserved only if 'India has one common citizenship and every citizen should feel that he is Indian first' regardless of any other differences. S R Bommai vs Union of India refers several times to fraternity. The judgment declared secularism as part of the basic structure of the Constitution and argued that secularism is the 'bastion to build fraternity'. Fraternity is basic to national integration and the rule of law is the chosen instrument in democratic India of resolving diverse conflicts and social problems and fostering fraternity 'transcending social, religious, linguistic or regional barriers'.

In Nandini Sundar and Others vs State of Chattisgarh (5th of July 2011), the Court held that the use of SPOs and Koya Commandos by the Chhattisgarh government violated a number of Constitutional provisions. The arming of some citizens and turning them against others infringed the whole idea of fraternity which, according to the Court, is a specific goal of the Constitution linked to its other assurances such as the promotion of human dignity and the unity and integrity of the nation. The violation of fraternity could not be seen apart from the fundamental right protections of Article 14 (Equality before the law) and Article 21 (Protection of life and personal liberty) as well as Directive Principles, which even if not justiciable are 'nevertheless fundamental in the governance of the country'. The particular Directive Principle referred to was the obligation of the state

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[15] See, however, Gupta's (1997) argument that reservations under Mandal recommendations put at riskboth fraternity and citizenship.

to use natural and material resources of the community for the benefit of all sections of citizens. The Court expressed dismay at the 'diminished responsibility' displayed by the Union government and iterated that the Union must 'undertake all such necessary steps in order to protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity'.

Of the judgments above, the first three employ fraternity in correlation with other well-defined Constitutional principles: social justice and economic equality, equal citizenship and secularism.[16] S R Bommai further establishes the association between fraternity and secularism. In the last judgment, the Court cites fraternity as a separate Constitutional principle, locating it within the ambit of the Centre's duty to ensure the constitutionality of every state government and establishing a connection between the Preambulary assurance of fraternity, fundamental rights and Directive Principles. In this understanding of fraternity, both social justice and development are invoked. These judgments reaffirm fraternity as a political category and a relevant social principle. The interpretation of fraternity as lying at the confluence of the dignity and self-worth of individuals and the unity of the plural and diverse nation has allowed the Court to link it both to fundamental citizenship rights as well as to ideas of social justice. It is only fraternity and not merely equality or liberty that can encompass the full range of these values; it is fraternity as I argue throughout this paper that is the Constitutional expression of India's commitment to pluralism and unity in diversity.

Fraternity in the Domains of Education and Housing

In this regard, therefore, it is worthwhile to consider how the Court uses fraternity in cases dealing with the two social domains of education and housing because these must be the primary sites for learning to live together as co-citizens of plural nation. The judgment in St Stephen's College vs University of Delhi, 1991 did not mention fraternity explicitly but spoke of a term which, as Constituent Assembly debates as well as other Supreme Court judgments show, is closely allied with it, 'national integration'. In holding that an aided minority institution could reserve seats for candidates belonging its own community but only to the extent of 50 per cent of the annual intake, the Court referred to Allahabad Agricultural Institute which 'in order to

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[16]   Shetty and Sanyal (2011) provide a slightly different analysis.

strengthen the spirit of national integration and to bring about the all Indian character of the Institute' seeks to admit students from across all zones of the country.

A recent judgment referring to fraternity was delivered in the case of Pramati Educational & Cultural Trust & Ors 2012, which questioned the validity of clause 5 of Article 15 of the Constitution whereby private educational institutions are legally obliged to reserve seats for Scheduled Castes, Scheduled Tribes and Other Backward Classes. The Court stated that it was not right to argue that admitting candidates from 'backward classes of citizens and from the Scheduled Castes and the Scheduled Tribes' would prevent other students from striving for and achieving academic excellence in such institutes. According to the judgment:[17]

> "Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these Government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens 'fraternity assuring the dignity of the individual and the unity and integrity of the nation'. The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the main stream of the nation."

The judgment refers to connection made between fraternity and national unity in the Preamble and argues that this ideal cannot be achieved unless all classes of citizens are integrated. Clearly, educational institutions are perceived as sites for the achievement of equality, social justice and national integration: all senses of the term fraternity as employed by the Constituent Assembly.

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[17] See http://supremecourtofindia.nic.in/outtoday/41505.pdf viewed on 18 August 2015.

A final judgment considered here was delivered in Indian Medical Association (IMA) vs Union of India.[18] Could the Army College of Medical Sciences (Delhi Cantonment) reserve all its seats for wards or children of Army personnel (current and former) and widows of Army personnel? The Court interpreted Article 15(2) of the Constitution in its most generic sense thereby including educational institutions under the rubric of 'shops'. Thus, it extended the protection of fundamental rights to those discriminated against, under prohibited categories, by any such service providers. In its judgment, the Court also spoke several times about fraternity among citizens and groups of them (Shetty and Sanyal 2011). It is worth quoting at some length from the judgment.

Great universities, such as Harvard which many decades ago did not admit students from formerly enslaved races, or women, or those with other disadvantages, have with the march of time recognized that the very notion of education as a philanthropic activity would lose its motive force, and the essentiality of its purpose, of imparting liberal education that leads people from darkness to light and that is inner soul would be derogated from if individuals from other races, or women, or those who face social disadvantages are also not provided access. In this regard, many universities have also come to the view that one of their essential purposes lies in providing higher education to ensure that in every sphere of social action, in which choices are made that impact differentially on different segments of the society, there be diversity of representation from all segments of the society. This is recognized as necessary to enrich and strengthen democratic processes, by bringing diversity of views and ensuring that debate occurs in a reasoned and reasonable manner, which in turn integrates the society and polity. Knowledge has expanded by leaps and bounds, and not all of it can be taught at the stage of secondary school education. The ability to engage with this expanding knowledge, to auto-didactically keep pace with such expanding frontiers, is typically provided only at collegiate level. This implies that unless access is provided on a wide scale, across all swath of the population, the debates about social, political, economic and technological choices would be uninformed, and therefore also likely to be unreasoned and unreasonable, thereby threatening the democratic process and social integration that is vital for fraternity and unity of the nation threatened.

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[18]   See http://indiankanoon.org/doc/1627898/ viewed on 12 March 2015.

In all these judgments the relationship between education, fraternity and national integration is clearly established. Universities and educational institutions are perceived as social sites for the production of democracy and citizenship through debate and interaction with all sections of society.

One might surmise that if pluralism and fraternity are fundamental to training in democracy and social integration in the university setting, another social space in which these values are critical is residential arrangements: living together in a spirit of accommodation in society. Several cases of housing discrimination based on caste or religion have been highlighted in the media in recent times and it may be tempting to think that Article 15of the Constitution should be able to take care of these instances.[19] However, housing restrictions are 'exclusionary covenants' under which the sale or transfer of property can be limited in terms of religion, ethnicity or race, which would otherwise be illegal.[20] The covenants are citizen-to-citizen agreements and fundamental rights provisions, which apply to individual-state relations do not encompass them.[21] In the US and Canada, however, courts have voided such contracts on various grounds,[22] including that of violating public policy.[23] In Re Drummond Wren (1945), the judgment of the Ontario Supreme Court referred to residential unity as a means of combating the religious and ethnic divisions and argued that the state and courts have a moral duty to assist the forces of cohesion in society and resist divisive tendencies that would threaten national unity.[24] These ideas echo the

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[19] Article 15 (1) – The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

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

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

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

[20] Gautam Bhatia makes a clear analysis of the legal arguments in such cases, which I have broadly relied on in this and the next two paragraphs. See 'Horizontal Discrimination, Article 15(2) and the Possibility of a Constitutional Civil Rights Act' at https://www.academia.edu/9736139/Article_15_2_and_a_Constitutional_Civil_Rights_Act viewed on 2 April 2015.

[21] They are part of forms of 'horizontal discrimination', discrimination of one private entity (individual citizen or corporation) by another (Bhatia op. cit.).

[22] Ibid.

[23] In the US case Shelley vs Kramer, the contract was voided because it was said to be judicially unenforceable as it violated equal protection provisions of the Constitution. However, in Canada, violation of public policy by restrictive contracts was cited.

[24] See http://faculty.law.ubc.ca/harris/documents/property/Re%20Drummond%20Wren.pdf viewed on 14 March 2015.

thoughts of Indian Constitution makers and their understanding that the legal application of Constitutional principles was the path by which social divisions would be overcome and India 'really' emerge as one nation. Indeed, as Justice Nariman seems to argue, the full realization of Constitutional ideals cannot occur unless citizens show tolerance and accommodation towards each other in society. As he says (2002: 29), 'When we gave ourselves a Constitution, it was certainly good to provide rights enforceable against a State and State agencies. But I believe that it would have made a difference to our attitudes and our national consciousness if we had stressed also the duties and responsibilities of one citizen to another'.

However, Supreme Court of India opinion on the matter of residential discrimination seems to differ. In Zoroastrian Co-op vs District Registrar Co-operative[25], a case regarding a housing society for Parsis only, the Court while upholding the private exclusionary covenant argued that what essentially unites a housing society is the 'bond of common habits and common usage among the members' and then asserted that in India, 'this bond was most frequently found in a community or caste or groups like cultivators of a village' (emphasis added).[26] There is an apparent sanction given to caste and community identities. In fact, if used as a basis for discriminatory housing, they are cannot be challenged under fundamental rights provisions. The vision of fraternity and pluralism evident in Constituent Assembly debates altogether disappears here.

It is clearly unfortunate that the Indian test case in the matter of residential discrimination is one that applies to a housing society composed of a vulnerable religious and cultural minority (the Parsis). Even if exclusionary covenants were invalidated, the particularities of the case might allow it to

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[25] This is the crucial case with regard to housing discrimination. According to the bye-laws of the Zoroastrian Cooperative Housing Society, only Parsis could be members. However, one respondent attempted to sell his property to a non-Parsi Builder's association. A series of verdicts held the by-laws invalid after which the case came to the Supreme Court. In 2005, the judgment upheld the bye-law. The Court argued that a member of a cooperative society gets his/her rights from the Act, rules and bye-laws governing it and is not entitled to question their constitutionality. Public policy in the context of the Cooperative Societies Act was to be defined by the 'four corners of that Act' (in other words, by statutory policy) and since there was nothing therein which prohibited the restriction, it could stand. It was held that non-enforcement of the covenant would harm the constitutional right to association. This judgment seems to err on several counts. It enforces a discriminatory private contract by citing the defense of freedom of association, despite the US precedent. By fusing public and statutory policy (Bhatia op. cit.) it also denies the application of fundamental rights provisions to the case.

[26] See http://indiankanoon.org/doc/713373/ viewed on 21 February 2015.

be defended, if adequate proof was provided, under Article 29(1): rights of linguistic and cultural minorities. However, both in India and elsewhere, the most severe and persistent problem of discrimination in housing manifests itself when a dominant community excludes or has excluded historically marginalized groups such as African Americans, Jews, Muslims or Dalit-Bahujan castes. This is the concern that has recently become the subject of so much public debate. In this context, the IMAvs Union of India judgment above becomes relevant because it has been cited (Bhatia op. cit.) for, perhaps, paving the way for rendering void exclusionary covenants such as that upheld in Zoroastrian Co-op.

The Supreme Court has referred to fraternity in cases to do with caste and tribe, class and religious distinctions. With particular reference to the domain of education, as I have shown above, the Court has dwelt on both the idea of fraternity as justice and equality of status and opportunity as well as the sense of universities as the settings for national integration and unity through the intermingling of Indian students of plural cultures and diverse social groups. However, the Court has avoided the questions of fraternity and national unity and integration in the context of residential discrimination, in which, as the US and Canadian precedents suggest, these most manifestly apply. In fact, the confirmation of educational institutions as sites of diversity, pluralism and fraternity and, in parallel, the relegation of housing societies to the unities and common habits and usages of caste and community is inconsistent with the purposes of the Constitution.

Conclusion

In the Constituent Assembly, fraternity was discussed as an active value, significant for a plural, diverse and divided society such as India. Indeed, as the paper has shown, rather than perceiving fraternity as undermining the human rights of liberty or equality, Ambedkar argued, 'fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than coats of paint'. Supreme Court judgments have largely recognized this though judicial interpretations seem to link fraternity more to equality and justice than to its other sense, of cooperation, solidarity and amity within society. In pursuing the use of fraternity and pluralism in Supreme Court judgments to do with educational institutions and housing, the paper showed that in the first case, the importance of these values is asserted but in the second case they are effectively set aside. IMA vs Union of India opens

up a new precedent which could be employed to link fraternity as social justice with fraternity as horizontal solidarity, amity and pluralism. However, the potential of this judgment for resolving the problem of residential bias or any other forms of horizontal discrimination has yet to be fulfilled.

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Multiculturalism and Women's Rights : Former Allies, Current Enemies : Revisiting the Uniform Civil Code Debate

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Abstract

This paper explores the long standing and ongoing debates on cultural relativism and human rights especially in the context of women's rights. Group rights and women's rights are often posed in an oppositional and competing context. Undoubtedly religious fundamentalisms is completely antithetical to women's rights. In multicultural societies and pluralist and secular states as well, group rights often trump women's rights. Interrogating the complexities of pluralism, this paper explores ways in which the most marginalized voices can be brought to the foregront of constructive dialogues so that the debates on these are not appropriated by certail powerful spokespersons of the communities both at the national and global levels. The Unifors Civil Code debate in India has embodied all these concerns of multiculturalisms, understanding of formal and substantive equality within democracies, the problematics of secularism, the debates over religious rights versus women's individual rights and freedoms within its contours and hence used illustratively in this context.

The debates around diversity, pluralism, hegemonic homogenization and an increasing atmosphere of intolerance are at the centre stage of Indian polity in contemporary times. While much of current debates are on the shrinking space of individual freedoms and group rights, there are again renewed discussions on the Uniform Civil Code and its implications for women in India. A number of associated concepts and terms like pluralism, multiculturalism, tolerance, legal pluralism, universality and cultural relativity of human rights are often used loosely and interchangeably in everyday discussions. A clear delineation of these concepts is necessary to carry on a meaningful and constructive dialogue on such issues. Globally and in

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the context of India, promotion and protection of cultural pluralism and group rights, especially of minority communities poses serious challenges to upholding and enhancing human rights of women. This paper explores the debates on multiculturalism and women's rights, contextualising it within the renewed debate on Uniform Civil Code in India and tries to assert that pluralism and multiculturalism are not inimical to realization of women's rights if nationally and globally a democratic political atmosphere that encourages constructive dialogue and criticism can be created.

Sen explores whether there is anything unique about Indian pluralism. He states that as Indians, we have inherited and experienced centuries of heterogeneity of linguistic and religious traditions, diverse cultures and philosophical traditions, so we may not have to take extra efforts to 'experience pluralism'. But efforts are required to value and preserve this diversity of cultures. He further argues that while there is nothing unique about the multiplicity of cultures, language, ways of life, norms and values in India, the extent of diversity here really is unique. He claims that the extent of religious diversity and plurality of intellectual traditions is something that most countries do not have. Unlike many countries which have a pluralist policy, India does not specifically have one. The secular Constitutional framework protects and promotes rights of religious and linguistic minorities as a part of fundamental rights. In situations where there are concerted efforts to challenge the very basis of this secularism, organized attacks on minorities are orchestrated coupled with simultaneous erosion of cultural multiplicity to replace with a homogenized polity in the name of unity and citizenship, there is an urgent need to emphasize on the value of pluralism. Sen acknowledges that the valuation of diversity does not have any special immunity from the requirements of equity and justice. He welcomes the reexamination and interrogation of personal laws because of the real intra and inter community 'asymmetries'that exist that have implications for fairness and justice. Hence a critical analysis of the implications of personal laws for equal rights of women is an imperative. However such examination does not erode the principles of secularism or plurality. Here Sen shares his viewpoint with several feminist scholars in India who have made strong cases for interrogating personal laws because all religious based laws have inherently, though not uniformly been unfair to women. But that absolutely does not mean homogenization and majority dominance pleading national integration – the mainstay of Article 44 of the Constitution – the Uniform

Civil Code as a Directive Principle of State Policy (Sen 1993:37-46).

Oommen's understanding of pluralism is contextualised within the debate between equality and the individual. He argues that though equality and individualism have similar origin and development trajectories in the advent of modernity, their relationship is not unilinear. While equality is widely accepted and valued, in 'advanced societies', it is formal equality rather than substantive equality that is accepted and valued. Contemporary societies with aggressive individualism use the meritocracy argument to dismiss claims of group or collectivity based inequalities. Formal equality i.e. equality of opportunity is acknowledged and preferred over substantive equality i.e. equality of outcome that recognizes and addresses structures of inequalities. Oommen sums up his argument stating that 'social diversity and heterogeneity is a social fact and pluralism is a value recognition and orientation of the same.' Advanced societies are increasingly becoming heterogeneous in the era of globalization where the individual rights model of equality is inadequate to address these complexities. It is imperative to have a pluralist approach that addresses rights of collectivities balancing it with that of individual rights to equality and non discrimination (Oommen 2002:46-49).

Mahajan goes a step further to distinguish between pluralism and multiculturalism, terms that are often used interchangeably. Cultural pluralism is an age old phenomenon where communities have coexisted within the same polity. But mere presence, coexistence of or tolerance towards different communities does not reflect multiculturalism which is concerned with the issue of equality. Mahajan emphasizes that it is 'equality that distinguishes multiculturalism from pluralism.' The author further argues that pluralism prevailed in pre modern societies that were hierarchical. As long as the hierarchy was accepted by different cross sections, tolerance and relative autonomy of non dominant communities and religious groups was acknowledged. The existence of plural legal systems is not in itself a sign of equality. It is democracy that espouses principles of equality and non discrimination, guaranteeing of civil and political rights to all. Multiculturalism advocates equality of cultural communities. Citizens and members of different cultural communities should receive equal treatment as a matter of right, not of benevolence (Mahajan 2002:12-15).

While Mahajan makes a distinction between pluralism and multiculturalism, Marty distinguishes diversity from pluralism. For him,

diversity refers to variety within a nation or region that may evoke appreciation but does not induce any further reaction. Pluralism for him means that in a civic context, the polity has to decide what to 'do' with the diversity in terms of creating or protecting a pluralist ethos as well as interpreting, interrogating, creating laws and policies that are expected to protect rights of all groups. Pluralism would entail reimagining public spaces and institutions as more inclusive of diverse cultures and expression and appreciating the worth of diversity (Marty 2007:14-25).

Recent debates and discussions have centred on an increasing atmosphere of intolerance generated by state and non state actors in India. While tolerance is undoubtedly a virtue, what exactly does one mean by being tolerant/ intolerant? Furedi interrogates the connotations of classical liberal ideal of tolerance. He argues that today tolerance is used as a 'mere rhetoric and polite etiquette instead of being understood in its 'freedom – affirming meaning'. He argues that tolerance of hostile or opposing world views entail great deal of confidence and convictions that requires judgement. Tolerance is not just about being non-judgemental or permissive; it needs greater engagement and conviction of thought (Furedi 2011:1). Expansion of tolerance entails building of coalitions of open minded people who can uphold freedom, independence and democracy.

Furedi's exposition on tolerance has implications for human rights from the local to the global plane. Does tolerance mean that there can be no or only muted criticism when communities engage in human rights violations citing cultural autonomy and freedoms? What happens when group rights trump over rights of individuals namely women within the community? How does the state balance the claims of these competing rights? How does the international human rights regime operate or react when atrocities are committed in the name of culture/religion/honour within the boundaries of the nation state? On one hand, commitment to international human rights standards may entail a watering down of national sovereignty and international criticism and intervention to human rights violations within the boundaries of the nation state is justified. On the other hand, human rights is often used a tool by powerful states to expand their imperialist designs. Armed humanitarian intervention becomes a method of taking control of that state and its economy and polity using the plea of protecting the marginalized – mainly minorities or women against mass human rights violations. We need to understand that in contemporary times, human rights protection may

always not be an innocent, laudable enterprise and human rights practitioners and defenders must be careful of not being co-opted or used by forces with ulterior motives. The use of culture rhetoric to justify human rights violations have been criticized by several human rights scholars and practitioners. It is needless to say that cultures are not monoliths, fossilized entities but are constantly evolving and negotiated upon in a myriad of ways. The debates on universalism and cultural relativism of human rights address many of the questions raised earlier. Issues of individual versus group rights, western conceptions of human rights, the relation between gender and culture and all encapsulated within this debate.

Universalism versus Cultural Relativism

The debate of universalism versus cultural relativism of human rights has its roots in anthropological discussions on the same issue – colonial anthropologists either exoticized or engaged in a rejection of norms and practices of 'other' cultures. This 'otherization'of culture was critiqued by anthropologists like Ruth Benedict who claimed that all cultures are morally valid. While this position is appreciated for its sensitivity and breaking the superiority- inferiority of cultures and practices, the claims that all normative practices are morally valid poses deep problems for opposing and eradicating human rights violations that cultural practices entail. Can slavery, gender based discrimination and violence, caste based practices be condoned because it is located in specific cultural/religious moorings? The national and international human rights legal and philosophical frameworks strongly oppose any kind of right violations using culture as an excuse. But the tension in balancing group rights and individual claims of autonomy, freedom and independence does persist with no easy solutions. At the international level, the Bill of Rights upholds the right to culture. The ICCPR and ICESCR uphold the rights of self determination of peoples. ICESCR acknowledges cultural rights. CEDAW prohibits any kind of discrimination including those based on cultural practices.

Donnelly's seminal work on universalism and cultural relativism addresses many of these concerns.

Cultural relativism is a doctrine that holds that (at least some) such variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination. Moral judgments, however, would seem to be essentially universal, as suggested not only by Kant's categorical imperative but

also by the common sense distinction between principled and self-interested action. And if human rights are, literally the rights (every) one has simply because one is a human being, they would seem to be universal by definition.

His conceptualization can be understood as a matrix that has four major positions – 1) Radical Universalism 2) Radical Relativism 3) Strong cultural relativism 4) Weak cultural relativism. These positions are not water right but rather placed in a continuum of approaches starting from the extreme positions of radical universalism and radical relativism. While the first holds that moral rights are universally valid because they derive from the principle of being human and cultures are irrelevant in determination of moral standards, radical relativism takes the opposite position claiming culture as the 'sole source of validity of moral right or rule'. In between these two radical positions, is strong and weak cultural relativism. The former takes culture as the 'principal source of the validity of a moral right or rule''. Here culture is understood as the main source of normative standards, values and rules, but there is also simultaneous acknowledgement of the universality of human nature and rights. Weak cultural relativism looks at 'culture as an important source of rights', presumes relativity of human nature, assumes a weak universalist position but also acknowledges that there are certain human standards that can be held universally. Donnelly tries to reconcile the tension between universalism and cultural relativism by advocating a weak cultural relativist position that acknowledges the importance of culture in shaping moral standards and allows for certain limited deviations from 'universal' human rights standards. Donnelly further argues that international human rights regime largely follows this model that gives credence to cultural rights and acknowledges variations in normative patterns in different societies but emphasizes on establishing cross cultural consensus on most human rights principles (Donnelly 1984: 400-419). Standard setting mechanisms like treaty/conventions/covenant making processes are fraught with tension as evidenced from various rounds of negotiations over language, prioritization of rights, declarations and reservations to arrive atleast at the lowest common denominator of rights. Donnelly and several other scholars agree that inspite of cultural variations, contemporary, globalized world with much less distinction between 'insiders' and 'outsiders' almost universally condemn certain practices at least in principle though always not in practice like slavery, caste based discrimination and agree on non-derogable rights like prohibition of torture, fair trial etc. (Donnelly 1984:400-419).

'Donnelly's three-tiered scheme of concepts, conceptions, and implementations designed to show "what ought to be universal, and what relative, in the domain of 'universal human rights.'" is critiqued by Goodhart. He evaluates Donnelly's work as 'positing fairly strong universality at the level of human rights concepts and increasing relativism at the levels of conceptions and implementations of human right'. To Goodhart, this model of weak cultural relativist position proposed by Donnelly obscures many of the nuanced analysis and questions that Donnelly raises. While this paper does not delve into Goodhart's critique, it revisits suggestions made by Goodhart to resolve the debate between universalist and relativist claims of human rights. Claiming that it is pointless to carry on this unending debate and looking for moral and philosophical justifications to prove that human rights are 'universal', Goodhart suggests practical ways in expanding the global appeal for human rights. He emphasizes on the ways social movements and human rights defenders use the rhetoric of human rights and strategize rights claims on the ground. As the language becomes more inclusive, human rights becomes a tool to fight any kind of oppression and domination both by state and non state actors and therefore attains wider global appeal and acceptance. The potential and ability of human rights to fight oppression and enhance human dignity reinforces its legitimacy on a much broader scale (Goodhart 2008:183-193).

Cultural Relativism and Women's Human Rights

The term women's human rights have two distinct yet related connotations. One, it refers to a range of rights at the national and international level that are meant for or applicable to women. At both levels there can be a general, gender neutral set of rights that are applicable irrespective of gender. These include the formal rights of equality, non discrimination and enjoyment of individual freedoms, as contained in Fundamental Rights (Part III) of the Indian Constitution and a whole host of civil, political, economic, social and cultural rights contained in the Bill of Rights- namely the UDHR, ICCPR and ICESCR. Secondly, women's human rights also connote going beyond formal rights model and reconceptualising human rights from a feminist perspective. A significant feminist criticism of the human rights framework is that it rests on a public private dichotomy. For a long time, human rights were invoked to oppose and establish protection of individual freedoms against abuses by states and official actors. The right against torture

or right to life is based on male experiences of human rights violations in the public domain by state actors. Domestic violence within the boundaries of the home constitutes similar physical, psychological and sexual violence but such acts do not come within the ambit of the non-derogable right against torture because it is committed by non state actors in private spaces. Women's experiences of rights violations occur primarily within the private sphere of the family and the community by non-state actors which often go unnoticed by the state. It is this public-private dichotomy in traditional human rights law that has posed serious challenges in the realization of women's human rights. Feminist reconceptualization of rights entails the following: a) interrogation of the philosophical foundations of human rights b) assessment of practices and enforcement mechanisms c) evaluation of the entire gamut of civil, political, economic, social and cultural rights from the perspective of women's lived experiences.

Based on the Enlighenment tradition, the liberal foundations of human rights is often understood and critiqued as a 'western' conception with focus on individualism, autonomy and an adversarial model of right claims and counter claims – concepts that may find little resonance in non western societies with strong communitarian ties and coupled with difficulties and resistance in accessing the state and the legal systems in the settlement of disputes. Feminist scholars like Chinkin, Charlesworth, Phillips, Coomaraswamy all make nuanced arguments that the promotion and protection of human rights of women is difficult for a multiplicity of reasons. Apart from the principal operative public sphere of human rights, operational challenges include weak enforcement mechanisms with fewer funds and human resources and lack of mainstreaming of women rights within the larger human rights framework. However, these scholars emphasize that the significant hurdle in realization of women's human rights is the ideological refusal to accept women's rights. Coomaraswamy rightly argues that women's rights find least resonance in many countries, especially in South Asia. This is not to fall into what Coomaraswamy calls the 'Orientalist trap' imagery of the progressive West with the free, autonomous, rational agent capable of accessing the institutions of the state and the backward, eastern 'other' that does not respect rights of several people including that of women. The reverse argument often posed in the name of cultural relativism that Eastern cultures are more evolved that gives credence to 'groups', are communitarian and hence more inclusive, less self centred because instead of making adversarial rights claims, duties of

each are well defined in the social order. Both these perspectives are equally damaging in the realization of rights of women (Cook 1994:40).

Increasingly both at the national and global level, multiculturalism is understood as inimical to women's rights. Protection of religious and cultural rights in national jurisdiction and international laws often runs counter to women's rights. However, as Phillips states, multiculturalism and feminism have been natural allies because both challenge hierarchies of power, raised assertions from the vantage point of the marginalized and challenged formal and simplistic assumptions of equality and principles of formal liberalism. These 'related struggles' as described by Susan Okin have increasingly parted ways and feminist criticism have pointed out how promotion of multiculturalism has consistently come at the cost of women's human rights (Phillips 2010:2). This is not only true in the contexts of Europe, UK or US but in the Indian context as well.

The debate on Uniform Civil Code continuously harps on the point that protection of minority rights means supporting inegalitarian and discriminatory practices towards minority women and a secular state that upholds fundamental rights of equality and non-discrimination has a moral obligation to create conditions for a common code for all citizens irrespective of their religious and/or ethnic backgrounds. This is precisely what Phillips is warning about. Cultural stereotypes, rising Islamophobia, threat perceptions about minorities and cultural essentialism, exaggeration of cultural differences pose threat to the upholding, maintenance, enhancement and appreciation of pluralism and diversity. Divisiveness is played upon by vested interests and 'cultural reification' does more damage to women's rights rather than enhancing them. As evidenced in the UCC debate since the 1990s, legitimate claims made by feminist scholars and women's rights activists were hijacked by the Hindu right. As mentioned earlier by Sen, there are definitely certain merits of probing into personal laws, as clearly highlighted by the Shah Bano controversy. But the same was used as weapon to vitiate the political and social atmosphere, establish Hindu superiority and 'progressiveness' and 'backwardness' of the Muslim minority in India. Recent concerted and recurrent acts of organized intolerance, hooliganism and violence are a chilling reminder of the murky past and more importantly a signal of the precarious present and future. In such conditions when democracy and plurality is threatened, honest efforts to promote women's rights will again be overshadowed, hijacked and appropriated.

The discourse of multiculturalism versus women's rights in India echoes of similar discussions in the West. However, I think that the scale and magnitude of the problem is lesser in India. Our pluralist traditions and thereafter the Constitutional framework assures citizens of protecting a multicultural polity that may be threatened by homogenizing tendencies, but India does not have to grapple as to how to respond to headscarves, Burkhas, turbans like that of the liberal democracies of the West. Civil society reaction and opposition to the cultural tradition rhetoric used in cases of honour killings, witch hunting, child and forced marriages, diktats of Khap Panchayats and rising incidents of moral policing is robust. It is acknowledged that the opposition may be more in urban areas than in rural ones, more by the English media than in vernacular and responses differ for each of these types of violence against women. It would be wrong to club all these kinds of violence and assume similar responses against them. Each of these incidents bring out fault lines existing in Indian society, ironically establishing enormous diversity that within the polity that cannot be bulldozed by ultra nationalist homogenizing forces. The state in some of these cases respond proactively (child marriage seems to a priority area, though the average of marriage of girls in India still remains at 15 years), while in other cases of honour killings and community based diktats, the state looks the other way till it is forced to take action against the offenders. While the state response may differ from quick responses to dragging its feet, it is clear that culture and tradition cannot be invoked legally (though often used socially and politically) to justify gender based violence and human rights violations. The debate on UCC gains importance because it deals with discriminatory practices, especially among Muslim minorities in the arena of family law like marriage, divorce, custody, adoption and maintenance. I am demarcating the boundaries of civil and criminal law to argue that while culture and religion can be used legally to continue gender based discriminatory practices, the same is not possible to justify gender based violence. Of course it goes without saying that there is no water tight boundary between discrimination and violence, they are in a seamless continuum and hence cultural justifications for any discrimination, including those based on gender require constant critique and opposition, not only because it is a precursor of violence but that the two are intrinsically connected in practice.

While gender equality as a benchmark of democracy and inclusiveness is to be appreciated, posting women's rights as a marker for labelling certain

societies and communities as traditional and backward and others as modern and therefore superior is deeply problematic. This 'cultural reification' collapses the differences between cultures, makes them synonymous with societies and thereafter the nation. It portrays cultures as monoliths, obliterates the fact that cultures are porous and continuously contested sites and that adaptive preference of women and men may be shaped by pluralist contexts in which they may have been raised. It also seems to suggest that people belonging to majority groups in liberal democracies are only influenced and not shaped by their culture, that it is they are more discerning individuals who have the capacity of reason and independent thought and such cultures are more flexible and tolerant of divergent views. In opposition, minorities are understood as non rational polities, passively constituted only by their culture and religion (Phillips 2010:1-30). Any contestation and struggles and debates within the community are ignored by such majoritarian discourses. This dichotomy and hierarchization of tradition and modernity creates wedges in building bridges across the divides.

Scholars and activists have long deliberated upon how to build alliances to promote human rights. Questions arise as to who can legitimately raise opposition and address gender based discrimination and violence when perpetrated within the community. Is 'external' critique to be ignored or rubbished because it is raised by 'outsiders' to the community? To what extent are dissenting voices within the community heard and acknowledged? Or does the community reject the 'dissenting' members and their opinions as not being authentic enough since they do not kowtow to long standing traditions. The rejection of 'external' critique is a typical reaction by minority groups which especially in politically charged atmosphere of homogenization respond by shutting out any opposition to preserve their cultural identity, claiming that those who are opposing such practices do not understand minority cultures. While it is true that it is possible for 'outsiders' to misread cultural practices at the same time the position that any opposition is only valid when raised by insiders is also problematic, because those 'most oppressed by a particular practice may also be least well equipped to recognize its inegalitarian character' (Phillips 2010:31). Moast importantly, this debate invariably happens between spokespersons of the communities, essentially represented by elderly men with conservative notions and deep patriarchal biases. Contestations and counter voices of the less empowered young and women within the community is silenced, pleading that they are not bonafide

representatives of the community.

Abdullahi An Na'im and several other feminist scholars certain ways out of this imbroglio. An Na'im uses the term 'community discourse' to denote discussions about crimes of honour. While not condoning these crimes, he argues for finding strategies to pre-empt such crimes. He suggests 'internal dialogue within the community and 'cross cultural dialogue' among various cultural groups to establish a stronger validation of international human rights standards (Cook 1994:174). While this may be a uphill if not a fruitless process in illiberal contexts, a continuous dialogue to understand and seek cooperation to establish egalitarian gender relations in multicultural democracies can generate very positive results. Also as feminist scholars point out, voices of the minorities within the minorities need to be prioritized. Dissenting opinions, divergent views from within the community must be brought into the public fora, which breaks the cultural monolith myths and establishes the diversity within communities. As in the UCC debate in India, instead of harping on the same hackneyed debates by politicians, lawyers and self and community appointed spokespersons; lesser heard opinions should be brought to the table. Instead of hearing the clerics and members of Muslim Personal Law Board, media which wield enormous power in shaping public opinions, should bring members of All India Muslim Women's Personal Law Board whose views on banning of polygamy, triple talaaq, child marriages, women's education is widely divergent from the mainstream views of the community as represented by the Personal Law Board. Instead of succumbing to identity politics and continuously wondering as to who represent, oppose and share opinions about human and women's rights violations, 'strategic essentailsm' works as a wothewhile strategy to forge alliances across cultural differences. This approach helps to forge solidarities on important issues like gender based violence simultaneously recognizing that women are constituted as much by their gender as by other social hierarchies like class, race, caste, region, religion, ethnicity, location, sexuality, age and able bodiedness. This recognition of intersectionality as well as prioritizing the fact that inspite of muti locations and experiences, violence against women happen exclusively or overarchingly to women because of their gender enables human rights movements and scholarship to move ahead that acknowledges multiculturalism and plurality of cultures, establishes that no culture/tradition/religion is a single uncontested entity, appreciates multiplicity of factors that shape human behaviours and their understanding

and responses to discrimination, establishes that women irrespective of their cultures are the receiving end of discrimination an d violence globally and enables us to usher in changes as human beings in joint causes and move away from the paralytic effect of identity politics of 'us' and 'them'. It is this dialogue and effective strategizing locally, nationally and globally that will help build more resistances and movements towards equality.

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V – Human Rights and North East India

The Task of Bearing Witness

Sanjoy Hazarika and Preeti Gill***

Abstract

The years of violence which has been taking place in the North-Eastern States has led to immense suffering, loss of life and physical as well as emotional trauma. The conflict situation has also led to loss of livelihood and food scarcity as well as destruction of basic infrastructure like roads and bridges, hospitals and schools. There are many stories of tragedies indocumented. At the same time, there is also hope generated by several civil society initiatives and partnerships which have led to the improvement in conditions relating to provision of health and other essential services. This paper documents many instances of sufferings as well as some good practices adopted by civil society.

In the course of travels for research work, documentation and filming as well as conversations with friends, old and new, in villages, towns and institutions across different parts of the North-east, we have met many people whose lives had been changed irrevocably by the decades of violence that had gripped their states.

Each family, each individual had stories to tell, of personal loss and bereavement, of physical and emotional trauma. For many of them, in the states of Nagaland and Mizoram especially, it was the first time that anyone from another part of India had visited their villages, sat among them and listened. These are stories that our country, let side the world, does not know of, has not cared to know, contributing to the silencing of voices on the margins. We believe that the telling of these stories can work as a form of catharsis and resilience building as well as positive intervention and empowerment, building bridges between communities and helping to open up a lesser known region and alienated peoples.

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Analysts say war and conflict are devastating to social and cultural institutions because they impact societies and individuals; every person who has survived conflict is in some way scarred by her/ his experience. It takes people and society a long time to come to terms with what happened to their lives.

A young woman in Dimapur who is a member of a women's association which works like an informal, tribal panchayat or council where social cases relating to women are handled, shared an experience. Her village, she said, was attacked by government forces in the 1960s. She was only a baby at the time but her mother who was running away from the burning village hide her in the hollow of a tree thinking she'd come back and retrieve her when it was safe. It was three days before she could come back. The child lay inside that hollow, hungry, frightened, alone.

We wondered: 'What must she have thought? What sort of impact would this have left on her?' The trauma haunted her, she said, and then as soon as she was old enough she went to join her father, who was a member of the Naga army fighting the Indian State. It was only much later that she came to terms with what had happened to her village, to herself and her father, who was killed in the course of battles with Indian security forces. She learnt forgiveness and turned to the Church, which is a very powerful institution in Nagaland and other parts of the North-east.

To say that women have faced violence in situations of conflict is to state the obvious but what this means in terms of impacts is something that is still being studied. While the most obvious impact is physical or sexual violence, the psychological scarring as a result of prolonged exposure to brutality has an even deeper impact on their well-being. Women find themselves at the receiving end of violence from three fronts: the State, the militants and a corresponding escalation of domestic violence. The effects of violent acts like rape, sexual abuse and assault lead to emotional trauma and what is known as Post-Traumatic Stress Disorder—again this is something that is being understood only now.

Facilities like trauma centres or counselling centres for such cases are few and totally inadequate to deal with the complexity and scale of the problem. According to the psychiatrist Dr P Ngully from Nagaland, who was associated with this study and is among the very few specialists to have looked

at PTSD in his state which has faced confrontation and violence both from the State and non-State groups for over 50 years, the sight of a uniformed person evokes fear and terror in villagers in Nagaland. "They have rarely seen any other face of India barring the army and the paramilitary, which they associate with harassment and violent behaviour," according to Dr. Ngully.

In fact, a survey and interviews for respondents set out in a study project for Nagaland and Assam were posited on a set of questions developed by the National Institute of Health (US) which are internationally accepted as indicative of whether a person has suffered from/suffers from PTSD. This questionnaire was discussed at an initial workshop with teams and resource persons including psychiatrists.

The questionnaire was based on the following set of questions: 'In your life have you ever had any experience that was so frightening, horrible or upsetting that, in the past month, you have had nightmares about it or thought about it when you did not want to? Tried hard not to think about it or went out of your way to avoid situations that reminded you of it? You were constantly on guard, watchful or easily startled? Felt numb or detached from others, from activities or your own surroundings?"

At times of conflict, women suffer as civilians with greater restrictions placed on them. They are assaulted, raped, humiliated, beaten and murdered during conditions of violence. They are displaced, turned out of their homes, disinherited, widowed and orphaned; they lose their children to bullets and beatings. Many just disappear, without a trace. Others are trafficked across state and national borders and face a nightmarish lifetime of sexual abuse and disease.

The loss that they face is not just emotional or physical but transfers into the economic and social spheres as well. Most women face a decline in social legitimacy and find themselves relegated to the fringes of society with no one to care for them or to speak on their behalf.

Since they form the bulk of the unemployed and the uneducated, they find themselves unable and ill-equipped to take on the burden of the household and as a result become completely poverty stricken. Young widows are forced to head households, even though in a patriarchal feudal set up they have little or no access to land and property. In tribal societies the economic burden is generally considered a primary responsibility of women

and for this reason perhaps women get very little help from their menfolk or from the State in the aftermath of violence when the work of reconstruction begins. In Nagaland, for example, the women do extensive farming work as in many other hill communities. In addition, they carry on with 'normal' life and do 'normal' chores to sustain their households-- cooking, washing, fetching of water, the bringing up and nurturing of children.

Other impacts of conflict include loss of livelihoods and food scarcity as a result of destruction of fields and farmlands, the destruction of basic infrastructure like roads and bridges, hospitals and shelters and schools. The women are forced to take on the role of food providers and caretakers of the old and the infirm, the wounded and young. In times of war womens access to public spaces becomes even more restricted and their mobility further hampered by the presence of security forces and armed militias. All too often their bodies become the site of battle with both sides treating them as the spoils of war. Women who lose their 'honour' find it extremely difficult to lead normal lives and to live down the stigma. There is a total breakdown of structures, of the norms of behaviour, of what is socially sanctioned behaviour and the results are the atrocities and human rights abuses that are reported by print, visual and audio media.

When there is a complete turning on its head of the known circumstances, the known life and exchanging it for the unknown, the uncertain, the insecure and the dangerous, how do people cope up with this situation.

This approach has helped in the process of enabling women to share their experiences of coping with the realities of daily life, experiences which they perhaps would not have felt confident enough to share were it not for the fact that the research teams in both states chosen for the study were 'local' and that contacts with those interviewed were made with extensive help from friends, neighbours, civil society groups, local women's groups, local interpreters and guides.

Women, after all are responsible in these situations as mothers of children and wives of the wounded, those killed and those who especially women, who are the most vulnerable sections of society, cope? What happens when they are forced to flee, to leave the familiar environments of their villages and towns, and find themselves cut off from their tribes and cultural moorings? What dangers confront them in their new environments? These are difficult and challenging issues and troubling questions.

Continued violence, especially in the rural areas, has resulted in large scale migration of young women and men to urban centres. Without any effective support system, they become extremely vulnerable to exploitation, violence and trafficking. The incidence of HIV/AIDS, drug abuse, alcohol and substance abuse increases substantially in such situations. The feminization of the AIDS epidemic is becoming all too apparent and the increased vulnerability of women to HIV/AIDS in situations of conflict is an area of growing concern to social and health activists. The presence of armed forces in large numbers also increases the demand for sex workers and young women are sucked into this and become pawns in a larger brutal network that thrives on human misery and conflict: human and drug trafficking proliferate with women and children being sent to other parts of the country. This is also as a result of the loss of other economic options and increased poverty as a result of longstanding conflict situations and their aftermath.

The state of women's health is another picture of neglect and apathy in areas of conflict. There is a lack of infrastructure, of adequate facilities, of health personnel and most of the Centre's much hyped health schemes remain just on paper with few being able to access these. Travels to the remote hinterland of both Nagaland and Assam showed us how the most marginalized segments of its population hardly figure in the "Incredible India" promoted by large corporations and governments, marching, the public is informed, towards 'development' and 'health for all'.

Another point important to flag here is what is happening to the young people 'the children of the conflict,' who are increasingly leaving their violent homelands for education and jobs elsewhere in the country. There are large numbers of students who flock to Delhi University every year. A Manipuri professor in Delhi says that there is a Manipuri student in every house in a colony behind the capital's Patel Chest Hospital. There has been a social impact of this out-migration: even vegetable sellers there have picked up the Manipuri language. While this is significant, we must also look at the other side of the social dimensions of this migration: what does the movement of a large amount of human resource capital mean for a small conflict-ridden state? Do these youth ever go back and, if so, to what?

Travelling with the research teams into remote villages and sitting in on the interviews they were doing with women and families of those who had been victims of conflicts, we came across many striking stories and

experiences. The reason for telling a few is to underline two points which we address later.

It was April a few years ago in Nagaland, the rains were abundant and the villages were beautiful. We went to the village of Benreu, set high among the hills in Peren district. It was not easy to get there. It took us six hours from Kohima through beautiful high hills and valleys, slushy mud and a landslide on the narrow winding hill road. It was cold and we sat in front of a huge open fireplace where a warming fire glowed and we talked to the villagers gathered there. They told us that the army came to the village after a brief mortar attack which killed a young mother and her child. All the villagers fled to the jungles, the granaries were destroyed and so were the homes of the people. When they finally returned, the villagers faced beatings and harassment each time the forces came looking for insurgents and their contacts. There was one saving grace-- the village was not burnt as so many had been in those days. This was because of young army officer who did not permit it. That was 52 years ago and the villagers still remember "Captain Dorairaj".

The two things which struck us when we heard this story were that one person in power, sensitive to local fears and insecurities, local customs and traditions can make a difference to the way a conflict is fought, the way an 'invading force' is perceived, the way local populations are dealt with. The other was that we were among the few independent groups of people from mainstream India to have visited Benrue in half a century.

When we conducted the project with support from the Heinrich Boll Foundation in 2011-12 on Assam and Nagaland, the main aim was documentation of the impact of conflict on women in the two states and wide dissemination of research and findings through publications, a documentary film ('A Measure of Impunity'), seminars and the media. The project sought to place these issues in the larger context of the challenges of nation building, regional growth and also look at broader issues of just laws, the use of State power and the rights of citizens especially women.

The definition and measurement of conflict can be also accessed by materials given in the Uppsala Conflict Data Program (UNCP) and the International Peace Research Institute, Oslo (PRIO), which is widely regarded as a primary source for armed conflict data (http://www.pcr. uu.se/research/udcp/database).

Apart from the obvious impacts like physical and sexual abuse, beatings, and torture there are other insidious ways in which women's safety and well being is threatened. As a result, the foundations of a community are under attack. There are greater restrictions placed on their mobility, and their access to health, education, means of livelihood and employment. Very little by way of documentation exists especially of issues like Post Traumatic Stress Disorder, the links between trafficking, drug and substance abuse, HIV/AIDS and conflict, or the escalation of domestic violence and sexual abuse in areas affected by armed conflict.

To bear witness has been a challenging and disturbing experience. Listening to and reading the testimonies of the victims has been particularly painful and saddening – especially as we are deeply aware that virtually none of the victims have had access either to compensation or justice by getting the legal system or even the administrative system to take care of the harm they have suffered and a cycle of hatred, violence, grief and unmitigated injustice.

But it is the nature of such inflicted harm, no matter where we are in the world, to be repetitive for as we say in this Introduction, women's bodies have become the battleground for ideas and contesting fighters, in and out of uniform. It is the latter as much as any other issue that we seek to address and call the attention of readers of this report. These unaddressed injustices as well as physical and mental harm and trauma that need to be faced by State, non-State and civil society groups as well as the international fora and discourse on human rights. The lack of justice has bred a sense of Impunity among both State and non-State as well as the rent seekers and quasi-State, which are patronized by the state, such as those responsible for the ''secret killings' in Assam.

It would be also important here to reflect on the quality of resilience shown by the victims and their families.

To bear witness has been a disturbing experience. Listening to and reading the testimonies of the victims has been particularly painful and saddening – especially as we are deeply aware that virtually none of the victims have had access either to compensation or justice by getting the legal system or even the administrative system to take care of the harm they have suffered. For some, the nightmare persists because they remained unhealed and unreached; for others the nightmare is renewed when they see the alleged

killers of relatives or friends walking around free. We have been privileged to have been included in some of the most personal and difficult situations which these women and their families have faced. It is not as if the suffering was confined to women. Indeed, while they have suffered acutely, other members of society also have been harmed, across the gender divide.

Prof Astier Almedom of Tufts University says, "If you lose your home during a disaster, you have to go somewhere else you risk losing your identity." In the course of her own work in Eritrea, neighbouring Ethiopia, she found that despite disruptions, certain mechanisms of social support alleviated some of the people's emotional pain and difficulties.

Prof. Almedom further described Resilience as a "multi-dimensional construct defined as the capacity of individuals, families, communities, and institutions to anticipate, withstand and/or judiciously engage with catastrophic events and/or experiences, actively making meaning out of adversity, with the goal of maintaining normal function without losing identity." (2008)

Many stories remain untold, many tragedies undocumented, many voices unheard in our North-east itself.

As long as that remains undone, our work will not be complete. The democratic deficit is too extensive not to map and too dangerous not to address and remedy.

The North-east of India is Asia in miniature, a region where India ends and South-east Asia begins – and also the converse, where India begins and South-east Asia ends. It remains uniquely disadvantaged by Partition and the legacy of colonial rule but with new policies of economic opportunity and regional cooperation opening up, this could change dramatically in the next decades. Indeed, not less than 96 percent of the region's borders are with other countries; only four percent is connected to the rest of India -- what is often described in this area as the 'mainland' or the 'mainstream'.

The region comprises eight states, home to about 42 million people, with a huge range of ethnic diversity and cultures who inhabit a dramatic ecological and equally diverse landscape. Of this, one of the greatest visible geographic and cultural markers is the Brahmaputra river, whose waters and valley sustains a majority of this population especially in the state of Assam before it flows into Bangladesh

The Brahmaputra is a key river in the region that encompasses India, Bangladesh, the Hindu Kush Himalaya mountain range and the Tibetan Plateau, widely known as the Third Pole.

Around 2,900 kilometres long from its origins in the glaciers of Tibet to its confluence with the Ganga in Bangladesh, the Brahmaputra drains most of the eastern Himalayas. In one 400 kilometre mountain stretch, the river drops more than 2,000 metres in altitude, as it takes what is known as the Great Bend. It carries a volume of water greater than the combined flow of the largest 20 rivers in Europe, second only to the Amazon and the Congo rivers, supporting the livelihoods of millions of people.

Today the river is threatened both by climate change and the race between India and China to build dams and other major infrastructure projects on its higher reaches. These plans could severely damage the river's ecosystems and its capacity to sustain the livelihoods of the people who live along it, and have become a source of severe tension between India, China and Bangladesh.

Downstream Assam and the NER (as the North East is known in India) have been one of the most globalized parts of the subcontinent for well over a century. It was where the prosperous tea gardens and companies in the Assam and Barak Valleys were set up, connecting to the international markets especially in London. Steamers and ferries took goods and people from as far as Dhaka and Kolkata to Dibrugarh in Upper Assam and back. Large reserves of oil and gas were discovered here in the 19th century and still supply a substantial part of India's energy needs. Partition and the India-Pakistan wars shut down the river route and it is only in recent years that Bangladesh and India are negotiating legal instruments of reopening trade, commerce and navigation on what remain the lifelines of both Bangladesh and its neighbour, the North-east.

A sense of political, economic and historic alienation has added to the fault lines of geography and ethnicity; this in turn has ensured that distances have grown in every sense of the word between the North-east and the rest of India. In a number of cases, this alienation has taken the shape of violent movements against the State seeking independence or much greater autonomy, although these appear currently to be winding down, as much as because of public fatigue and exasperation with frequent shutdowns, economic deceleration, compared to other parts of as well as the security heavy-handedness that has come to characterize life in one of Asia's most

ecologically diverse and rich areas.

Economic development has failed to keep up with rising expectations. The large majority of the population of the region is rural-based although there has been a sharp degree of urbanization in pockets such as Mizoram, on the border with Myanmar, where one-third of the entire state lives in and around the capital of Aizawl.

There has been a growth in the incidence of rural poverty although incomes in urban areas have improved substantially, leading to a sharp and visible spatial inequity. New malls, houses and construction are on an aggressive upward spiral in a handful of cities, indicating the growth of disposable incomes. In addition, local governments have become major sources of employment – such as for teachers and police recruits. The land-person ratio is falling and barring some areas, there has been a drop in farm productivity. Indeed, according to the Government of India, the NER is perhaps the slowest growing region of the country, buffeted by internal violent conflicts, low productivity, out migration and natural disasters.

The primary sector has not grown and more than 60 years after independence, infrastructure remains creaky at best, although there has been an improvement in railways services and road transport connections. States like Assam suffer as much as 13 percent or more damage to their net sown area from floods and most states are net importers of food. Oil and gas are major economic drivers although the tea economy has suffered setbacks in the past years.

However, despite the crisis in issues of rights, conflict and violence of various dimensions that the region has suffered from for over 50 years, as was described in the earlier part of the article, there is growing evidence of a number of civil society initiatives and partnerships with the principal stakeholder which have led to substantive and sustained changes and improvement in conditions relating to access to health, for example, and delivery of services to marginalized groups through a rights-based approach.

An example is of the Centre for North East Studies and Policy Research (C-NES), established in 2000, which works both at the policy and field levels on various issues of the North East on a range of governance issues, especially health with special emphasis on women and children, education, environment, and livelihood issues.

The organization has been providing basic health care services to the vulnerable populations living on the islands of the Brahmaputra through regular medical camps with a special focus on pregnant women, new mothers and ensuring the full immunization cycle for children,. These islands are known locally as Chars or Saporis.

The programme in 13 districts of Assam reaches communities through specially developed boats equipped with laboratories and pharmacies for a decade. The operation is popularly known as the 'Ships of Hope' and is critical to reducing Assam Maternal Mortality Ratio (MMR is the number of women who die during delivery) which at 300 per 100,000 live births is the highest in India. It needs to be noted that this performance shows a dramatic drop from the MMR of 490 a decade back, and signifies the best improvement in maternal mortality figures in India -- but it's still not enough. As in other fields, much more needs to be done.

The campaign is part of a Public Private Partnership (PPP) between C-NES and the National Health Mission (NHM), Government of Assam. The goal is to reach the unreached, the millions at the bottom, who have been deprived of their basic rights including delivery of health care and education.

This means giving access to health care to hundreds of thousands of people on the islands, for the first time since independence in 1947, and with a special focus on women and children who continue to be the most vulnerable in difficult conditions.

In 10 years, nearly two million (20 lakh) people have been reached with regular health care and annually over 300,000 persons, especially women and children, have received special care: the women with ante and post natal checkups, the most critical period of pregnancy in these areas, and the children with full immunization. In numerous cases, doctors and nursing staff have conducted emergency and safe deliveries on board and on the islands.

The result is that people trust the organization delivering the service as much as the service delivery itself, a unique response among public recipients of a State-sponsored service.

Each boat carries a fully fledged medical team (two doctors, three nurses, and lab technicians and pharmacists) that conduct regular camps organized through a network of community health workers and other organizers in the district. The goal is to take sustained health care to hundreds of thousands

of people on the islands, for the first time since independence, and with a special focus on women and children who continue to be the most vulnerable in difficult conditions. Another major initiative is built upon a separate programme that is taking behavorial change to such groups, including minority areas, where women have to struggle against patriarchy, superstition and religious taboos; as a result of sustained campaigns by programme counsellors, more and more women have started taking to family planning methods, demonstrating an attitudinal breakthrough, defying traditional beliefs and family opposition.

This unique health clinic story began with a single boat, a prototype called Akha (Hope) in the Dibrugarh district in 2005, where a five person team, mostly temporary workers, functioned. Today, the organization works in 13 districts of Assam with 15 boat clinics with a full time staff of nearly 250: 30 doctors, 90 nurses and another 30 pharmacists and lab technicians. The project has since spread to other districts, first, through a partnership with UNICEF and more recently, with NHM which is helping to scale the programme up.

Such examples of best practices abound in the region and across India. The C-NES effort has been captured in Government of India and Government of Assam documents and are showcased as flagship successes of working in difficult conditions and areas to bring basic rights of health access to literally the last mile.

Migration from North East India : Discrimination and Racism

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Abstract

People from the North East region of India living in mega cities have been unfairly treated in their day-to-day life. Some of such incidents have been labelled as racial discrimination, attracting significant media coverage and public attention leading to the formation of a 'North East' identity. This essay will discuss the implications of these issues.

I.   Introduction

We are living in the 'age of migration' (Russell et al 2010) which is marked by a rapid growth of migration than ever before, and the migrants are also said to earn considerably higher income, better access to education and health care and better prospects for their children (UNDP 2009, 1-2).

Out of the 1.02 billion people in India, 307 million (30 per cent) were migrants by their place of birth (Census of India 2011). Maharashtra received the largest number of migrants (7.9 million) by the place of birth from other states and countries, followed by Delhi (5.6 million) and West Bengal (5.5 million). During 1991-2001, the number of migrants (excluding Jammu & Kashmir) has risen by 32.9 per cent, high in comparison to India's population growth of 21.5 per cent during this decade. Population pressure on land, increased opportunities for work, education and a variety of reasons including marriage in case of females contribute to migration to rural or urban areas. In case of intra-state migrants, majority of the migration is from one rural area to another, due to marriage in case of females and in search of

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work in case of males. In the case of inter-state migrants, the movement is primarily towards urban areas (Census of India 2011).

Scholars belonging to different social science disciplines have studied historical and contemporary migration into, out of and within India. Migration from the country has been a focus for some time, and remittances are important in state such as Kerala, Karnataka. In addition, migration to North East region of India (hereafter, the region) has also been studied extensively. However, a new pattern has emerged in internal migration with an increasing number of young men and women from the region have migrated to mega cities in recent years. However, no comprehensive study has been conducted so far on the issue. Yet it is gaining public importance, political significance and social relevance due to the incidents of alleged discrimination they have faced. The historical and contemporary migration from the region can be broadly divided into the colonial-era migration for studies, while the post-independent migration and post-liberalisation migration were both for studies, employment and learning skills which could be applied in home condition upon return.

II. Causes of Migration

The North Eastern region has a history of poor inter and intra-regional connectivity. The vast majority of its population (85 per cent) lives in rural areas as against the national average of 72 per cent. Agriculture is the main source of livelihood for about 70 per cent of the population; yet, the region produces only 1.5 per cent of country's food grain production. It imports food grains, even for own consumption. The 'Green Revolution' has not impacted the states of the region; agriculture is mainly dependent upon seasonal rainfall. Manufacturing activities are limited. The share of manufacturing in the Gross Domestic Product of the region was only 4.8 per cent in 1993-94 compared to the national average (18 per cent). This share has decreased over time from 1993-94 to 2002-03. The share, however, varies across the states, from 3 per cent in Nagaland, Arunachal Pradesh, Meghalaya and Tripura to 8 per cent in Assam in 1993-94. This shows that the scale of industrialization has failed to take off in the region.[1] The share of tertiary

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[1]   The number of large factories is merely 1.56 per cent of the total large scale factories in India. Considering industrial employment and capital formation in the region it can be concluded that the large scale manufacturing sector is virtually non-existent. A weak manufacturing sector is one of the root causes of poor performance of Gross Domestic Product.

sector is about 53.38 per cent in 2009-10 as against 57.29 per cent in India. This sector is growing due to the expansion of public administration with the state governments being the main employers.

In rapidly growing states such as Punjab, Karnataka, Kerala, Maharashtra and Tamil Nadu, the agricultural sector is in relative decline, while the services and manufacturing sectors are growing. However, there is little evidence of economic diversification in most of the states of the region. Agriculture remains the backbone of the economy and jhum or shifting cultivation dominates the hill states. Though the region produces food grains, yet, same is not sufficient to meet the demand. With a high rate of dependency, the region remains the major importer of food grains (Government of India 2013; Government of Tripura 2007; MDoNER and NEC 2008).

On the contrary, the literacy rate is significantly above the national average (according to 2001 Census, it was 68.5 per cent). Infant mortality rates, except Assam, are well below the national average. Though human development indicators are relatively favourable, the region has not been able to build on these strengths and capture its potential. The standard of living of people as lagged behind the rest of the country. Also the divergence in per capita income between the national average and the region shows a steady increase over the years. As a result the region's population seem to be increasingly excluded from India's current economic growth. Significant segment of the economy is associated with the growth in the government sector and ancillary trade and service sectors. Thus, despite having abundant natural resources, the states of the region remain poor. The economic growth is slower than that of the rest of the country and this is reflected in the average per capita income of the region, which is approximately 30 per cent lower than the national average (Government of India 2013; Government of Tripura 2007; MDoNER and NEC 2008).

In addition, several states of the region have been affected by armed conflict and ethnic tensions affecting livelihoods and well-beings leading to extensive violence, death and damage property, population displacement and insecurity. These have brought many direct and indirect costs which in turn affect livelihoods at the time of conflict and for many years thereafter. For instance, educational institutions in Manipur have had to shut down for several weeks in the wake of movements against the policies of the government or demanding for the introduction of special legislation in the state. Furthermore,

there are gaps in higher education, technical and vocational training in most states of the region, forcing many students to go to other parts of the country. Widely recognized impediments for development include: (a) high degree of isolation from the rest of India and severe limitations on cross-border trade; (b) poor internal infrastructure and services that hamper access to markets and credit, and (c) low level of business confidence and difficult investment climate caused by the impact of armed violence (Government of India 2013; Government of Tripura 2007; MDoNER and NEC 2008).

Unemployment among the educated youth has reached alarming proportions. There is a marked mismatch between demands in job market and a weak educational system, especially to meet the requirements of a changing economy (Rimei 2015:30). With hardly any major industrial activity, the state governments are the major provider of employment. There is huge disparity between the generation of employment and the number of people seeking gainful work. The increasing number of educated unemployed youth is considerably due to low level of industrialisation and lower expansion of modern service sector occupation (Ramesh 2015).

On the other hand, the economic liberalisation of the economy of the country and the consequent information technology boom in prosperous regions of the country has created new jobs across sectors. As a result, a large number of people from across India have migrated for employment to Bengaluru, Chennai, Delhi, Hyderabad, Pune and other cities. Thus one of the primary reasons responsible for pulling migrants out of the region is the impact of globalization. The lure of better job opportunities attracts them to mega cities. In addition to this there is the pull factor of a better environment for educational opportunities, with multiple choices of study options. There is also the additional attraction of employment opportunities in Central government jobs where reservations exist for the Scheduled Castes (SCs) and Scheduled Tribes (STs) communities[2] (It needs to be stressed that the tribal population comprises about 27.2% of the region's population, but the region is largely seen a 'tribal land'. The STs are a majority in Mizoram, Meghalaya, Nagaland and Arunachal Pradesh).

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[2]   "Globalisation has opened doors to employment opportunities, particularly semi-skilled and semi-professional crowds. Ability to communicate in English and hospitality, social-oriented culture, honesty, hard-working culture attracted to private companies." See Rimei 2015: 9.

Bengaluru is considered to be the 'Silicon Valley' of India, and is the destination of large-scale migration from other parts of Karnataka and other states which are relatively poorer. Out of a total of 761,485 migrants into the Bangalore [Bengaluru] Urban Agglomeration (UA) in 2001, representing 13.4 % of the UA's population (of 5.7 million), 401,932 were from within Karnataka and 353,156 were from outside the state. Bengaluru is second, next only to Greater Mumbai, in terms of the proportion of in-migrants to total population (13.4 %) (Sridhar et al. 2013:292).

In short, the main push factors that compel young men and women out of the region have been the limited educational and job opportunities and violent conflict while the main pull factors that encourage them to migrate are the availability of better educational and job opportunities in mega cities and other places. Majority of them migrated in search of employment and education to Delhi, Pune and cities in South India.[3] Some of them said that they came to Bengaluru under the influence of family and friends,[4] while a few others said they did so for the purpose of the ministry of God[5] (their involvement in missionary activities) (Centre for North East Studies and Policy Research 2014).

Guesswork on Migrant Population

In the absence of an exhaustive census or survey, the estimated population of people from North East region studying and working in other parts of the country differ widely. Particularly the estimates for mega cities are confusing and unreliable because they are just guesswork or hearsay in the absence of any census or survey. For example, the combined population of people including students and professionals from the region in Bengaluru was estimated to be around 2.5 lakh (The Economic Times, August 17, 2012), over 3.5 lakh in Karnataka (The Hindu, September 5, 2012), about 2 lakh in Delhi (The Sunday Guardian November 30, 2014), while from that of Assam alone in Bengaluru was around one lakh.[6] Despite this, it is necessary to understand the characteristics of the young migrants from the region.

• There is significant feminization of migration, both students and workers;

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[3]   39 per cent according to Rimei (2015)
[4]   8 per cent according to Rimei (2015)
[5]   4 per cent according to Rimei (2015)
[6]   Gaurav Das, Assamese usher in New Year in Bangalore, The Times of India, April 8, 2013.

- Most of them are young and unmarried, live with friends and relatives in shared rooms in largely congested areas;

- They are mostly either first-time migrants or children of those who had studied elsewhere;

- A significant number of them do not have economic motive for migration, and preferred short-term migration;[7]

- They mostly opted for salaried jobs;

- A significant sections of blue collared workers works in service sectors such as in beauty parlours and private security;

- There is a large student section; and.

- Many of them prefer to stay closer to members of their own ethnic group.

III. Discrimination

We will not enter into defining the meaning of 'discrimination'; however for the purpose of this essay we will take discrimination as 'treating unfairly' and an expression of ethnocentrism (Marshal 1998:163).

There were frequent reports of forms of discriminations including 'racism' against some sections of the migrant population of the region in cities like Delhi or Bengaluru (see Table 1) in which some incidents were perceived to be racially motivated (Singh 2013).

Table 1: Crimes committed against people of the North East region			
Year	Delhi	Bengaluru	Gurgaon
2012	55	18	0
2013	72	4	0
2014	286	7	9

Source: Union minister of state for home Kiren Rijiju said in a written reply in the Lok Sabha on March 3, 2015, see also The Telegraph, Kolkata, March 4, 2015

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7   This is primarily based on interviews with students, professionals and teachers conducted during fieldwork in Delhi and Bengaluru in July 2015.

During 2011-13, as much as 150 crimes were reported in Delhi alone. In February 2014, a student from Arunachal Pradesh died in Delhi after he was assaulted by shopkeepers following an altercation. This incident caused outrage among the people of the region. Relationship between North East and rest of the country is applied to the relationship between developed 'centre' and backward 'periphery'. Dependency theorists[8] have analysed relationships of exploitation between the 'developed' core and the 'underdeveloped' periphery. The relationship between mainstream India and North East can also be framed as falling within the same analogy wherein the region is viewed as in conflict with the Centre on the social, economic and geopolitical fronts. "Geopolitical factors, sense of relative deprivation and feeling of alienation have posed grave problems in the Northeast India. In this land-locked, yet geo-strategically located part of India, the wide gulf of economic development and accompanying social problems are afflicted by the perpetual insurgent movements and other ethnic conflicts between and among different groups."[9]

The North Eastern region is often misunderstood as a homogenous unit. It is not. There is immense ethnic and cultural diversity within the region as well as within each state of the region. There are tribal and non-tribal populations, people with Mongoloid and other features[10]. The tribal people including those who have Mongoloid features are much more prone to discrimination when they go outside the region. This is a fact, we must acknowledge it. Chinki is the most commonly used term outside North East to refer to them. This is considered as somewhat 'derogatory' by many people. Even the non-tribal population from the region, but who have Mongoloid features, are also subjected to some forms of discrimination. For example, the Meiteis of Manipur are not considered as a tribal but they suffer discrimination like any other tribal people from the region. Whether they are recognised as a Scheduled Tribe or not, they are seen, outside the

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[8]　Dependency theory is the notion that resources flow from a "periphery" of poor and underdeveloped states to a "core" of wealthy states, enriching the latter at the expense of the former.

[9]　See, Chapter V, Conclusion,
http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/34583/11/11_chapter%205.pdf,
Accessed on October 4, 2015.

[10]　For more information on this classification, please see, Sir Herbert Risley, The People of India, Madras, Asian Educational Services 1999 and Dale Hoiberg People & Society in the Indian Subcontinent, Students' Britannica India: Select essays, Volume IX, 2000, New Delhi, Encyclopadia Briannica (India), pp 113-120.

region, as a 'tribe' and over and above they have Mongoloid features. Others from the region who are not called Chinki have also suffered discrimination should they were known to be from the North East.[11] Thus there is tendency towards stereotyping the people and the region as 'backward', 'remote', 'tribal', 'troublesome' and 'cultural inferior'.

At the same time, there is a strong feeling of mistrust against the 'outsiders' (the migrants from across the international borders as well as from other parts of the country) in some areas of the region as there are apprehensions of being marginalized by the 'outsiders'. A sense of mistrust and pessimism signify their relationships. Therefore, the question we may ask is, did some people deliberately indulge in tit-for-tat strategy? This is most likely, for instance, following the conflict between Bodos and Muslims in Assam in 2012, there was an 'exodus' of North East migrants who were living in Bengaluru back to their home-states in response to SMS messages and word-of–mouth rumours suggesting that Muslim youths and organisations were planning an attack on people from the North East living in different parts of the city.[12] Recently a prominent politician from Bihar allegedly threatened to pull out Manipuri passengers from trains passing through Bihar and send them back to Manipur in protest against alleged violence against migrants there.

In addition, being young and unmarried, many of the North East people are seen as fun- loving, and careless about the cultural practices of the host societies. During an interaction with students in Bengaluru, some students expressed shocked for being labelled as a 'nuisance'[13] Moreover, different professions have different social status in the society. These perceptions differ from one society to the other. A large number of the people from the region work as beauticians, waiters, sales personnel and private security guards which are considered least attractive in the hierarchy of professions.[14]

Furthermore, they are said to be unable to adjust and accommodate

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[11] "I am not called Chinki at all, but face situations where I was treated differently since I am from the North East," said a student in New Delhi in May 2015.

[12] About a month earlier, violence had erupted in the district of Kokrajhar in Assam. The incident involved the indigenous Bodo community and 'illegal' Bengali migrants from Bangladesh.

[13] We interacted with several students in Bengaluru in July 2015.

[14] A retired officer once told the first author of this essay during a seminar in Mumbai in August 2015 that the people from North East are 'not doing great job'.

themselves with their host societies. Those living in Bengaluru have stated that one of their biggest hurdles was not knowing the local language (Kannada) and enjoying with the local cuisine. Even the property dealers were reluctant to give them accommodation. If so they charged higher brokerage and rental rates.[15] In such situation, some young people suffered the most.

It is also equally important to study how they are seen by others. What they eat or wear matters a lot, although it can be argued that this is a matter of free choice. They are further accused of eating 'smelly' food. Several landlords and others objected to this. Some of them had confronted when their landlords objected for bringing guests and friends.

IV. Formation of a Regional Identity

There are also over-enthusiastic advocacy groups and individuals who are active on issues concerning them. It is irony that some of them portray any incidents involving North East people as racially motivated. We agree that as their number has increased rapidly in the recent past, there are more crimes against them. However, it would be wrong to assume all the crime as racially motivated. If a worker hailing from the region is not paid his or her salary, one can't simply call it as racially motivated.

States of the region are mainly characterised by intense polarisation of politics around ethnicity. For instance, one of the sharpest examples is Manipur where the political aspirations of main ethnic groups are at loggerheads over the political future of Manipur. On one side, the Meiteis (the dominant group in the state) who live in the plain areas want an independent country of Manipur, and on the other, both Nagas and Kukis, who live in the hill areas, are in favour of Manipur's division into three parts. If this happens, Manipur will lose large part of its land. Despite these differences, many young men and women of Manipur (or of the region) stand united against the alleged discrimination. They organised protest rallies against the alleged racial abuses and other crimes. In recent years they have become more assertive regarding their rights. In short, within the region they are divided by intense ethnic identity mobilisation, by contrast the alleged discrimination

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15 While 65 per cent of the respondents stated that they had problems in accommodation to their host society, 35 per cent said that they did not. Rimei 2015:31.

bind them together (Singh 2013). Under such situation a distinct regional identity which we may call 'Northeast identity' has emerged outside the region. The formation of this identity is partly due to their strong and united stand against discrimination as well as partly due to the different roles played by both the media and the government.

V.   Role of Media

Incidents of crimes involving the North East people in mega cities usually attract a lot of media attention. Newspapers carry such news by highlighting the victim's identity such as North East, Manipuri, Mizo, Naga etc. A sample of headlines of major daily newspapers is given below:

•   'Three men harass Northeast woman, assault husband in Amar Colony' (The Indian Express)

•   'Molested Naga woman beaten outside court' (The Times of India)

•   'NE girl molested in Gurgaon' (The Times of India)

•   'Nagaland woman molested in car' (The Hindu)

•   'Manipuri girl raped in Delhi' (The Hindu)

•   'Mizoram woman murdered in south Delhi' (The Times of India)

•   'Northeast exodus wanes, at last in Bangalore' (http://www.dnaindia. com/)

•   'Delhi: NE students protest Arunachal boy's death' (The Hindustan Times)

The same yardstick was hardly followed if the victims were from other parts of the country. Media also rarely cover other positive aspects of their lives such as their achievements and aspirations. No single reason can account for the cause of discrimination. The reasons are varied and are closely intertwined.

VI. Government Response

As crimes against them have increased in recent years, the Central government as well as some state governments have stepped in. In this context Prime Minister Narendra Modi said during an election campaign in Assam:

The attack on the students cannot be tolerated and we will have to ensure their safety and security, with the first step in this direction being to set up hostels in major cities of the country ... Hostels would be constructed not only in Delhi, but also in major cities like Bangalore, Hyderabad and Chennai so that my children from the North East do not face any problem when they go for interviews to these cities ...[16]

The Central Government went to the extent of constituting a Committee in 2014 to look into the various concerns of persons hailing from the region who are living in different parts of the country, especially the metropolitan areas, and to suggest suitable remedial measures. The terms of reference of the Committee were: (a) to examine the various kinds of concerns, including the concerns regarding security, of the persons hailing from the North-eastern states; (b) to examine the causes behind the attacks/ violence and discrimination against them; (c) to suggest measures to be taken by the government to address these concerns; and to suggest legal remedies to address these concerns (Government of India 2014). The Committee's recommendations have been accepted by the government. As part of the legal measures, the Indian Penal Code will be amended as recommended by the committee. As part of legal assistance, a panel of seven lawyers including five women lawyers has been constituted by the Delhi State Legal Service Authority for providing legal assistance to the needy people. The Central government has also decided to recruit 20 police personnel (10 men & 10 women) in the Delhi police from the region; organise exchange programme of police personnel between North Eastern states and metropolitan cities; (c) set up North East Special Unit; (d) to refer cases involving people from the region to fast track courts; (e) to set up a special helpline; (f) deployment of police in vulnerable areas prone to crime against the North East people.

Further, in order to educate the people about the region, universities have been advised to teach history of the region and participation in the freedom movement at graduation level and post-graduation level. Similar action has been sought from the National Council of Educational Research and Training (NCERT) with respect to elementary and higher secondary education. A special scholarship scheme for students of the region 'Ishan Uday' has been launched from the academic session 2014-15 providing 10,000 scholarships

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[16] "At Assam rally, Narendra Modi condemns attacks on North East students in Delhi," Press Trust of India, 22 February 2014.

ranging from Rs.3,500/- to 5,000/- per month for studying at under-graduate level in colleges and universities of the country. Under 'Ishan Vikas' scheme, selected students from school and college levels will be taken to different Indian Institute of Technology, National Institute of Technology and other engineering institutes for exposure/internship programme. Ministries of Culture, Tourism, Information & Broadcasting have also planned to roll out programmes to bridge the gap between the region and the rest of the country, including action plan for educating the people about the rich cultural heritage of the region and its wider coverage and promotion at the national level, film festivals and festivals showcasing culture, films, food, sports etc. The Central government is planning to construct hostels for students in Delhi and other cities. The government has also been exploring the effective measures to deal with the problem of accommodation faced by the students and professionals (Government of India 2015). The Union Ministry of Home Affairs has also asked the states and union territories to book anyone who commits an act of atrocity against people from the region under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.[17]

There are dedicated police officers assigned to help young people in distress in several cities including Delhi. Sensitization programmes are being conducted from time to time for civil servants in Delhi. We are however concerned if these programmes are really achievable (Centre for North East Studies and Policy Research 2014). In addition, in a fresh effort at bridging the gap between the Indian mainland and the region, the Centre for North East Studies and Policy Research, Jamia Millia Islamia has initiated a series of seminars and publications on Freedom Fighters from region. The Centre has organised workshops, attended by several historians, for developing new education curricula on the History of North East region for colleges and universities.[18]

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[17] See Karishma Kuenzang & Kashika Saxena, "Call a Northeastern 'Chinki', be jailed for 5 yrs", 6 June, 2012, http://timesofindia.indiatimes.com/life-style/people/Call-a-Northeastern-Chinki-be-jailed-for-5-yrs/articleshow/13848316.cms, Accessed on 4 October, 2015.

[18] Such as 'Assam and the Role of Muslims in the Independence Movement,' in 2010, 'Little Known Fighters Against the Raj: Figures from Meghalaya in 2011 and 'Little Known Fighters Against the Raj: Manipur's Bir Tikendrajit Singh' in 2012. The Centre has published relevant books including 'Little Known Fighters against the Raj: Figures from Meghalaya'.

Conclusions

Any attempt at trying to bridge the gap between heartland India and its North East will have to address the crisis of inclusion or exclusion. As Bijukumar (2013: 24-25) has stated the "fear of exclusion started even before Independence. The Nagas foresaw the possibility of exclusion in post-colonial India in the event of their integration with Indian Union, and started mobilizing Nagas for a separate nation free from the clutches of the Indian state. Moreover, they also felt that their community life and values would be threatened with the increasing number of the majority communities from other parts of India." This sense of social exclusion was articulated by the emergence of new social forces – the educated elite, students and youth groups, etc. Even today, the North East people who live in Bengaluru cannot shake off the memory of the 'exodus' of 2012. But, the increasing discrimination simply because someone looks different is unfair and must be discouraged.

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Where Are the 'People'?
A Study of Peace Processes in India's Northeast

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Abstract

Wars in history are fought in the name of 'people' as much as peace ironically is made in their name. While none of us denies the importance of bringing people back to the heart of peace process, the task seldom proves to be simple or easy as many scholars and activists would have us believe. The series of case studies cited in the paper leads us to conclude, first of all, that it is not only difficult but impossible to hold an ethnically divided people together merely by signing an accord and by making provisions for the representation of minorities in it. People cannot be unified through institutional interventions, as the experience of two Bodo Accords point out. The Accord of 2003 could hardly help in arresting continuing genocide in the area. Secondly, by all indications the August Accord of 2015 is framed in the script of Shillong Accord (1975) with the difference that in the former the civil society is viewed as a powerful vehicle of taking the Accord to the people while the latter was followed by systematic attempts of crackdown on the Naga civil society. In the case of Shillong Accord there was hardly any attempt at reaching out to the people; in the latter two almost successive attempts at reconciliation eventually ran out of steam. But the underlying assumption that peace is too serious a business to be left to the variety and contingency of people's wishes runs through both of them. It is to be seen whether the latest Accord also retraces the same footprints of the Shillong Accord and ends up in a fiasco. Thirdly, although ULFA kept itself open to public debates and criticisms particularly during the first decade of its existence albeit in a limited sense, it eventually closed in on itself as it was

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declared unlawful and was forced to go underground. By all accounts, ULFA's popularity was at its peak during the late-1980s. But, its transformation into a closed, hermetically sealed, militaristic organization wiped out the last traces of inner-party democracy within it. Finally, people situated between the mighty State machine on one hand and the heavily armed non-State actors on the other are vulnerable to pressures from both these parties. The prospects of the emergence of a critical public are always stonewalled by the twin strategies of coercion and cooption adopted by them. It seems that 'peace' and 'people' tragically take on two parallel trajectories in which people are merely the clients and the signatories its dispensers.

Wars in history are fought in the name of 'people' as much as peace ironically is made in their name. While none of us denies the importance of bringing people back to the heart of peace process, the task seldom proves to be simple or easy as many scholars and activists would have us believe. For one thing, people are not an undifferentiated entity. In a region like the Northeast, ethnic lines are by all accounts strong and sharp giving rise to alarmingly regular cycles of violence and conflicts. The important question that one may raise in this connection is: Does the success of peace accords depend on the degree of people's unity? Or, do the peace accords themselves serve as instruments of unification? We will see why unification of people becomes difficult – whether through pre-Accord processes of reconciliation as in the Naga case or by redefining the provisions contained in accords as in the case of Bodo Accords.

For another, it is important to reflect on what the phrase 'people's involvement' in the peace process exactly means. While direct participation of people in the process of signing accords is both impossible and bizarre, it may mean at one level that those who sign the accord take part in public debates and thus hold themselves accountable to at least the debating people. We will see how the United Liberation Front of Assam (ULFA) gradually withdrew from the people and closed in on itself. Elections, in simple terms,

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[1] By 'accord/s' we refer to accord/s in general, and not to any particular accord/s, which we refer to as 'Accord' with 'A' in capital.

[2] While we use 'State' with capital 'S" to refer to Indian State, we restrict the term 'state' with small 's' in order to refer to any constituent state of the Indian Union. We retain the original spelling when the term figures in quotes.

are not regarded as a reliable means of ascertaining representative claims of these organizations. It, at another level, may mean that the signatories also take upon themselves the responsibility of taking the accords to the people and make them acceptable to them. Both Shillong Accord (1975) and the latest August Accord (2015) are illustrative of it. The August Accord with the National Socialist Council of Nagalim (IM) was preceded by the collapse of the Naga Reconciliation process. The two meanings do not have to be mutually exclusive – although they were so in both the abovementioned Naga cases. The second in the absence of the first is likely to be undemocratic and force the accords on the people.

Besides, people being a large and unwieldy mass can hardly represent themselves; they need to be represented. The problem is: each of the parties involved in conflict claims itself to be representative of people as much as one accuses another of being unrepresentative – if not, anti-people - in their agenda and activities. People, in other words, constitute a site of contest amongst the conflicting parties including both the State and the non-State actors. The conflicting parties and civil society organizations have very different - at times contending – perspectives on representation.

The official perspective is interesting. Peace accords presuppose some sort of tactical understanding reached between the conflicting parties to their mutual advantage under conditions of diplomatic secrecy. Accords are not supposed to be the outcome of public deliberations. The problems get compounded as different segments of people are sought to be inducted into the peace process with their bewilderingly varied interests making peace difficult to achieve. Secondly, by signing an accord, the State confers recognition on the representative claims of those who sign it. The Mizo Accord (1986) is most illustrative. Pu. Lalthanhawla – at that time the incumbent Chief Minister of Mizoram who came to power after winning a popular election - stepped down and Pu. Laldenga – the rebel leader who signed the Mizo Accord on behalf of Mizo National Front (MNF) took over as the interim Chief Minister in 1986 and continued till 1988 without contesting any election. Thirdly, once an accord is signed it is imperative that the civil society organizations take it to the grassroots, and rally and elicit public support in favour of that. By contrast, armed groups and non-State actors view people as being ethnically constituted and insist on partition-based solution to the problems. They also look upon themselves as both the unquestioned representative and vanguard of the community they claim to represent. The fratricidal warfare amongst

different Naga rebel groups is centred on their contesting claims to represent the Naga people. The involvement of such civil society groups as Peace Mission and Church in Nagaland or Peoples' Consultative Group in Assam is instructive. Their representative claims are fundamentally mediated through their claim to uphold and defend certain basic principles of democracy or what Rawls would have called 'Laws of the People' like the inalienability of human life, everyone's entitlement to human rights etc. For them, 'people' as a collective is formed on the basis of some norms and principles the observance of which is expected to hold them together. These norms and principles are the bare minimum that one requires for one's human existence. This is possible if one subjects peace accords to rigorous peace audit. The recently published five-volume Sage Series in Human Rights Audits of Peace Processes edited by Rita Manchanda (2015) is a case in point.

Peace Accord as Unifier?

The literature on peace accords dwells mostly on how peace accords fragment and divide 'people' by not only playing one ethnic community off against another, but by introducing newer sources of discord within a community. As we will see, how Shillong Accord (1975) severely fractured the Naga society and if early signals are to be believed, the most recent Naga Accord signed on 3 August 2015 is unlikely to be acceptable to the rivalling factions of Naga rebels. This Section, however, proposes to study how those who sign accords also take lessons from history and seek to design them in a way that is expected to bring the conflicting ethnic communities and rebel groups together. At a time when social schism between communities is most acute and refuses to go away, peace accords are seen as the desperate remedy to all the social forces that keep them apart. The two Bodo accords of 1993 and 2003 may serve as a case in point.

Bodos, as we know, are concentrated mainly in the northern bank of the Brahmaputra valley of Assam. The Bodos by all accounts adapted themselves 'overwhelmingly' to the Hindu society in general and the Varna-Hindu Assamese mainstream in particular at least through the 1960s. They were as Mukherjee and Mukherjee point out, 'for a long time eager to be accommodated into the lower rungs of Hindu hierarchy' (Mukherjee & Mukherjee 1982:287). Many Bodos enthusiastically took part in the erstwhile Assam movement (1979-1985) while voicing their resentments against encroachment of 'outsiders' on tribal belts and blocks. The faint murmurs

of disquiet were first audible when as early as in 1979 when some of the tribal families were served with 'quite notice' by some enthusiasts of the Assam movement on the alleged ground that they were 'outsiders' and were asked to vacate Assam. The now abortive Memorandum of Settlement (1985) that brought the Assam movement to an end helped only in tightening the grip of the Varna-Hindu Assamese mainstream inasmuch as it declares that "Constitutional, legislative and administrative safeguards, as may be appropriate, shall be provided to protect, preserve and promote the cultural, linguistic identity and heritage of the Assamese people" (Art. 6).

The more the grip was tightened, the more there was resentment voiced by the tribes in Assam. Bodos were the first to fall out. The ABSU-resolution entitled 'Divide Assam fifty-fifty' adopted in its Bansbari conference (1987) – otherwise regarded as the testament of subsequent Bodo militancy – marks the final parting of ways between the Bodos and the Assamese. It calls for the formation of the separate state of Bodoland from out of the present state of Assam on the ground that "Assam Government is nothing but only an Assamese Government and not the Government of the people of Assam". The conference was soon followed by the Gohpur riots in 1989. Not a single Bodo, according to reports, rendered homeless as a result took shelter in any of the relief camps on the ground that they were run by the Assamese-dominated administration (Ramaseshan 1989:101). Some of them even fled away to nearby Arunachal Pradesh. Besides, Rabi Ram Brahma, then the General Secretary of ABSU, issued a warning that all non-Bodos living in proposed Bodoland would be expelled if they did not vacate it on their own by 15 August, 1989. A series of clashes between the Bodos and the non-Bodos occurred thereafter in Gohpur, Mangaldoi and parts of North Lakhimpur.

As the Bodo movement started to gather momentum, the State in its bid to find out a settlement entered into an agreement with the All-Bodo Students' Union-Bodo People's Action Committee (ABSU-BPAC) leadership. The Accord signed in February 1993 sought to provide the Bodos with some measure of 'autonomy' in areas, which were 'contiguous' and in which they constituted a majority of 50 percent or more of the population. Even for the sake of preserving contiguity, areas where Bodos constituted less than 50 percent would be the constituent parts of the Council. A cursory glance at the population figures of the autochthonous Bodos living in the villages claimed by ABSU-BPAC combine shows that their percentage has been rapidly on

decline right from the middle of the nineteenth century. Such factors as massive influx of outsiders, deforestation, rapid environmental degradation and land alienation are primarily responsible for this remarkable decline. In over 500 villages which they claimed as part of Bodoland Autonomous Council (BAC), they were reportedly reduced to a minority.

In its 28th Annual Conference held at Langhin Tinali, Karbi Anglong on 3-5 March 1996, ABSU disowned the Bodo Accord and revived its demand for separate Bodoland. When Bodo leaders reiterated their demand for inclusion of about 1000 contiguous villages, they were curtly told by Hiteswar Saikia – Assam's the then chief minister - that they had not constituted a majority in these villages. The Bodo leadership got the clue, went deep inside the villages and cleansed them of the non-Bodos in their bid to create a Bodo majority (Bhaumik, 1998:13). A series of riots was reportedly organized in an apparently planned manner to spark off the desired exodus. Ethnic cleansing resorted to by a section of militant Bodo leadership was therefore characterized by their potent desire of being grotesquely 'democratic' by creating a majority of their own in order to lay hold of the villages under the jurisdiction of BAC.

In a paper published in 1995, Bhattacharjee aptly sums up the problem in the following words: "… what the situation in reality demands is that the existing political system needs to be restructured to the satisfaction of the *total population and not only of a particular community or communities*" (Bhattacharjee 1995:208 italics mine). Bhattacharjee, it must be noted, calls for an institutional solution to the issue. The problem was addressed by way of first scrapping the lame duck Bodoland Autonomous Council on 27 May 2003 and then by signing a fresh Accord with the Bodo Liberation Front (BLT) leaders on 10 February, 2003 that subsequently led to the creation of Bodoland Territorial Council (BTC) on 7 December. Besides extending Constitutional protection to the Bodos, the Memorandum of Settlement aims to 'safeguard' the interests and concerns of the 'non-tribals in the BTC area' by way of ensuring their special representation in the BTC (clause 2) and securing their settlement rights and transfer and inheritance of property.

Bodo insurgency represents the classic paradox involved in the official policy of granting homeland to the agitating groups and communities of the region. A faction of the Bodos organized under National Democratic Front of Bodoland (NDFB) is yet to close its ranks with the BLT. While the

clashes of 2012 claimed 86 lives, the violence that hit the northern banks again between late April and early May 2014 took a toll of 32 human lives. The Bodo case clearly shows that the people in the Bodoland area remain not only ethnically divided, but institutional interventions particularly in the form of instituting BTC could not arrest violent clashes and unify them.

Taking 'Peace' to the People

Does peace emerge from below or peace arrived at by the contending elites needs to be taken to the people so that they subsequently accept it in order that peace becomes sustainable? Doesn't peace that trickles down and permeates the body politic take on an elitist character by helping in 'manufacturing' popular consent to peace? The history of Naga peace process tells us that peace 'forced' on the people by 'manufacturing' consent proves to be unsustainable albeit reigniting conflicts and violence with renewed ferocity.

The history of peace making in the erstwhile Naga Hills/Nagaland is as old as the history of conflict. Space does not permit us to delve into the complexities of the history of peace making in this case. But a comparison between the Shillong Accord (1975) and the one signed with the National Socialist Council of Nagalim (Isaak-Muivah) on 3 August 2015 may not be out of context here. For, both Accords show how they are signed under conditions of complete secrecy. While the pre- and post-history of Shillong Accord is one of keeping 'people' at arm's length, in the August Accord the initiative of keeping people in the loop - although started with much enthusiasm in the first part of the last decade – ended up with acute intertribal bitterness and was abandoned long before the Accord was signed. The Government, however, expects that the civil society organizations must come forward and help the Government in forging a consensus amongst different Naga rebel factions and make it acceptable to one and all.

After the collapse of the Peace Mission consisting of Jayaprakash Narayan – the veteran Gandhian, Gopinath Bardoloi – the Chief Minister of Assam, and Reverend Michael Scott formed to build bridges between the Government and the rebels groups, and the spurt in violence amongst fighting Naga groups, the Church of Nagaland Baptist Mission (CNBC) appointed a Liaison Committee to bring together all sections of the Naga underground leaders and the Government of India. After months of negotiation, it was

decided that a six-member committee would be appointed by the 'Federal Government of Nagaland' ('FGN') to conduct negotiations with the Government. Peace talks were held on 10-11 November 1975 resulting in what Steyn calls 'subdued signing' (Steyn 2002: 155) of the Shillong Accord (1975). The Accord was signed by them – not as the representatives of the 'Federal Government of Nagaland' ('FGN') but 'on behalf of the underground organizations' – in reality only a breakaway group of Naga National Council (NNC). The Shillong Accord (1975) may be regarded as the classical paradigm of peace established through war and of war continued through the act of peacemaking. In spite of being excruciatingly brief, two of the three clauses that make up Article 3 – the only substantive Article in this three-Article Accord provide for the 'acceptance of the Constitution of India, without condition and of their own volition' and the instrumentalities of 'depositing' arms by the underground. While Article 1 names the parties signing the Accord, Article 2 briefly lays down the historical background of 'the series of discussions' that led to the act of signing the Accord. Article 3 clause (iii) holds out the promise of arriving at what it describes as the 'final settlement' in future, which was never arrived.

An understanding of the post-Shillong Accord scenario may be instructive in this connection. The Government adopted what Bhaumik calls, 'a tribe-by-tribe approach' to what the Naga National Council construed as a pan-Naga problem (Bhaumik 2005). The whole idea was to depend on the intermediaries like the gaonburas (village elders), the dobhashis (interpreters), the leaders of the public and most importantly, the family members of the 'hostiles' and to ask them to get in touch with the underground – failing which unlimited State repression would be unleashed against them – sometimes, entire villages and family - to get them to surrender by way of accepting demands which were essentially of local nature, like construction of roads, bridges, rural unemployment etc. The whole exercise was intended to fragment and thereby decimate what was for the Naga National Council a comprehensive agenda of self-determination. The Accord turned into a non-starter and soon was interpreted as a 'surrender pact' by the National Socialist Council of Nagaland (now Nagalim). The 'people' were kept in the dark. Here is how Steyn describes it: "… the wishes of the elders and the ordinary people of the villages have been disregarded" (Steyn 2002:157).

Besides, the signature of the Accord was soon followed by some of the worst ever crackdowns on Naga civil society. Nagaland came under

emergency rule immediately after the Accord was signed. Commentators like Luithui and Haksar (1999) have shown how free circulation and exchange of opinions and views were censored and crippled in Nagaland. Even Phizo – the leader of NNC - distanced himself from the Accord. While the Accord became the source of discord amongst various Naga groups and communities, the declaration of President's Rule hardly offered any opportunity to the civil society to take it to the people.

NSCN was born in 1980 literally from out of the ruins of failed Shillong Accord. It referred to NNC in its Manifesto of 1980, as a 'spent force', which had become 'treacherous and reactionary'. It was at this point time, the intertribal rivalry again raised its hydra head. One of the 'bloodiest internal clashes in the history of Naga insurgency' took place on 30 April, 1988 when Khaplang's men (rival NSCN faction) attacked the General Headquarters of the Muivah faction and killed one hundred cadres. In a statement issued in July 1989, Isaak Chishi Swu - the NSCN Chairman - and Thuengaleng Muivah - its Secretary - accused the Vice-Chairman Khaplang of killing dozens of Christian socialist revolutionaries who were Tangkhul Nagas (a Naga group based mainly in Manipur). As the intertribal rivalry took its toll on human lives and Naga society became severely fractured, CNBC in 1990 felt the necessity of reconciliation between different Naga tribes as a necessary condition for the success of peace talks with the Government of India.

The CNBC set the background to another round of peace talks. The ceasefire and Naga peace talks with NSCN (IM) were officially announced during the United Front Government led by Prime Minister I. K. Gujral in August 1997. The period that immediately followed it witnessed a flurry of civil society initiatives and activities.

Reconciliation for Peace

The importance of unifying the diverse and often rivaling Naga groups and communities was felt more intensely as the inter-factional feud came to a head. Unlike in the Bodo case, reconciliation was seen here by the dominant Naga civil society groups as the prerequisite for sustainable peace. 'The Naga National Reconciliation Process' was initiated with the specific objective

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[3] Such ethnic prefixes as 'Naga' or 'Meitei' etc. to qualify civil society although common in the Northeast and point to its ethnically divided nature, are an anathema to any textbook definition of civil society.

of reconciliation between diverse Naga groups. Without bridging the gaps within the society and holding talks with their own communities, the next stage of peace dialogue with the Government of India, it was felt, could not progress. The Konyak Hoho representing the largest Naga tribe declared that reconciliation and unity must precede any agreement with the Indian State. As the declaration for the reconciliation made on 20 December 2001 at Kohima pointed out: "Nagas targeting the Nagas cannot solve the Naga political issue". The Concept Note prepared by the Naga Hoho Coordination Committee defines 'rebuilding of the Naga family' as the principal objective of the reconciliation process. Both processes of peace and reconciliation were considered as mutually complementary for peace without reconciliation it was argued, is not durable as much as reconciliation without peace is partial and incomplete. As the Workshop on Reconciliation and Unity held in Bangkok adopted the following declaration:

Reconciliation process should continue for the growth and well being of the Naga society. The political negotiations should be the priority concern (sic) of all Nagas while at the same time pursuing the reconciliation process with vigor ('Bangkok …' 2002).

The process received a jolt when a section of Naga rebels publicly expressed their reservations about a couple of members of the Naga Reconciliation Commission. The enthusiasm of an otherwise strong and vibrant Naga civil society comprising such organizations as Naga Mothers' Association (NMA), Naga Students' Federation (NSF) and Naga People's Movement for Human Rights (NPMHR) was considerably undermined by the impasse. The rivalry ate into the vitals of peace process. NSCN (Khaplang) is reported to have issued 'Quit Notice' to the Tangkhuls of Nagaland. Direct clashes between the supporters of IM and K factions have been reported from such places as Dimapur, Mokokchong and Zunheboto etc. of Nagaland during the last few years.

The process was revived in 2008 by Reverend Wati Aiyer who was successful in putting in place a Joint Monitoring Mechanism between the Naga factions to ensure that they do not fight and blood is not spilt. But the initiative ran out of steam as it could not withstand the rise in intertribal clashes and was subsequently abandoned.

While the scope of ceasefire with NSCN (IM) signed in 1997 was confined to the Indian state of Nagaland, it was 'extended without territorial

limits' in 2001. This opened up the Pandora's Box insofar as it was viewed by the states of Manipur, Assam and Arunachal Pradesh as the first step towards integration of Naga-inhabited areas of these states with the state of Nagaland. The Government of India as a result was forced to reissue a statement rescinding its earlier decision of ceasefire extension. The anti-Ceasefire extension agitation that rocked the whole of Imphal valley and set almost all government establishments of Manipur's capital including the Legislative Assembly ablaze in 2001 was reportedly spearheaded and organized by some of the leading Meitei militant outfits active in the area. Naga civil society did not have any enduring communication with the neighbouring Meitei society since then and vice versa. This, as Shimray (2004) tells us, left a 'bad scar' in the Naga-Meitei relations.

Civil society groups were divided along ethnic lines. As they stuck to their ground hardening the ethnic boundaries that already set them apart, any dialogue became impossible between them. After the Assam Legislative Assembly passed a unanimous resolution affirming the geographical integrity of the state, the Naga Hoho remarked: "… nobody can decide the fate of the Nagas." The NPMHR also reiterated similar concerns by commenting, "nobody can compromise the right of the (Naga) people." Muivah at that time appeared 'unbending' and 'unresponsive' on the issue of Nagalim. In an interview (held in March 2005) with Sanjoy Hazarika, he was reportedly critical of the Meiteis living in the Imphal valley and said that the Nagas would not live on the "whims" of the Meiteis (Hazarika 2005). Manipur, in his words, would have to accept 'the inevitable' in an obvious reference to its imminent breakup and integration of the Naga-inhabited areas of Manipur Hills into Nagalim.

The August Accord

The Accord signed on 3 August 2015 between the Government of India and the National Socialist Council of Nagalim (IM) is aptly described as a 'Framework Agreement' for the finer details are yet to be spelt out and are expected to take another 'four to six months' to emerge. The signature of the Accord is preceded by at least 80 rounds of discussion between the parties spread over 18 years since 1997.

It is not clear how the agreement addresses the NSCN (IM)'s apparently 'non-negotiable' demands of integration of Naga-inhabited areas in Assam,

Manipur and Arunachal Pradesh and sovereignty. But it is learnt that a credible resolution of the Naga problem is expected to provide a framework that will support stronger ties among Nagas across the region without substantially changing the jurisdictional and administrative authority of the neighbouring states. Thuengaleng Muivah of NSCN (IM) said on 14 August 2015 that it has not given up its demand for sovereignty and unification of all Naga-inhabited areas. As he puts it: "There cannot be any solution without integration (unification of Naga areas). Nor has the demand for sovereignty been given up" (quoted in Rutsa 2015:26). Muivah's speech marked the celebration of the 69th anniversary of Naga Independence Day on 14 August 2015.

While all the political parties – whether in government or in opposition – reiterated their faith in the territorial integrity of Manipur, the civil society groups continue to remain ethnically divided. E. Johnson, the president of the United Committee Manipur points out: "We welcome the accord if it is confined to Manipur." Ph. Deben - the vice-president of Imphal-based group All-Manipur United Clubs Organisation, shared similar sentiments: "We do not object any peace accord, but not at the expense of our territory. The Centre should remember 2001." As many as 18 people were killed in Manipur in 2001 when the Centre decided to extend ceasefire "beyond territorial limits" or in areas beyond Nagaland.

In his speech at Hebron, the headquarters of NSCN (I-M), Muivah who is also Ato Kilonser (the prime minister) of the organization asked the Nagas to respect the sensibilities of the neighbouring states as much as the Centre confers recognition on the 'unique history of the Nagas'. Muivah said that the world has changed and, in modern democracies sovereignty lay with the people. Recognizing this, the Government of India and the NSCN (IM) had agreed to "respect people's wishes to share sovereign power as defined in the competencies". He says that 'sovereign power will be shared with India in a spirit of coexistence'. And the demand for integration will remain on the table even if the Indian Government finds it difficult to accept it at present.

The Accord comes within four months of the reneging on the ceasefire by the Khaplang faction of the National Socialist Council of Nagalim (K) – the one opposed to the Muivah-Isaak faction. The faction led by the Burmese Naga rebel leader S. S. Khaplang, who now has a fraternal alliance with several other Northeast Indian rebel groups. Since Khaplang broke away from the ceasefire, his fighters have been joined by United National Liberation Front

of Assam (ULFA) and some Meitei groups in attacking Indian troops. Thirty soldiers have died in these attacks – 18 in one single strike in Manipur in June 2015. There is no way Government in New Delhi can deal with Khaplang, who is a Burmese national. NSCN (K) in a recent statement quoted by The Times of India vows to fight "for the reclamation of Naga sovereignty" and points out that it is under no obligation to 'either agree or disagree' with the Accord. As late as on 13 August 2015, security forces killed two members of the NSCN (K) after a brief gun battle in Nagaland's Mokokchung district and recovered a huge cache of ammunition. Besides, the three Naga rebel organizations – NSC (Khole-Kitovi), Naga National Council and Federal Government of Nagaland came together and described the August 2015 Accord as 'stage-managed' and maintained that the Naga tribes would not accept any accord signed without their consent'.

While the politics of the Naga-dominated districts is generally aligned with the greater Nagalim movement, two underground organizations claiming to represent the Zomi-Kukis - the United People's Front (UPF) and Kuki National Organization (KNO) - both of which have had a suspension of operations arrangement with the Indian Army since 2005 – have reiterated their demands for 'Autonomous Hills State' and a full-fledged Kuki state respectively and are anxiously waiting for political talks with the Government of India to begin. Their anxiety is heightened by the present Accord which is likely to contain something about the Naga areas in Manipur.

The August accord envisages that civil society discussions must be initiated in order to work out the details of the Framework. Is the civil society process a precondition or the post condition of the success of the accord? The Shillong Accord fiasco is attributed to its complete neglect of the civil society groups. In this case however, the Government is reported to have authorized 16 members of two influential Naga groups – Naga Hoho and Eastern Nagaland People's Organisation to travel to Myanmar in August 2015 to persuade S. S. Khaplang to resume ceasefire with New Delhi in a bid to bring peace to the region. It is yet unclear whether these two organizations had actually met the old and ailing leader of Myanmar; but a 4-member team of Naga Mothers' Association (NMA) under the leadership of Rosemary Dzuvichu went to the NSCN (K) headquarters in Myanmar and met a high-level team of representatives including the Kilonsers or 'Ministers' nominated by Khaplang who had expressed his inability to personally meet the team apparently owing to his own failing health. It is learnt from NMA:

Our deliberations went on for two days on August 30 and 31 with the outfit's leaders. The NSCN (K) leadership told us that it neither opposes nor supports the Naga peace accord but would wait to see what comes out of it and accordingly decide the next course of action (quoted in 'Naga Group Went to Myanmar …' 2015:15).

The signals are confusing. If the Government of India has already mandated the civil society groups to communicate and liaise with NSCN (K), then the recent newspaper report that National Investigating Agency (NIA) has declared Rs.7 lakh bounty on the head of the 75-year old leader should mark the final parting of ways with this rebel organization.

Muivah reportedly found support for a peaceful and enduring solution across Naga civil society organizations. Delegates ranging from the supreme tribal body, the Naga Hoho, the Eastern Naga People's Organization, the United Naga Council of Manipur, the Zeliangrong Baudi North Cachar Hills, Arunachal Naga Students' Association from Burma – all supported the Framework Agreement he had signed with New Delhi. NSCN (IM) maintains that about 250 persons have been consulted before the Agreement was reached.

Learning from People to Making People Learn

While the insurgent organizations take their representative character as axiomatic, such organizations as the United Liberation Front of Assam (ULFA) at least during its initial years seemed open to public criticism and was in communication with the general public. But as the noose was tightened on them and the organization was banned, its leadership went underground and connection with the people wore thin. ULFA was not in principle averse to public criticisms particularly through the late 1980s. As one of its spokesmen observed way back in 1990 a little before it was declared a banned organisation:

We have many things to learn from the foreigners' deportation movement (1979-85). ULFA is now fully aware of the problems that arose out of the inability of the inexperienced leadership (in an obvious reference to the Asom Gana Parishad leadership, the author) to realize the necessity of self-analysis and self-criticism. As the middle age saying that English (sic.) 'King can do no wrong', so also the saying that 'ULFA can do no wrong' will be equally wrong. While moving forward along the path of revolution, one

can make one or two mistakes. Sometimes our dispassionate self-criticism will be able to detect them, sometimes other peoples' criticisms will point to them. We welcome all sorts of criticism that are helpful in making us move towards our fundamental objective.

It must be noted in this context that ULFA welcomes not all criticisms – but only those criticisms that help it in realizing its "objective". That it represents the people is taken by it to be too self-evident to be subjected to any further scrutiny. ULFA stretched the point a step further to argue that those who raise questions about its representative character must be treated as 'outsiders' and therefore have no place in Assam. This is also the reason why ULFA came down strongly on the outside NGOs and some of the killings of the NGO leaders are attributed to it. The members of the community they claim to represent acquiesce to ULFA's claim not because they consider it as 'true'; they consider the claim to be 'true' because they acquiesce to it.[4]

Even as early as in 1990, a weekly newspaper well known for its sympathy for the Front remarks:

Earlier, ULFA used to explain all its activities and express them in public. But now ULFA has become so convinced of its authority and acceptance (by the people, the author) that it does not feel the necessity of providing explanations even when asked by the people.

The turnaround in ULFA's position on public criticism should not escape our notice. The gag on free exchange of public opinion seemed obvious. A weekly journal used to publish a regular column viz. Janmat or 'public opinion' in which ULFA's Publicity Secretary would directly respond to reader's queries. In one such column published on 13 June 1990, he makes a fervent 'appeal' to the people to 'keep this process active'. He explains why the earlier practice of responding to people's queries individually has been discarded: On the one hand, the organization is flooded with so many letters that at one point it becomes impossible to respond to individual queries. On the other hand, it apprehends that many of those who are not quite friendly to the organization write letters in 'fictitious names' and cleverly extract information about it in this manner. In the process, the organization might have already supplied some very sensitive information about its activities to sources that 'evidently' had used them in ways inimical to its interests. As

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4   I made the point in Das (2009:48-69)

the organization was banned and it went underground, it lost touch with the people. As one reads Rajib Bhattacharyya's recent account (2014) of his encounter with the ULFA leadership in an undisclosed location in Myanmar, one cannot but develop the feeling that being in underground for all these years, many of them are out of sync with the contemporary reality.

Whither People

It will be wrong to think that the State and non-State actors can always take the people they claim to represent for a ride. Although difficult under conditions when the people are squeezed between the State and non-State actors, popular resentment – often overt resistance - seems to have witnessed a newfound confidence particularly in recent years. Random though they may appear at first sight, the following examples give us some clue to understand how they are articulated and with what consequences.

Thousands of Ao Nagas of Dimapur in September 2004 dressed in their traditional attire staged a protest march demanding the arrest of the assailants of Dr. Maong Wati, a prominent Ao Naga professional and philanthropist within 15 days. Such open criticism of the militants appears to be a new trend in the politics of the Northeast and even Naga Students' Federation (NSF) has openly attacked both NSCN (IM) and NSCN (K) for the alleged torture and killing of three youths in separate incidents over the months of August and September 2004.

Such protests are by no means confined to Nagaland. Manipur, where many a public protest is believed to have been organized at the instance of the insurgents, is simmering with growing discontent with the atrocities committed by the armed groups. Many civil society groups in the Northeast have been protesting against abuse and violation of civil and political rights by the armed opposition groups. On 8 July 2004 women activists organized a demonstration at the Zeliangrong locality in Kakhulong, Imphal demanding the safe release of the deputy director of Manipur's Commerce and Industry Department, Kaphunchung L Kamei, who was abducted by an armed outfit called Human Rights and Protection Guild on 1 July 2004. Various social organizations including Manipur Students' Federation condemned the killing of Shyamsunder in March 2004 by People's Revolutionary Party of Kangleipak (PREPAK). Over 2000 angry villagers reportedly took out a rally from Karang to Moirang with the body of a 4-year old girl named

Salam Thoibi, who was killed in an indiscriminate firing by United National Liberation Front (UNLF) cadres in Karang village in Bishnupur district of Manipur on 22 February 2004. The Committee on Human Rights, Manipur in a statement on 16 August 2003 termed the killing of 6 persons and injuring 15 others in a bomb explosion detonated by the PLA on a bus crossing the Lilong Bridge in Imphal West district on 14 August 2003 as an act of terrorism.

Such loosely organized popular initiatives are increasingly gathering momentum in the region. A reference may be made to the popular demonstrations held against the United Liberation Front of Assam (ULFA) in the wake of the abduction and killing of Sanjay Ghose in Majuli back in 1997. The 'abduction' and 'killing' of Sanjay Ghose – the head of Association for Voluntary Action and Rural Development-North East (AVARD-NE) – a leading voluntary organization involved in a low-cost experiment in erosion control by way of planting trees along the coastline of the Brahmaputra - had remarkably cut into ULFA's legendary popularity. "It seemed that the tide was turning definitely against ULFA" ("Ghose killing…" 1997) with the effect that hundreds of intellectuals took out a procession 'defying a Janata (public) Curfew' clamped by ULFA on the Independence Day celebrations in 1997. When two of Ghose's alleged 'abductors' were shot dead in Majuli, local residents of Kamalabari reportedly shouted slogans in support of the police action ('Ghose killing …' 1997). That probably marked the beginning of what turned out to be rapid erosion of popular support for ULFA.

The incidents of people raising their voice against the 'atrocities' committed by the rebels seem to be on the rise. The public outrage against bomb blasts reportedly carried out by ULFA on 15 August 2004 at Dhemaji, Upper Assam, killing 13 persons mostly women and schoolchildren who had turned out to take part in the Independence Day celebrations in their school is a case in point. As The Assam Tribune – Assam's largest circulating English daily observed in an editorial: "All sections of the people of the state condemn the senseless killing of the innocents so that those involved in such acts do not dare to commit such acts in future". ULFA suffered a huge dip in its popularity from which it could never recover.

If Ghose killing marks beginning of the erosion, the killing of an alleged ULFA cadre in Kakopathar in early 2006 shows another face of the critical public that does not any longer take 'encounter deaths' by the paramilitary

forces for granted. The incident of army jawans (soldiers) opening fire on a mob protesting against the death of a suspected ULFA activist and killing in the process as many as five persons in Kakopathar village in the district of Tinsukia, Upper Assam is a case in point. One of the jawans was allegedly 'stoned to death' by the villagers and the army firing is believed to be a 'retaliation' against the ghastly killing of one of their men and was intended to clear the national highway dug and blocked for hours by the irate villagers.

Notwithstanding such sporadic and loosely organized protests, it is important to note that none of them could turn into a potent symbol of resistance as they could have been and prove to be sustainable. Take the last incident as an example. A recent study, for instance, holds that the fear of reprisal from State and non-State forces more often than not acts as a deterrent. Besides, the lure of hefty compensation both from the Government and the Army also prevents the victims' families from pursuing the case and seeking legal action. As Barbora observes:

To be sure, none of the survivors (of the Kakopathar mobilization that led to the massacre) would ever argue that there was a just resolution to the events that saw the death of many. Yet in their interviews with the … team, all the respondents were aware of the outcome of the pecuniary largesse and the threat of more violence by the state) was reason enough for them to want to slip under the radar of surveillance and policing (Barbora 2014:122).

The people are thus numbed into submission by inflicting fear and through cooption – both at the same time. Peace that accompanies the silence of the people does not by any means imply 'just' solution to the problem.

Concluding Observations

The series of case studies cited above leads us to conclude, first of all, that it is not only difficult but also impossible to hold an ethnically divided people together merely by signing an accord and by making provisions for the representation of minorities in it. People cannot be unified through institutional interventions, as the experience of two Bodo Accords point out. The Accord of 2003 could hardly help in arresting continuing genocide in the area. Secondly, by all indications the August Accord of 2015 is framed in the script of Shillong Accord (1975) with the difference that in the former the civil society is viewed as a powerful vehicle of taking the Accord to the people while the latter was followed by systematic attempts of crackdown

on the Naga civil society. In the case of Shillong Accord there was hardly any attempt at reaching out to the people; in the latter two almost successive attempts at reconciliation eventually ran out of steam. But the underlying assumption that peace is too serious a business to be left to the variety and contingency of people's wishes runs through both of them. It is to be seen whether the latest Accord also retraces the same footprints of the Shillong Accord and ends up in a fiasco. Thirdly, although ULFA kept itself open to public debates and criticisms particularly during the first decade of its existence albeit in a limited sense, it eventually closed in on itself as it was declared unlawful and was forced to go underground. By all accounts, ULFA's popularity was at its peak during the late-1980s. But, its transformation into a closed, hermetically sealed, militaristic organization wiped out the last traces of inner-party democracy within it. Finally, people situated between the mighty State machine on one hand and the heavily armed non-State actors on the other are vulnerable to pressures from both these parties. The prospects of the emergence of a critical public are always stonewalled by the twin strategies of coercion and cooption adopted by them. It seems that 'peace' and 'people' tragically take on two parallel trajectories in which people are merely the clients and the signatories its dispensers.

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VI – Development and Human Rights

Development, Environment and Ecological Rights

*S. Parasuraman**

Abstract

The ongoing profit seeking development activities on a relentless basis, since colonial times., have also been leading to destruction of natural resources based livelihoods and alienation of people from their habitat. The human rights discourse has led to resistance against exploitation, violence and abuse of power. The right to development has been accepted as an integral part of fundamental human rights in Vienna during 1993 to impose obligations on individual States as well as on the international community to promote fair development policies which are sustainable in nature through effective international cooperation. This paper discusses these issues in detail along with the interventions made by the National Green Tribunal and their implications.

The neo-liberal economic project has fundamentally altered living condition of millions of people in the country. The relentless profit seeking progress meant destruction of commons and natural resource based livelihoods, alienation of people from their habitat, and stripping people of dignity. There is a crying need to reflect on the purpose of people's institutions and the direction of change processes, and intervene to nurture individual self-actualisation and collective human well-being. These people's institutions must not only act proactively to further their individual and collective progress and well-being, but also act as critical determinants of public policy. The State and the market along with family and community must transform and become responsible for securing and honouring livelihoods and dignity.

Since colonial times, a massive number of people – perhaps a hundred million – have been the victims of the processes of dispossession, expropriation, and displacement - tearing up by the roots. The means

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whereby they lived have been taken from them in the name of development and modernisation – that which brings the highest rate of return on capital.

The land and sea have always been contested terrains historically as political conquests of nations. However, the nature of this contest has changed from the very inception of Indian nationhood, because of its unswerving faith in modern development models, and its political priorities. In addition to overt conquests of territoriality, and appropriation and control of power by traditional elitists, the element of covert conquest of the resources of the poor by the rich, while apparently acting in their interest, has become central to contemporary development discourses across the world.

1. A Cost Benefit Analysis of Development: Two Cases

Is this sacrifice by millions of people worth it? There is growing evidence that contemporary development may have created greater loss than gain even by standards of effectiveness and efficiency of modern management. A cost benefit analysis of the Sardar Sarovar Project (SSP) dam based on official information of various government agencies and public media; in the period between 1985 when the project began, till 2007; revealed the following details. The planned command area of irrigation was 3.43 million ha in Gujarat of which the actual area irrigated stagnated at at 1.53 lakh ha; while in Rajasthan the planned irrigation area was 0.135 million ha; which has not been realised at all. As on December 31, 2007 only about 19% of the canal network was completed in Gujarat. In Gujarat only 29%–33% of the actual planned drinking water had been realised; partially because of diversion to power plants and industrial use, that had five times more water allocated in 2007. Power estimates attributed to dam height were far higher than real estimates, were not fully realised, and were expected to drop significantly once full irrigation measure began in the long-term.

The total cost of the SSP already touched Rs 45,673.86 crores in 2007, and was expected to go up to Rs 70,000 crores by 2012, as against the estimated Rs 6,406.04 crores at 1986-1987 price levels. Because of indiscriminate market borrowing in the period 2001–06, 53% of total expenditure was related to debt repayment by project authorities. The dam is estimated to submerge 37,000 ha land in 245 villages in Gujarat, Maharashtra and Madhya Pradesh (MP), with 193 villages in MP alone. SSP's canal network is supposed to be the largest in the world (estimated to be 90,389 km), located in the State of Gujarat [GoG]; itself requiring 80,000 ha to 1,80,000 ha of land. In the Indian

context, as is widely known, cultivable and arable land is just not available; and new land often involves deforestation and might still be inappropriate.

Of the 42,064 acres of land used for compensatory afforestation in Gujarat, MP and Maharashtra; field assessments indicated that 86% of the afforested areas are found to be highly degraded with little or no tree cover. The number of trees clear felled in just 9 out of 33 submergence villages in Maharashtra was 5,72,000. The total catchment area of 2,442,440 ha was not treated before submergence to prevent siltation and erosion; and about 52% of the command area faced high to very high probability of water logging and salinisation resulting in crop loss.

More than 40,000 families have to be rehabilitated. This does not count the people displaced by partial submersion and land for CAD development; who are not even enumerated in the project. Those that have been rehabilitated have not received land for land and alternate settlements with services.

Even a cursory analysis of the costs and benefits of the dam indicate that it is not an efficient and effective project even by market standards, let alone account for human and environmental costs. This was evident in 1991. However, it became equally evident that concerned authorities had no intent to comply with mandated environmental measures and relief and rehabilitation. Construction of the dam wall was stopped in 1995 by the Supreme Court; and in 1993, the World Bank withdrew its funding support. The project had violated several legal and policy mandates besides the NWDTA including financial clearance from the Planning Commission, the Environment Clearances of the Ministry of Environment and Forests, and CAG instructions. Construction on the dam wall was resumed in 2000, again on the orders of the Supreme Court; in spite continuing evidence that there were no efforts to either generate the infrastructure needed to harvest the benefits of the dam even at its current heights, or comply with various legal and policy mandates to mitigate costs.

The narrative of the SSP is not unusual in India's experience. A review of past irrigation and power projects shows that average cost overrun is about 235% more than projected cost; time overrun averages 10 years; and the irrigation, power and drinking water performance finally realised averages at around 60% of the potential created. Nor are irrigation projects the only instance of such irrational development; that can be found in all the sectors.

Looking at another key national development project, in early 2000, a new regulatory framework was announced as a part of the export import (EXIM) policy, which eventually led to the enactment of the Special Economic Zones (SEZ) Act 2005 in India to promote exports, attract investment, create employment opportunities, and give momentum to the manufacturing sector and growth in the economy. The Act has provisions in the form of income tax holidays, indirect tax exemptions and other benefits to incentivise economic activities in the SEZs. Was the SEZA effective of the SEZ Act in achieving its defined objectives, particularly in the context of the Comptroller and Auditor General (CAG) report released in November 2014 on the performance of the SEZs and tabled in Parliament .[1]

The Comptroller and Auditor General of India (CAG, 2014) report sampled 152 SEZs, and found that their non-performance targets were very low compared to their projected estimates: in employment (ranging from 65% to 96%, investment (ranging from 24% to 75%), and exports (ranging from 46% to 93%). In case of employment, the CAG reports that in 117 developers/units in 12 states (Table 1), the actual employment (2,84,785) vis-à-vis the projections (39,17,677) made by the developers/ units had fallen short by nearly 93% (36,32,892). The modest achievements of the SEZs in the country are a contribution from a few SEZs operating in a few developed states. Many of them were established in the EPZ (export processing zone) regime between 1965 and 2005. At the fundamental policy levels, there are cases of breach of conditions relating to the memorandum of understanding (MOU) reached between developers and the government on employment.

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[1] The Government of Maharashtra announced on 20th November 2015 that the cancelled Special Economic Zones (SEZs) in Maharashtra will have to return the Revenue department land they have acquired, but they can keep the land bought from farmers. According to an official from Industries Department, more than 24,000 hectares were acquired for SEZs by industrial houses in the state. The previous Manmohan Singh government had approved 139 SEZs in Maharashtra during its 10-year rule at the Centre, he said. Land measuring 24,784 hectares, both public and private, was bought for the SEZs by various industrial houses in the state. These lands are still in their custody, though the licenses of 70 SEZs were either cancelled or their promoters quit the scheme, after a change in policy by the central government, he said. In the remaining 69 SEZs, the businesses have not yet been set up on the land acquired, the official said. Apurva Chandra, Principal Secretary (Industries), said, "If the land has been acquired from farmers, it will remain with the entrepreneur for whom the SEZ was approved. If the land is acquired from the Revenue department, the state will take it back in case the SEZ is cancelled." Revenue Minister Eknath Khadse admitted that most of the industrial houses have not returned huge tracts of land to the original owners or the government.:

http://economictimes.indiatimes.com/articleshow/49883480.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

In contrast to the low income and basic development benefits, the costs just in terms of tax concessions/exemptions of central and state taxes availed by SEZs have been enormous. The annual statement of revenue foregone under the Central tax system on account of direct taxes and customs as per CAG reports estimates the amount availed as Rs 83,104 crore (Rs 55,158 crore of income tax, and Rs 27,946 crore of indirect taxes) between 2006–07 and 2012–13.

Further, exemptions/deductions worth Rs 1,150 crore (Rs 4.39 crore of income tax, and Rs 1,145 crore of indirect taxes) were granted to ineligible companies; and systemic weaknesses to the tune of Rs 27,130 crore in the systems of the direct and indirect tax administration. Even though the income tax department accepted that the minimum alternate tax (MAT) affected the cash flow of SEZ units/ developers; it did not show any signs of proactive tax planning to encourage productivity and innovation that would enhance cash flows. This loss to the exchequer in terms of "tax forgone" without commensurate outcomes was not often seen as "sum lost". Further, the Ministry of Finance, in a study, pegged the loss at Rs 1,75,487 crore from tax holidays granted to SEZs between 2004 and 2010.

This accounting on revenue loss because of various tax sops to SEZs presented along with the revenue budget every year is not complete. It does not consider concessions given on account of the central excise and service taxes (ST). The Income Tax Act, 1961 does not have a clear provision for timely remittance of foreign currency, and there is no mechanism for capturing, accounting and monitoring of ST forgone, either by the development commissioners or the jurisdictional ST commissionerates. There is no provision to recover duty forgone on inputs utilised for manufacture of finished products on clearances of such exempted goods in the Department of Treasuries & Accounts (DTA) as it is done in the Export Oriented Units (EOUs) Scheme. The tax administration's (direct taxes and indirect taxes) continuing failure to process many cases of undue tax claims amounting to Rs 1,654 crore questions the robustness of the tax scrutiny process in the SEZs. Further, concessions under the state statutes, viz, stamp duty, value added tax (VAT), central sales tax (CST), etc, were not be captured at one place and quantified in the absence of any monitoring mechanism. Overall, reports indicate that there are anomalies in the existing policy of these duty-free zones.

The social impact of specific SEZs in their immediate physical surroundings has also not been captured or reported fully except for some studies on SEZs in Gujarat by government authorities. However, there has been much evidence presented by the social impact of the land acquisition for SEZ - mostly from farmers. Studies from the field include those zones where agitations have taken place/are going on, as well as those so-called "model SEZ policy" in terms of amicable transfer of land. Setting up of SEZs has often been opposed by the farmers whose land is being acquired, and also by the local people; who claimed that they were neither adequately compensated nor properly rehabilitated. It was argued that the nature of the SEZ model of industrialisation destroys more jobs than it creates. However, like similar past development projects that have been sagas of unfulfilled promises of compensation, rehabilitation and jobs; SEZs too displace a number of people who have been reduced to street begging in cities, and at best, only a few have got low skill, low grade jobs, such as that of a chowkidar. (Sahoo 2015).

These two development policies are not exceptions, but rather the norm of contemporary mainstream development practice. There is no clear data on the total number of people displaced by development projects in the country. Walter Fernandes arrived at an estimate of 185 lakh Displaced and Project Affected Peoples (DPs and PAPs) 1951-1985. He later placed the estimate of displaced people at 213 lakhs till 1990, fewer than a third of them resettled [Fernandes 1998: 231]. Studies on displacement 1951-1995 completed in six states and other research indicate that these estimates are still far less than the real number of people who were displaced between 1947-2000; who may number close to 50 million. Orissa, West Bengal, Jharkhand and AP have together caused more than 100 lakh DPs, or 50 per cent of 213 lakh, over half of them by dams; and do not include high displacement states like Chhattisgarh. Around 20 million ha of land have been acquired by all the development projects between 1951-1995 all over India, including 7 million ha of forests and six million ha of other CPRs. Two thirds of the massive land area that dams use is CPRs, against 40 per cent by other projects. This is why for every ten Displaced People, six are Project Affected. Based on these studies, the water resource estimate of affected DPs/PAPs increased from 164 lakh 1951-1995 to 40 million 1947-2000, 25 million of them DPs and 15 million PAPs; the increase accounted by the inclusion of CPR dependants from the list of DPs (Fernandes 2004). These studies show that these human costs are unacceptable.

The key note in contemporary development is that peoples (tribals, coastal communities, and other local communities) embedded in their environments must be willing to sacrifice their way of life for national interest. Has there been any difference in integrity and accountability in the political priorities of the Indian governance in its use of the environment since Independence? None of the successive governments while outlining their development priorities have been transparent about why more land is necessary for its development objectives, nor has it told us the status of the land already acquired and lying unused in several states. In areas where lands were acquired long ago, affected people continue to wait for courts to hear their cases.

2. Transforming Paradigms

Even a simplistic evaluation of contemporary development projects using the narrow lens of economic profitability show that they do not work for the vast majority of people. It is the elephant in the room of the development discourse; denied, distorted and covered in falsehoods. The universality of their persistence, in spite of their irrationality by their own standards, and their fragmented nature that allows them to act against their own counsel, indicates that these are symptoms of deeper systemic and ethical crisis.

What is the worldview and mindset that has given rise to contemporary development practice? Currently, forces of modernisation, industrialisation, and economic globalisation informed by the paradigm of neo-classical economics have reinterpreted human development as reducible to economic growth. Commenting on the mindset driving the modern State, Scott says "[High Modernist ideology] is best conceived as a strong, one might even say muscle-bound, version of the self-confidence about scientific and technical progress, the expansion of production, the growing satisfaction of human needs, the mastery of nature (including human nature), and, above all, the rational design of social order commensurate with the scientific understanding of natural laws" (Scott 1998:4).

When societies became legible, which is the primary concern of the modern state and market, it is possible to undertake large scale social engineering that high modernist ideology seeks. This ideology is both a matter of 'interests' as well as faith. It represents a combination of capitalist entrepreneurs who with the support the state promote technical and social models that fit into the high modern worldview using superior reason as a

canon: centralised systems, grid planing, large scale, standardised projects; as well as promote their political and economic self interests. It is spread across the entire political spectrum - from Left to the Right; with the legitimacy to bring about large scale changes in people's culture, society; their values, norms and world views. When combined with the third element of an authoritarian state, that is able to enforce high modernist designs; the context becomes dangerous. The last element is related to the third is a civil society without the capacity to resist these high modern plans. (Scott 1998). It is precisely this ideology that have driven public policies that create structural upheavals, distributional concerns, poverty, conflict, and inequality in nations and societies; as well as large scale to environmental degradation, deforestation, toxic contamination of ecologies.

Donella Meadows while discussing leverage points in complex systems lists them in the following order of importance: the ability to transcend worldviews, followed by mindset from which the system arises, and then followed by the goals of the system (Meadows 2006). According to her, the new emerging paradigm is one that emphasises just and sustainable development, by restoring the importance of individual inner values and mind-sets, the goals of the human systems, the way that power is used, and the technology that embodies these principles. Thus, the 'economic growth' paradigm would be replaced by 'economic degrowth' paradigm ushering in a new step in human and world progress.

Growing evidence has pointed to the possibilities of new, emerging paradigms; that are more holistic and wide, embracing the rapid expansion of global relatedness. These changing development paradigms from partial to more integral responses is the proper subject of this paper. In spite of evidence of repeated development failures that not only do not deliver promised benefits but also do considerable damage to human life and the environment, why does the neoliberal economist world view persist? What are some of the challenges that the emergent paradigm that centres life rather than wealth pose to the current order?

To answer these questions, the paper looks at the nature of Rights, Development, and the Environment in India particularly in the last decade; from different points of view, to arrive upon an holistic understanding. The first section examines the anthropocentric worldview of the Human Rights Discourse and Developmentality: who is included as worthy of ethical

consideration and who is excluded; and its implications for animals and nature, as well as human beings who occupy marginal / oppressed positions. The second paper draws out the commonalities between development (means of progress) and human rights (voices for progress), particularly focussing on the Right to Development; which expands the human rights discourse towards positive and proactive directions to include the holistic relations, that people have with their environment for life and livelihood. From this lens of sustainable development, this paper also also looks at the role of recent laws and policies in realising these rights, the challenges they face, and the ongoing contestation. The last section focussed on the NGT's approach that has played a significant role in enabling environmental justice since its establishment five years ago; given the significant voice it has issues of justice related to the environment and people affected by contemporary development.

3.   An Integral View of Human Rights

The evolution of the human rights discourse over history is one of resistance to exploitation, violence and the abuse of power. Expanding beyond the initial resistance to domination of the monarchy and religion, it now includes resistance to various hierarchical and oppressive structures such caste, gender, class and race. It has also expanded beyond individual "morality" to how societies are structured; moving beyond individual entitlements to mutual obligations. In this sense, Rights is the means to justice by arrangement of society to prevent exploitation. Significant as these movements for justice in the Human Rights discourse has been, they are still a product of particular socio-political circumstances; and use the human-centred optic at the very heart of their ethical and political concerns. This anthropomorphic centred worldview fundamentally weakens the integrity to protect and ensure rights for all.

According to this worldview, human beings are essentially different (zoo-political duality) and superior to animals (human exceptionalism). This superiority is established by the virtue of possessing a set of essential essential capacities that animals do not have; such as consciousness, language, reason and rationality, autonomy; and therefore worthy of privileged ethical and political statuses.

Human/animal dualism denies the continuum of human and animal

sentience relevant to the evolution of an holistic ethic. It has been proved that animals have the capacity to experience pain and fear, violent and premature death. Further, all human experience does not always satisfy the grounds for human exceptionalism as criteria for ethical inclusion/exclusion: infants, those in coma, and those with cognitive difficulties. Human exceptionalism is not merely a biological category but also an anthropological one that does not have a stable or constant line across societies; depending on how various cultural practices classify and distinguish human and animals, through a process of inclusion and exclusion.

The human / animal duality is also a political tool that distinguishes between those who are the proper subjects of justice and those who are not. It uses convenient criteria of what is lacking for ethical inclusion/exclusion - in defining the "Other". Not only do these criteria have shifting definitions, but also have no demonstrable superiority over others. Underpinning human exceptionalism is a mindset that classifies life into unequal hierarchies, including and privileging some, while excluding others making them undeserving of dignity . The fundamental 'Other' of the animal is extended to dehumanise, control and human 'Others': lower classes, non-white races, women; essentially inferior because they lack some specific capacity.

The pursuit of 'development' as a global project and its conflation with surplus accumulation, high consumption and economic growth - developmentality - has had varied and extensive adverse social and ecological impacts across the planet. Developmentality exceeds the human rights discourse in its quest for the exceptional human life; that can completely manipulate nature, through use of reason and intentionality; to maximise production, accumulate wealth, and increase consumption. All other human experience is the 'Other': inferior and animalised, that has to be 'uplifted', 'coercively improved', or 'displaced' in service of superior humanity. The costs of development is borne heavily by these 'Others': the financially poor and otherwise subaltern groups (often tribal or indigenous groups); as well as by nature. However unlike earlier forms of exploitation, where there is a clear demarcation between the exploited and exploiter, developmentality is carried out in the very name of the 'growth' of people it harms.

Human exceptionalism, the easy co-option of human rights language, the animalisation of the 'other'; and developmentality all represent a constellation of thinking that arises from the same world view; and challenging

this world view is not just an individual concern but also a systemic one that is deeply concerned about the organisation of collective living. Injustices are systemically and ideologically linked; and use similar processes of exclusion, silencing, paternalism, and coercion. To address these issues, an intersectional, non-anthropocentric worldview is needed that question persistent hierarchies that anthropocentrism creates. Given that both human rights discourse and developmentality arise from the same anthropocentric worldview, human rights has to revisit its fundamental purpose: to protect forms of life that were "previously invisible to the powerful"; to include not just the same and familiar, but the different, vulnerable and silent.

4.   Right to Development

In development thinking, shifting from mindset that values human beings and life rather than economic growth, is a paradigm shift. It is here that the human rights discourse, particularly the Economic, Social and Cultural Rights ('positive' rights associated with initiating certain beneficial acts, rather than the 'negative' Civil and Political Rights that prohibits certain acts), play a critical role. While development aims to provide the means for progress, human rights gives voice to speak up and out to ensure that these means are available universally and in an accountable manner. For development to become truly effective to ensure well-being, a robust human rights discourse must accompany it.

The Right to Development recognised as an integral part of fundamental human rights in Vienna in 1993 resists the conflation of national development to economic growth criteria alone; and reinterprets public purpose to mean normative ideas that expand individual freedom and capacities through democratic processes. It included sovereignty over natural resources, self-determination, popular participation in development, and equality of opportunity; and could be invoked by individuals and by peoples. It imposes obligations on individual States to ensure equal and adequate access to essential resources, and on the international community to promote fair development policies and effective international cooperation.

It is increasingly evident that non-compliance with human rights standards results in uneven or inappropriate development outcomes. For instance, tribal people number 104 million people and constitute 8 percent of India's population; and 93 million scheduled tribal people lived in rural areas. These tribal peoples live mostly in rural areas, have benefitted the least from

post independent India's development policies is well established today; with high levels of poverty and poorer performance in development indicators. An estimated 30 million tribal people were forcibly displaced from land and forests in post independence India; with their commonly held natural resources appropriated by various development, industrial and conservation projects. Major projects planned for the next 15 years require over 11 million hectares of land. Modern administrative mechanisms (such as enumeration and surveys) dismiss customary and collective commons and erode the customary and largely sustainable rights of local communities over land, forests, wastelands, seashores and pastures. Clearly, adverse consequences of development have often been borne by those who have benefited the least from these processes.

With increasing democratisation and penetration of global norms, human rights values have been adopted everywhere by domestic groups shaping local social action; providing along with a set of values, norms for good governance, and a system of laws. Grassroots social movements are not merely emulating existing mechanisms but by generating responses to new realities.

The Supreme Court has played a critical role in interpreting the constitution and making new social legislations based on public interest litigation to realise the Right to Development; resulting in the expansion of the meaning of right to life to enforce socio-economic rights. Some key recent laws include the recent land acquisition laws, forest rights laws and food security laws. All of these prioritise the inclusion of the most vulnerable, and stress participatory and democratic processes of decision-making; and include include mechanisms such as prior consent, improved compensation, recognition of diverse range of right-holders, decentralised grievance redressal and most importantly mandatory social impact assessment.

While land rights protect peoples from being displaced, forests rights legislation seeks to remedy the historical injustice inflicted on tribal and forest dwelling peoples by acknowledging the sustainable relations that diverse peoples with their environment, their rights of commons, and their right to access and use natural habitats. It confers negative rights of protection from forced displacement and its concurrent adverse impacts; and positive rights of legalisation of commons and people's institutions that secure individual and collective livelihoods through access and use of environmental resources.

While the new legislation are an improvement on the existing provisions, their contribution to realisation to the right for development remains plagued by contestations and concerns related to monitoring of genuine democratic decision making, emphasis on individual rather than collective rights, erosion of claims, complex procedures and poor implementation. Debates on the recent legislation on land indicates that thinking is dominated by economic growth rather than human development. Increasingly, discourses on poverty and other forms of deprivation are being viewed through the more modest Social Protection approach with a welfare orientation, and even narrower Social Risk approach originating in World Bank, that focusses on targeted programmes such as cash transfers to vulnerable groups to buffer fluctuating incomes and consumption, rather than addressing underlying systemic issues of fair distribution or fostering individual and collective progress.

5. Impacting Environmental Governance

Since the enactment of the NGT Act in October 2010 till 31st January 2015, the NGT has cleared 5167 of the 7768 cases pending before it; speedily with almost 67% cases being disposed off within nine months. It has wide ranging powers to adjudicate on disputes involving substantial questions related to legal rights to the environment. These powers coupled with technical expertise has resulted in its capacity to exponentially deal with a number of complex environmental problems in a just and sustainable manner. What are the nature and broader patterns of the green tribunal orders, and their impact on environmental governance in India?

The establishment of the NGT is amongst a increasing flurry of specialised authorities, courts and tribunals to deal with environmental issues across the world in response to an ever growing evidence about the adverse impacts of development on environment. Two key reasons include the need for speeding the process of adjucation, and the necessity of a multi-dimension approach to environmental problems. While the Courts in India have had a significant role in addressing environmental concerns, they have expressed their inability to deal with complex environmental issues involving scientific and technical details; including correctness of the technological and scientific opinions, efficacy of the technology, and alternative technology or modifications as suggested by the Pollution Control Board or other bodies. Expert witnesses are often mercenaries with biased testimonies.

While no substantial progress was made based on the supreme court

ruling in 1996 on establishing separate environmental courts; surprisingly, following the 186th Law Commission Report that recommended the constitution of a separate environmental court, the Government of India enacted the National Green Tribunal Act in April 2010, notified on 18th October 2010. The Principal Bench of NGT is in Delhi and its four zonal benches are in Chennai, Kolkatta, Pune and Bhopal. It comprises of judicial and non-judicial members (currently eight judicial members and eight expert members in all the benches as of 10th October 2015.

The role of the NGT assumes great significance in the current context, given the existence of powerful competing claims over natural resources. Not only does this resource use, particularly by the state and market-initiated development programmes, affect the environment but also has severe impacts on different strata of society resulting in conflicts. Resolution of these challenges require many mechanisms including the recognition of common property regimes at a wider social level; regulatory bodies like the pollution control boards and the forest department; and adjudication by the judiciary at various levels. In this scenario, the Supreme Court of India is the most important and final arbitrator.

Through its resolution of more than 5,000 cases over the last five years, the Green Tribunals have begun to transform the process of environmental governance; and is now regarded as one of the most powerful Green Tribunals in the world. It has intervened in three key areas: (1) appeals against environmental clearance granted by the Ministry of Environment and Forests and Climate Change; (2) relief, compensation and restitution of environment; and (3) appeals and writ petitions filed on substantial questions related to legal right to environment.

The NGT and its Zonal benches have come down heavily against the environmental clearance authority i.e MoEF & CC in clearing development and infrastructure projects. Unlike the defensive and hands off approach of the Indian Supreme Court against development and infrastructure projects, the NGT and its Zonal benches have employed both legal and scientific methods, and assessed critically the clearance process and the environmental impact assessment reports, before arriving at a decision. While the criticality of the role of the SC cannot be denied, it has largely taken a role of non-interference about infrastructure and huge investment projects irrespective of the costs on local communities and the environment.

The NGT has in contrast has not only ruled in favour of the environment against micro-structures; but have also challenged the big corporates, the central and state governments, for not following environmental regulations. In particular, it has dismissed environment clearances, recognising that the mandatory consent from the gram sabha of affected villages and public hearings are often mockeries of informed decision-making and consent. In doing so, it has held its nominal authority, the Ministry of Environment and Forests as well as other government agencies such as the Pollution Control Board and the Municipalities, more responsible and accountable.

Another key area of action that the NGT has engaged is to provide relief and compensation to victims of pollution and other environmental damage. It has repeatedly penalised the polluter for not following norms and regulations; where they were not only asked to pay for the damage incurred, but also restitution of the environment. Further, this penalties rather than being capped into small amounts, are to the tune of crores, in keeping with the magnitude of the enterprise, to have an deterrent effect. Penalties have been extended to polluters including industries, Municipal Corporations, Housing Co-operatives, Gram Panchayats, Businesses such as Hospitals and Hotels.

The NGT has attempted to enforce local community rights and public rights to the environment recognising that the poor and disadvantaged sections of the society pay a heavy price because of environmental degradation; and, therefore, that their rights need to be protected. As such, it integrates human rights and environmental protection; taking the approach that development activities that support citizen's demands have to be carried out without unduly straining the available natural resources. Some of the principles that it uses includes sustainable development, polluter pays principle, precautionary principle, inter-generation and intra-generation equity, right to healthy environment as part of fundamental right to life have been reinforced by the NGT in a series of orders.

The NGT has been consistent, innovative and proactive in creating an enabling environment to address environmental grievances: such as the relaxation of the locus standi principle of petitioners; in few cases, through monitoring committees to improve environmental conditions; quantum of compensation for the damage done to the environment and to the victims of environmental degradation; awarding petitioners to take initiative; applying

polluters pay principle and precautionary principle for environmental protection. It has also take suo motu interest in a few cases to prevent environmental damage.

Of particular importance is that the National Green Tribunal and its zonal benches has both judicial and non-judicial expert members from multi-disciplinary backgrounds; enhancing its capacity understand complex environment problems and taking reasoned decisions. Not only have the orders of the NGT generated optimism in civil society groups working for sustainable development and environmental protection, but has also increased the meaningfulness of other implementing agencies such Pollution Control Boards; reducing their dependence on administrative bodies.

The NGT's actions have not always been well received, particularly by the MoEF who has challenged the NGT's rulings on its various policies, as well as the increasing number of its environmental clearances questioned. NGT's demand to have suo moto power to protect the environment has already been rejected by the MoEF & Climate Change. Further, NGT orders have been challenged in High Courts (Chennai and Mumbai) rather than the SC (as mandated); with High courts holding that they are constitutional bodies while the NGT is only a statutory body. Finally, while NGT's landmark environmental judgments still leave much to be desired in terms of execution, with the Tribunal having no effective means for monitoring their implementation.

6.   Moving to the Future

The reduction of human life because of the contemporary development paradigm is written most vividly in the labouring body of poor and marginalised women, reduced to interchangeable and expendable machines, stripped of their creativity and reason, chained to a ever repeating set of productive and reproductive work, valued at minimal cost, vulnerable to undernourishment and disease (Parasuraman et al 2003). These are not the only bodies that contemporary development has inscribed, and the number and intensity of these inscriptions will be only intensified by a pursuit of greed and and arrogance.

Development in the country is at a crossroads. It has been evident for sometime now, that neoliberal economic thought that has driven the mind set of developmentality and mainstream development projects is partial and

fragmented; that its costs are far higher than its benefits. It has a deceptive, slippery nature: in that it uses the language of universal rights to cloak its self interest; and the language of reason to buffer its beliefs, even when presented with evidence to the contrary.

That the old paradigm is being challenged fundamentally is now evident. For instance, a cornerstone of current economic thought that informs contemporary development is the Rational Choice Theory that characterises human beings as rational egoists: separate individuals making reasoned decisions to constantly maximise profits for the self while reducing losses. The Hardin's tragedy of Commons arising from this theory has been widely used to support appropriation of natural resources by the State and other actors for development projects; who claim superiority about their judgments and methods about the best use of the environment. While Hardin's argument holds true for limited competitive markets, the presence of long established Common Property Regimes over large tracts of history indicate that other variables also have also a significant role to play: non-egoistic choices, internal norms, mental models, etc;. They also demonstrate progressive people's institutions that are capable of mutual trust and generating collective norms based on meta-principles such as equality; carrying out iterative planning and implementation processes that can course correct action; and a holonic, embedded perspective in complex systems (Ostrom 1990, 2005, 2007). Indeed, it is this quality of unity and inter-dependence, that has fuelled several global and local discourses on rights and social movements.

At this current juncture, the contest is enjoined between the old and new paradigms, their perspectives and mechanisms at various fronts: in the establishment of reason and critical thinking as an universal human faculty over brute and dominating force; the importance of the individual, subjective and diverse human experience for progress; the vast pressures of globalism that has challenged persistent issues of social identity such as gender, class and caste; the complex and collaborative arrangements of human institutions spanning the globe; the nature and evolution of the participatory and democratic state; and the increasing immanent urge to embody universal equality and unity. The full possibilities of this new paradigm is beyond the scope of this paper. The vast and illuminating writings of Sri Aurobindo on the role of human psychology in social development throws light on these possibilities; the requisite conditions; and its relevance for progress in individuals, societies, and civilisations (Aurobindo 1949).

Instead, this paper focusses on glimpses into the nature of the old and the new paradigms that concern sustainable and just development of the nation in this moment of time. Firstly, it is clear that these problems cannot be addressed by partial and fragmented solutions. To make this shift, it is essential that the hierarchical vision of the world that is excluding and oppressive be replaced by one of equal co-existence. The very mind set of human beings has to change to generate authentic and ethical responses. It is here that the language of universal rights is useful. By its capacity to expand to all of life and nature, it brings in an integral vision, where in different development, environment and human rights can co-exist in harmony.

Universal justice assumes key importance, represented not in the least by the role that the Supreme Court has played towards sustainable development. However, court battles are not enough to win the war. As narratives of modern development constantly describe, without empowerment and participation of the most marginalised and deprived, such development will be inimical to progress; no matter how it is represented in paper. It is towards this end that the rights discourse has constantly emphasised democratic decision-making and informed consent; and which the mindset of developmentality finds so difficult to encounter.

At the heart of promotion of equal decision-making is robust people's institutions; that are inclusive, participative, and critical. There is a greater recognition that the modern and rationalistic mind and its institutions are not the sole purveyors of progress. There is inner wisdom in all people when sourced, that can generate relevant and just people institutions and responses. What is needed is to create enabling environments where people are empowered and can assert their inner wisdom, generate local and global institutions and systems, and engage in transformative action. Without committed intent to respect people's inner power, their worldviews and their institutions; and without clear and mandated mechanisms vested with resources, that are effectively implemented, monitored and audited; the rights framework for sustainable development cannot be realised.

This paradigm war on several fronts: on the ethical front where all life is accorded dignity, on the systemic front as resistance to the reduction of life to wealth, and on the action front with various discourses and movements reclaiming their voices. There is a growing convergence in mind-sets about development, rights, environment and universal progress, while retaining the

specific and the local. This synergy has provided the plasticity needed to counter the ill-effects of the rapid effects of contemporary development. While discussing changing paradigms, Donella Meadows writes "in a nutshell, you keep pointing out at the anomalies and failures in the old paradigm, you keep speaking louder and with assurance from the new one, you insert people with the new paradigm in places of public visibility and power. You don't waste time with reactionaries; rather you work with active change agents and the vast middle ground of people who are open-minded."

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The Human Rights Imagination and Nonhuman Life in the Age of Developmentality

*Krithika Srinivasan**

Abstract

This paper examines the anthropocentrism of the human rights imagination; and explores the implications for one of the most basic end goals of the institution of human rights – contesting and preventing the abuse of power. For this, it critically investigates the human/animal distinction - the zoöpolitical rationalities - that underpin the assumption of human exceptionalism embedded in human rights discourse, raising questions about their validity and coherence. It then draws on scholarship in philosophy, political science and human geography to show how the zoöpolitical logics associated with human rights discourse have pernicious implications for not only nonhuman life, but also for subaltern human life. The paper discusses this with specific reference to 'developmentality; it argues that the ecological and social impacts of contemporary development are enabled by the co-option and reproduction of very same ideas of human exceptionalism that are entrenched in human rights discourse. In developing these analyses, the paper suggests that the anthropocentric boundaries and zoöpolitical logics of the human rights imagination undermine its integrity; and weaken the force and reach of its protective function in the contemporary world. In conclusion, the paper emphasizes the need to critically revisit the exclusionary boundaries of the human rights imagination in order to reclaim its fundamental mission of checking the excesses of power on vulnerable life.

Introduction

The paper discusses the anthropocentric boundaries of the human rights imagination, and the complex consequences of these boundaries for one of the most basic end goals of the institution of human rights – contesting and preventing the abuse of power. Specifically, it explore this issue in relation to

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the zoöpolitical distinction between human animals and nonhuman animals which forms a key foundation of the anthropocentrism of human rights. Drawing on scholarship in human rights theory, political science, human geography and philosophy, the paper suggests that zoöpolitical logics of inclusion/exclusion undermine the integrity of the human rights framework and weaken the force and reach of its protective functions in the contemporary world. This is especially so in the context of contemporary neoliberal development: the paper argues that the profoundly harmful ecological and social impacts of developmentality are made possible by the reproduction of very same ideas of human exceptionalism that are embedded in human rights discourse and anthropocentric humanism more broadly. In all, the paper puts forward instrumental (anthropocentric) and ethical arguments about the need to critically revisit the exclusionary boundaries of the human rights imagination in order to reclaim its fundamental mission of checking the excesses of power on vulnerable life.

The paper is structured as follows. It first offers an overview of the raison-d'être and fundamental purpose of the institution of human rights. For this, it examines scholarship on the evolution of the idea of human rights in order to highlight the socio-political conditions that necessitated the emergence of the concept of rights, leading to the the establishment of 'human rights' as is now understood. It then interrogates the human/animal dualism that informs the human-centred delimitation of human rights. It explores the concept of human exceptionalism by scrutinizing the zoöpolitical philosophical and scientific justifications that have been offered. This investigation of rationalities of human exceptionalism suggests that the human/animal dualism (Vaughan-Williams 2015) is not as natural or inevitable as it appears on the surface. By doing this, the paper raises questions about the seeming legitimacy of the ethico-political marginalization of the plethora of vulnerable life-forms that humans share the planet Earth with.

The paper then explores how the human/animal dualism embedded in human rights discourse enables the marginalization and exclusion of not only nonhuman Others, but also human Others, and discusses this with specific reference to 'developmentality' (Deb 2009). The paper contends that the social and ecological impacts of contemporary development can be attributed to the co-option and extension of the zoöpolitical logics associated with human rights discourse. The logics of inclusion/exclusion facilitate the displacement

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[1]   use 'human' to refer to human beings and 'animal' to refer to nonhuman animals from now on.

of 'lesser' people and nature in the name of a 'superior' vision of human wellbeing. In other words, the anthropocentric delimitation of human rights discourse has pernicious consequences for human and nonhuman life in the face of developmentality. In conclusion, the article stresses the need to revisit the anthropocentric boundaries of the human rights imagination so as to strengthen its integrity and the force of its protective role.

2.   The Raison d'être of Human Rights

In some senses, it may seem meaningless to invite reflection on the human-centred optic – the anthropocentrism – of human rights discourse. After all, the very word 'human' in 'human rights' predefines the scope of human rights as including only human life. Given this ambit, it seems appropriate that the discursive, ethical and political concerns of the institution of human rights should revolve solely around members of one animal species: Homo sapiens sapiens.

However, a closer look at the evolution of the idea of human rights as a "meme" suggests that the singular emphasis on the human is more the product of particular socio-political circumstances than an essential cornerstone of the institution of human rights.

While the idea of human rights enjoys global recognition and takes on diverse manifestations in today's world, its initial traces are found in the history of Western Europe and North America. Some of the earliest quasi-legal articulations of the idea of human rights emerged as a challenge to the supreme authority of the monarch and the violent rule this often entailed. Noted human rights theorist Conor Gearty (2009) identifies these initial articulations in documents such as the Magna Carta, the French Declaration of the Rights of Man and the Citizen, and the American Declaration of Independence. He points out that while these texts discussed the rights of 'humans', the word human was used primarily as a rhetorical device in service of the more fundamental goal of resisting the power of the monarchy. The concern was primarily with the 'rights' component of the term, and the safeguards that it bestowed in the face of the "abuse of power" (Gearty 2009:180).

The language of human rights was also deployed to thwart the exercise of abusive power in the context of colonial attitudes and practices towards indigenous people, especially in what is now the Here too, while the shared humanity of the colonialists and indigenous people was emphasized, this

was an "opportunistic" (Gearty 2007:3) argument which drew on religious and philosophical doctrines about the 'human' in order to foreground the vulnerabilities that cut across racial and ethnic divides in pursuit of the broader goal of preventing exploitation and oppression?]. To put it differently, 'human rights' is not "a description of some essential truth about a species…[but] a subset of a larger idea – resistance to abusive power" (Gearty 2009: 176).

The circumstantial valorization of 'human-ness' in early formulations of 'rights' however were consolidated and given added meaning in the Enlightenment era, especially in the work of Immanuel Kant. Kant's work was directed at challenging the authority of the Church by replacing the 'soul' with the 'mind' (encompassing reason/rationality, autonomy, consciousness etc.) as the essential attribute that bestowed intrinsic ethical value (Garner 2004; Sorabji 1993). However, as shall be discussed in the next section, these mental capacities are not universal human attributes, nor are these only human specific.

As such, the primary function of rights discourse is better understood as that of resistance to exploitation, violence and the abuse of power rather that of "a foundational commitment to a uniquely human autonomy", and the multiple elaborations of human rights – whether religious, philosophical or sociological – are first and foremost "reflections of this underlying sensitivity to the abuse of power" (Gearty 2009: 178-180). Indeed, many social activists in the 18th and 19th centuries, including anti-slavery activists such as those who were part of the Quaker movement, recognized and addressed the common ethical problems posed by the exploitation and abuse of both human and animal 'Others' (Hribal 2007). In other words, the key idea underpinning human rights discourse is that "power should not be abused and that those who are victims of abuse of this nature should have an entitlement to resist" (Gearty 2009: 180).

Another important feature of the idea of 'rights' is that it seeks to move beyond individual morality, through its concern with how societies are organized. Rights refer to entitlements which have to be respected in inter-personal relationships and society regardless of personal choices and preferences; i.e., an element of obligation is encompassed in the idea of rights (Gearty 2009). In Mendieta's words, "rights…stabilize our mutual behavioural expectations…in so far as they transfer the weight of moral oughts to the positive sanction of enforceable law" (2011: 7). Rights, thus,

can be understood as one approach to justice (Campbell 1988; Sandel 2009): as means of arranging society so that social relations are not exploitative and abusive, and as a set of discursive tools to counter and combat "the potential harm that is inherent in all social relations" (Habermas 1993, p.109 cited in Mendieta 2011: 7).

Nonetheless, the socio-political conditions in which rights discourse evolved has meant that resolutely anthropocentric conceptions of rights - and justice - have become established. It is a narrowly delimited, anthropocentric, 'human' rights that has gained traction in mainstream public, political and policy imaginaries, and that now has almost universal recognition. By contrast, the idea that the institution of rights could be relevant to nonhuman animals, or to nature, is typically scorned as preposterous and illegitimate (Frey 1980, Srinivasan 2010).

Many philosophical and scientific justifications have been offered for the prominence given to the 'human' in conceptions of rights and justice, and for the resulting marginalization of other forms of vulnerable life that are and can be subject to abusive power by human society. The next section critically examines the way this narrowing of scope of 'human rights' to anthropocentrism world views.

3.   Rationalities of Human Exceptionalism

In general, the anthropocentric delimitation of the scope of human rights (and humanistic approaches to justice) is premised on widely held knowledge-beliefs about human specialness, about a 'human exceptionalism' (Haraway 2008) which sets humans apart from all other animals, and indeed all other life; and which renders them worthy of privileged ethical and political statuses. These knowledge-beliefs (Foucault 1984) about human exceptionalism primarily revolve around zoöpolitical distinctions (Vaughan-Williams 2015) between humans and other animals, distinctions which are seen as justifying the ethical exclusion and marginalization of animal 'Others'. Justifications of human/animal dualism arguably denies the recognition that other animals share with humans many vulnerabilities that are considered central to questions of ethics and justice – such as the capacity to experience pain and fear, and to experience violent and premature death. More precisely, they have revolved around establishing the grounds for a human exceptionalism that allows for the dismissal of the many "continuities in… goods and harms" experienced by human and nonhuman animals (Kymlicka

and Donaldson 2014: 119).

Human exceptionalism has been a long-standing topic of philosophical, scientific and public reflection. For the purposes of analytical clarity, it is useful to classify arguments about human exceptionalism into two categories: a) capacity-oriented accounts; and b) social accounts.

3a. Capacity-oriented Accounts of Human Exceptionalism

Capacity-oriented accounts argue that there is "an essential divide" (Steiner 2013: 1) between humans and other animals because animals lack certain capacities which determine moral worth. Discussions about such capacities often relate to sentience (the capacity to experience physical and emotional pain or pleasure), or more typically, to cognitive faculties such as consciousness, reason/rationality, autonomy, and intelligence (Armstrong and Botzler 2008). The core argument for human exceptionalism is that nonhuman animals lack these capacities and as such are deserving of lesser ethical consideration.[3]

To the uncritical eye, these distinctions between human and animal capacities seem an obvious truth. However, a closer look reveals a more complicated picture. Fundamentally, it is now widely acknowledged that nonhuman animals are sentient beings. There is much scientific evidence that animals, including fish, feel pain and experience fear and stress (Garner 2010; Meijboom and Bovenkerk 2013; Sunstein and Nussbaum 2004). Aversive stimuli cause similar physiological reactions in humans and animals. Humans and animals share similar morphological pain structures, especially vertebrates and cephalopods. Pain in animals also has the same evolutionary function as in humans – that is to avoid harm and death (Garner 2004). Indeed, it is because the neurological and physiological systems of humans and animals are similar in many basic ways, that animals, and not plants, are used in medical experiments.

But we don't need the sciences to tell us all of this. Human beings have used pain since time immemorial to make animals do what we want them to do: it is because we know that animals feel pain that we whip horses to make

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[3] Indeed, many of these cognitive capacities are often considered to be solely human. Behaviours which would be attributed to conscious reflection and reason in humans are usually explained as hard-wired – as instinctual – in animals. For example, when a mother rat shifts her young ones to a safer location, her behaviour is considered to be hardwired. But a similar act by a human mother would be considered to be more than biological, it would be viewed as the outcome of reasoning and conscious reflection.

them go faster or use electric prods on cattle to make them move towards the milking shed. Even Descartes who famously declared that animals are automatons like machines offered a circular justification for his denial of animal sentience. To Descartes, admitting otherwise would render ethically problematic most human use of animals: the denial of animal sentience "absolves them [humans] from the suspicion of crime when they eat or kill animals" (Descartes 1991: 366).

A key reason to easily dismiss or overlook animal suffering and sentience is the communication gap between humans and animals. Communication and anthropomorphic projection (Burghardt 2007)[4] play key roles in the recognition of pain in others; as well as the capacity to identify sentience. While animal sentience is no longer really denied, definitive assessments of cognitive capacities continue to pose challenges; because people do not share an unambiguous mode of communication with other animals (Srinivasan 2010).[5]

There has been much scientific research attempts to assess and gauge cognitive capacities such as consciousness, self-awareness and rationality in animals (Armstrong and Botzler 2008; Singer and Kuhse 2002; Sorabji 1993), and there is now significant scientific consensus that many animals possess many of these capacities (Garner 2010; Gearty 2009; Kymlicka and Donaldson 2014). Nonetheless, the results of such research continue to be interminably debated because these are all capacities, that at the most basic level, can be grasped only with communication and/or anthropomorphic projection. For example, the only way one can know that 'reason' has motivated another person's decision to migrate to another country is when the other person tells him/her, or when he/she make an assumption about the same based on projecting his/her own experiences and thought processes onto the other person. However, a bird has no way of telling me that 'reason' has motivated his/her annual migration, and anthropomorphic projection in the case of animals is considered highly suspect (Burghardt 2007).

Just like humans have no determinate and definitive means of proving to other animals that they have certain cognitive capacities such as rationality, consciousness and intelligence; other animals have no definitive means of

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[4] The assumption that the 'Other' is similar/has similar responses to the Self.

[5] This is not to say that people and animals cannot communicate. However, there is a lack of consensus about what constitutes legitimate human-animal communication, which in turn allows for endless human debates about the validity of different human interpretations of animal communication.

proving the same to us. Given this,it becomes quite problematic to assume animals don't have these capacities simply because humans cannot discern these capacities.

Capacity-oriented accounts of human exceptionalism have faced two other significant challenges. One relates to marginal human cases: the simple fact that not all humans share the capacities used to justify human exceptionalism (Singer and Kuhse 2002). These include infants, those in coma, and those with cognitive difficulties. Indeed, the feminist, disability and postcolonial movements have all focused on refuting the primacy of rationality, consciousness and autonomy as criteria for ethical inclusion/exclusion. They have instead called attention to how ethical value is "inescapably linked to our ontological existence as finite and vulnerable physical beings (i.e., as human animals)" (Kymlicka and Donaldson 2014: 117).

Secondly, these are all capacities that are indicative of what Mendieta (2011: 8) refers to as "metaphysical chauvinism"; these capacities are by definition based on human standards, and in relation to what humans possess and animals are seen as lacking. Animals don't display human intelligence, they don't display consciousness or rationality the way humans have it (Wolch 1998). In other words, percieved gaps in capacities animals are deployed to justify human exceptionalism. To use a counterfactual, imagine what might happen if we used the capacity of smell or sound to make ethical and political distinctions. A dog or even a rat would fare much better. Smell or sound might seem like irrelevant and arbitrary criteria, but the same could be said for the criteria that are commonly used to rationalize human exceptionalism.

Attention to the history of social exclusion shows that the use of purported differences in capacities to establish ethical hierarchies is problematic . History is replete with examples of such difference-based hierarchies (Alessio 2008; Srinivasan 2010). For instance, both colonialism and slavery were justified on the basis of the intellectual inferiority of the non-white races; women were not considered intelligent or emotionally stable enough to be granted equal social privileges to men. Indeed, when Mary Wollstonecraft (1975) published her treatise 'A Vindication of the Rights of Woman', a highly critical commentator responded with a satirical piece titled 'A Vindication of the Rights of Brutes'; to this commentator, recognising the rights of women was almost as ludicrous as recognising the rights of animals (Anker 2004).

3b. Social Accounts of Human Exceptionalism

Purported differences in capacities have not been the only justifications developed for human exceptionalism. Another set of rationalities have revolved around the character of society and social organization.

One such rationality is that of shared identity: the idea that humans owe special ethical obligations to other human beings simply because of their shared human-ness. Shared identity as a criterion for ethical inclusion/ exclusion can be seen in intra-human domains as well. Race, gender, religion, class and nationality have all been identities that have justified exploitation and the exercise of violence throughout history. It is to surmount the pernicious consequences of identity-based exclusion that scholars such as Amartya Sen (2006) have pointed to the multiplicity of identities that make up every person. For instance, one might belong to a racial group, and to a particular linguistic region, but is also a woman, a South Asian, a human – and an animal. In other words, a broader view of shared identity, substantially changes the question of the limits of ethical obligations.

The limited view of shared identity goes along with what Kymlicka and Donaldson (2014) call the 'displacement' concern: the worry that attending to animal vulnerability will displace attention and resources that would otherwise be directed at marginalised human groups. This is seen in the common refrain that animal advocates should redirect their attention and energies to vulnerable people (Srinivasan 2010). Kymlicka and Donaldson contend that the displacement argument is an old one, one which was wielded against the civil rights and feminist movements which were accused of displacing attention from class struggles. However, as he also points out, justice is not a "zero-sum" game. Whatt's more, an intersectional approach that attends to manifestations of injustice in different domains only "helps to strengthen the salience of justice more generally in society" (Kymlicka and Donaldson 2014: 119).

A particularly strong argument against including animals in frameworks of justice and rights relates to worries that minority human groups might be maligned for their culturally-specific interactions with animals (Garner 2002). Animals and their vulnerability are often instrumentally deployed in religious, cultural and ethnic conflicts to denigrate cultural minorities. This is similar to the American right-wing rhetoric on women's equality deployed against Middle Eastern and Islamic cultures (Kymlicka and Donaldson 2014). This

is evident in the communalisation of animal foods in India (beef and eggs), Australia, the United Kingdom (kosher and halal slaughter), the United States, and the vilification of Chinese Americans and African Americans for live meat markets and dog fighting (Kim 2015; Srinivasan and Rao 2015).

A more careful analysis reveals that the instrumental deployment of animal vulnerability is flawed in mainstream approaches to animal wellbeing that relies on the idea of 'unnecessary suffering'. As Kymlicka and Donaldson (2014) point out, 'unnecessary suffering' is determined by the kinds of interactions with and uses of animals that are considered acceptable by the majority at any particular point in time; it has very little to do with actual animal wellbeing. In other words, mainstream conceptions of animal wellbeing are defined by the views and practices of the majority group in any society; more readily making the views and practices of minority groups, the topic of public controversy. In light of this, this problem can only be addressed by attending to animal vulnerability and wellbeing in and of itself (Kymlicka and Donaldson 2014). Such attention to animal wellbeing separate of what is considered 'acceptable' in society will render most majority views and practices ethically problematic (for example, large-scale animal farming and zoos); and make it impossible to single out minority groups and their interactions with animals (Kasturirangan, Srinivasan, and Rao 2014; Srinivasan 2010).

The ethical and political exclusion of animals is also justified on the grounds that how one chooses to relate to animal life is a personal matter. In other words, animal ethics is seen as a matter for morality, and not for politics or justice (Garner 2002; Srinivasan 2015). Indeed, sentimentalism is a charge that is often levelled at those who politically advocate for animals; playing out in phrases such as 'animal lover' or 'nature lover' used as a deragotary manner to refer to animal or environmental activists (Srinivasan 2010). Here too, history offers a useful perspective. Such charges have been used time and again to denigrate the views of women and marginal groups ('nigger lover' for instance). So the deragatory ease with which animal advocacy is dismissed rests on a dismissal of the hard-won victories of the civil liberties movement as well as of feminist struggles to establish that the personal is political].

That animal advocacy is personal ignores the manner in which individual interactions with animals are mediated by wider social structures in today's world. It is broader socio-political systems that allow for a dog in the laboratory

to be treated very differently from a dog that is a house pet; for a chicken to be treated very differently from a penguin. The decisions to subject animals to medical and scientific experiments, to clear forests for 'development', or to factory farm chickens are all taken at the collective, systemic level, and not the personal level (Srinivasan 2013; Srinivasan 2015; Twine 2013). Mendieta (2011) argues that animals are an integral part of human society, and are subject to vulnerabilities created by their place(s) in human society. As such, their vulnerabilities and wellbeing becomes a matter for justice and politics – which are about the organization of collective living – and not merely a matter for morality.

The above sections have examined prevailing rationalities of human exceptionalism which have buttressed the ethical and political marginalization of nonhuman animals. However, as discussed, both capacity-oriented accounts and social accounts of human exceptionalism do not withstand serious critical scrutiny. In Pluhar's (1995: 57) words, there is no capacity that "is wholly lacking in nonhumans and wholly present in humans." The weaknesses of the social accounts also become apparent when one notes the eerily similar justifications that were and are used for the marginalization of human groups. Given the gaps of the zoöpolitical distinctions and assumptions that underlie the seemingly natural and impermeable boundaries of the human rights imagination, it is necessary to revisit the easy dismissal of animal vulnerability and the exclusion and/or marginalization of nonhuman animals from frameworks of justice, including human rights discourse.

The paper has so far laid out an ethical case for the reconsideration of the anthropocentrism of the human rights imagination; from a non-anthropocentric worldview. As discussed in the following section, the questions raised by the challenges to the pillars of human exceptionalism also question a set of more instrumental arguments related to human rights discourse and developmentality; and highlights the need for an intersectional, non-anthropocentric, approach to questions of justice and rights.

4.   Dehumanisation and Animalization

The intersectional character of justice and injustice has for long been discussed widely in relation to questions of gender, race and class. Recent scholarship (Deckha 2008; Kim 2015; Matsuoka and Sorenson 2014; Pellow 2014), however, has pushed intersectional approaches in new and radical directions by teasing out the interactivity of processes of marginalisation,

oppression and exploitation in both intra-human relationships and human-animal relationships. This work has systematically demonstrated that whether in the context of race, gender, species or class differences, "injustices are typically interconnected, rooted in similar ideologies of domination, relying on similar processes of exclusion, silencing, paternalism, and coercion" (Kymlicka and Donaldson 2014: 119).

To scholars of intersectionality, a fundamental problem with anthropocentrism (and human exceptionalism) is that "it leads to a pernicious hierarchy among humans… [it] leads not only to privileging humans over animals but also to privileging men's productive labour over women's reproductive labour, to privileging the able-bodied over people with disabilities" (Kymlicka and Donaldson 2014: 116). In other words, the human/animal distinction has pernicious consequences for not only animal 'Others', but also for human 'Others'.

Of particular relevance to this paper is scholarship that examines the role of the human/animal distinction in enabling and supporting the marginalisation, exploitation and even violent control of human 'Others' through dehumanisation and the use of animal metaphors. History is full of such examples, right from the dehumanisation of Jewish people and gypsies in Nazi Germany (Sax 2000), the animalization of indigenous groups in imperial colonies, and that of 'irregular' migrants in contemporary Europe (Vaughan-Williams 2015).

The core insight in these analyses is these animalization strategies and concomitant ethico-political marginalization of human 'Others' is dependent on preceding ethico-political boundaries that exclude the animal 'Other'. To put it differently, the human/animal distinction is what that makes it possible to draw "further distinctions within the category of the human" (Vaughan-Williams 2015, 6), and thereby displace certain human 'Others' from the purview of ethics and justice. Thus, the human/animal distinction is not merely an ontological or descriptive tool, but a political one that serves to distinguish between those who are the proper subjects of justice and those who are not.

Giorgio Agamben (1998; 2004) and Jacques Derrida (2008: 2009) offer the most comprehensive analyses in this regard. Agamben and Derrida separately argue the human/animal distinction has played a central role in conceptions of the 'human'. They suggest that the 'human' has always been

understood in relation to what it does not include, i.e., in relation to what lies outside. To Agamben, the human/animal distinction is demarcated not by mere biological differences, but by the working of the anthropological machine: "the symbolic and material mechanisms at work in various scientific and philosophical discourses that classify and distinguish humans and animals through a dual process of inclusion and exclusion" (Calarco 2008, 92–93).

To both these writers, that there is no stable or constant line that serves to delineate the human-animal boundary. For example, Derrida points out that reason/rationality, a key trait used to distinguish between humans and lesser 'Others', including animals, was always defined in relation to what the 'Other' did not seem to have. The 'Other', for a long while, encompassed the lower classes, non-white races, women, and of course, animals. In Derrida's telling, "the worst, cruellest, the most inhuman violence has been unleashed against living beings, beasts or humans, and humans in particular who precisely were not accorded the dignity of being fellows" (2009: 108). As such, the primary function of the human/animal distinction is political: it functions to demarcate certain forms of life as of lesser value and therefore excludable from considerations of ethics and justice.

The acknowledgement of the political character of the human/animal distinction sheds new light on efforts to contest injustice, exploitation and violence in intra-human interactions. The conventional strategy in such situations is that of pointing to the 'human-ness' of marginalized or exploited 'Others'. Anthropocentric human rights discourse rests on the strategy of humanisation and rehumanisation. However, rehumanisation as a strategy is founded on the unstable onto-political distinction of human/animal, and as such "runs a risk of inhabiting and thereby reproducing" the exclusionary logics that it seeks to combat (Vaughan-Williams 2015: 8).

Vaughan-Williams (2015) offers an excellent empirical analysis of this in the context of the interface between European Union border security practices and migrantsHe shows how humanitarian and human rights discourses that seek to address the concerns of 'irregular' migrants have not only been "co-opted by authorities complicit in that violence" (Vaughan-Williams 2015: 2), but also "depend upon and reproduce prior zoöpolitical[6] distinctions and spaces" (Vaughan-Williams 2015: 4). To Vaughan-Williams, it is the underlying reliance of human rights discourse on the human/animal

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6   Human/animal

distinction that enables such co-option by allowing for border security to animalize 'irregular' migrants, for the very purpose of safeguarding the human rights of 'regular' migrants and citizens.

5.   The Zoöpolitical Logic of Developmentality

Vaughan-William's point about the integral link between the zoöpolitical distinction, the easy co-option of human rights language, and the animalization of migrants are relevant to broader and increasingly troubling concerns about the impacts of contemporary 'development', and the associated human rights violations. As many commentators (Escobar 1995; Gasper 2004; McMichael 2012; Parasuraman 1999; Parasuraman, Upadhaya, and Balasubramanian 2010; Penz, Drydyk, and Bose 2011; Sachs 1992; Shrivastava and Kothari 2012) have documented, over the last seventy years, the pursuit of 'development' as a global project has had varied and extensive adverse social and ecological impacts across the planet. Developmentality (Deb 2009) – the pursuit of development as a global project and the discursive and material conflation of 'development' with surplus accumulation, high consumption and economic growth - has relied on the physical, psychological, cultural and spiritual displacement and exploitation of people and nature (Kala 2001). Ironically, the ultimate end of 'development' is human wellbeing: it is in the name of human wellbeing and progress that such exploitation and displacement is justified.

In that sense, the rationalities of developmentality are different from those of older forms of exploitation such as slavery or colonial extraction. The key stated beneficiaries of colonialism and slavery were the colonialists and the slaver owners/traders. By contrast, contemporary development is carried out in the name of the very people it exploits, displaces, or subjects to harmful 'progress'. Development discourses and practices, for the most part, display and exceed the anthropocentrism of humanism, and indeed of human rights discourse, in their valorization of the human. Indeed, developmentality can be viewed as the apotheosis of human exceptionalism[7] in its quest for the perfect human life that is free of all the risks and vulnerabilities that go along with being part of nature. Simultaneously, contemporary development relies on the human/animal distinction that is foundational to the anthropocentric human rights imagination.

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[7]   I am grateful to Rajesh Kasturirangan for pointing this out to me.

On the one hand, the ethical marginalization enabled by the zoöpolitical distinction allows for nonhuman life to be treated as a mere resource to be used and exploited for human ends. This resource logic is visible in mainstream environmentalism as well; where nonhuman nature is offered safeguards only to the extent that its destruction will affect human wellbeing.

On the other hand, developmentality makes more subtle use of zoöpolitical logics in articulating and pursuing a very particular vision of hierarchichal humanity and human wellbeing that is considered 'superior': a vision of an exceptional human life that is characterized by high levels of financial wealth and consumption, and insulation from the vagaries of nature. All other visions of humanity and all other values and lifestyles are relegated to an inferior, animalized status; which either need to be 'uplifted' or that can be displaced in service of superior humanity (Martinez-Alier 2009). Thus the capacity to deploy reason and intentionality to manipulate the external environment and maximize production, central to the human/animal dualism, leads to the "privileging of European systems of intensive agriculture and property use over traditional forms of subsistence production" (Kymlicka and Donaldson 2014: 116).

Zoöpolitical logic that enables the exploitation and marginalization of animal 'Others' also enables the demarcation of some human 'Others' and their lifestyles as inferior – and thereby displaceable or requiring coercive 'improvement' (Li 2007). Its effect is evident in the uneven distribution of the adverse impacts of development: it is the financially poor and otherwise subaltern groups – often tribal or indigenous groups – who, along with nonhuman nature, bear the costs of development (Penz, Drydyk, and Bose 2011). It is those 'Others' who do not meet the 'superior' standards of human-ness (cf. Hauskeller 2013) embedded in developmentality; who are displaced and exploited in the pursuit of exceptional human wellbeing.

The human/animal dualism that forms the basis of the anthropocentrism of mainstream approaches to justice (including human rights discourse) enables the marginalization and exploitation of nonhuman 'Others' and also subaltern human 'Others'. It lies at the root of the extensive and persistent socio-ecological impacts of contemporary development.

This raises significant questions about the coherence and strength of anthropocentric human rights discourse. It also raises questions about the effectiveness of the institution of human rights in addressing the socio-

ecological impacts of development. Can the human rights approach, which works by demarcating boundaries that exclude lesser 'Others' in order to maintain the priority of some select forms of life, meaningfully challenge the social formation of developmentality; which uses similar zoöpolitical logics of inclusion/exclusion, even more intensely in its pursuit of a human exceptionalism?

6.   Conclusion

This paper has questioned the anthropocentrism of the human rights imagination by critically examining rationalities of human exceptionalism that have underpinned such anthropocentrism, and by showing how the human/animal distinction that is central to anthropocentrism has pernicious consequences for not only nonhuman life but also human life because of its political function of excluding the 'Other' from the purview of justice.

As discussed early on in this article, the idea of 'rights' - and human rights discourse - emerged as a means of resisting the exercise of abusive power, and to prevent and redress exploitation. The basic end goal of the social formation of human rights lies in protecting the vulnerable from the excesses of those who are able to exploit or otherwise wield harmful power.

Development in the contemporary world has been largely achieved through the exploitation of vulnerable human and nonhuman life. For this, developmentality has made dual use of the anthropocentrism of human rights discourse: a) it has used the 'species-narcissism' (Benton 1988) of human rights to justify its quest for a narrowly framed vision of human progress and 'superior' human life; b) it has used the zoöpolitical human/animal dichotomy to exploit, abuse and displace human and nonhuman 'Others' in pursuit of such human progress.

In such a context, it is vital that human rights discourse sheds its anthropocentric mask and sever links with discredited rationalities of human exceptionalism. By shedding its zoöpolitical logic, it will not only thwart the usage of the institution of human rights by developmentality; but will also be able to enhance the force of its protection by drawing attention to the vast range of vulnerable beings, human and nonhuman, that are harmed by neoliberal development. For this, the human rights imagination must reclaim its fundamental purpose of protecting "all those who are injurable and vulnerable by virtue of the fact that they are, even if unwittingly, members

of our community"(Mendieta 2011: 8). It needs to revive its most basic goal, that of extending its protective function over those forms of life that were "previously invisible to the powerful" (Gearty 2009: 182).

Historically, the expanding scope of human rights has gradually encompassed different kinds of previously excluded humans – slaves, women, the working class, non-white races. In today's world, characterised by widespread awareness of the mutual vulnerability of human and nonhuman life in the face of developmentality, it is rendered urgent that the human rights imagination revisit its chauvinistic privileging of just one form of life. As Mendieta (2011: 8, emphasis mine), drawing on Habermas, reminds us, "it is precisely against this kind of metaphysical chauvinism that we humans invented the institution of rights – human and non-human. Rights are one of the few human institutions we invented not for the sake of preserving and protecting that which is similar, familiar and can argue and talk back… [but] to force ourselves to respect and protect that which is alien, different, vulnerable, indefensible and speechless." Such a revisiting of the imaginative boundaries of human rights discourse will only strengthen the cogency, reach and force of its efforts to resist, prevent and redress injustice and the abuse of power in the contemporary world.

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Wronged by Development?
The Impasse in Development -
Human Rights Debate

*Sohini Sengupta**

Abstract

Development and Human rights have been increasingly connected by democratic movements to foreground the shortcomings of current economic policies. This has come at a time when human development model is being eroded with the violation of human rights of the mist vulnerable social groups. The objective of this paper is to analyze the paths of convergence between human rights discourse and development policies and the processes that aid or higher this relationship such as bottom-up democratic processes that claim a variety of social and economic rights for people, translating demand for wellbeing into legal entitlements, it also highlights some problematic trends that seek to restricts the scope of mutuality between development and human rights. For instance, the economic policies that make the poorest more vulnerable and social safety net argument that reduces the promises of rights based development. As such, it appears that the development-human rights impasse is bridged with resilient and at times adversarial human rights lens that constantly examines the true outcomes of economic and social policies for the poorest.

Introduction

Concern about the promotion of human well being is the common thread that weaves development and human rights together. Both are grounded in moral values of rights, equality and social justice and assumption of common humanity. If development aims to secure freedom and progress for all, human rights perspective provides the legal and institutional means to obtain these. If development processes, meant to improve human life, lead

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to devastating social and economic consequences for people, then human rights may serve as a frame to revise original goals and seek remedy for shortcomings. For the most deprived in a population group, development holds a promise, but it is human rights that create the voice that translates the demand for wellbeing into an entitlement. Clearly, for development to stay true to its ultimate goal of expanding wellbeing especially for those with the maximum deficit, human rights must play a critical role. It is necessary therefore to not only deepen our understanding of the mutuality between development and human rights but also attend to processes that make these relationships robust or fragile.

Recent decades have witnessed growing convergence between ideas of human development and human rights. According to the UNDP's human development report, that clearly articulates this relationship, the common goal and purpose shared by the two concepts, is 'securing human freedoms' (UNDP 2001). Freedom in this context, based on Amartya Sen's capability perspective, refers not to market freedom or consumer choice but positive freedom that people have to lead the lives that they value through increased opportunities to improve their functioning (Deneulin 2009, 2014, Cornia and Stewart 2014). Sen (1999:40) refers to this as 'well-being freedom' by which he means the real opportunities that a person has to achieve wellbeing. Extent of this freedom enables us to evaluate not only how well individuals were doing in a society but also what would constitute a 'good society' (ibid:41). Based on this approach the goal of development is to expand freedoms and capabilities to progressively improve the standard of living and quality of life of all human beings.

Centering human lives rather than economic growth, signaled a paradigm shift in development thinking.

Rights based approaches to development have built upon the concept of human development to contest dominant discourse, policies and practices of economic development. Human rights and capabilities, as Sen (2005) argues, have conceptual similarities in terms of their motivations. Moreover, 'both frameworks provide a sharp contrast with dominant economic policy approaches that emphasize the expansion of Gross Domestic Product as their principle goals.' (Vizard et al 2011) Rights based approaches strengthen moral connections between human rights and development by providing normative basis for citizens to make claims on nation-state and to hold

their states accountable for their duties (Uvin 2004, Cornwall and Nyamu-Musembi 2005). More specifically, the rights perspective creates accountability mechanisms for state and non-state actors and re-examining individual versus collective claims to development (ibid). As Fukuda-Parr (2013:203) argues, while human rights and development both describe essential entitlements as their goal, rights also define obligations of duty bearers and the necessity of social arrangements such that people may realize their freedom and dignity.

Often the poorest or most oppressed people, with the most development deficit, bear the brunt when 'development goes wrong' (Uvin 2004). As economic globalization creates structural upheavals, distributional concerns and increasing poverty and inequality in nations and societies, progressive development policies located within the framework of human rights gains greater salience (Osmani 2011). Rights are increasingly invoked to uphold justice and equity concerns around global economic policies and authoritarian, non-participatory development (Langford 2015). From a rights perspective, the realization of human rights is the objective of development (Crawford and Andreassen 2015). Rights therefore must be guaranteed during the process as well as in the outcome of development through transparent, participatory processes that include all, even the most marginalized development actor through appropriate procedures (Sengupta 2001, 2013). Often this ethical project however runs counter to mainstream development discourse and processes informed by the paradigm of neo-classical economics, which despite shifts from Washington to post-Washington consensus (Kanbur 2010), remain resilient, continuing to drive public policies that infringe on and undermine human rights of groups and population.

Concerns about growing poverty, inequality and conflicts in countries experiencing rapid economic growth, led to the emergence of social protection as a key strategy within development policy discourse in the late 1990s. Social Protection instruments such as social insurance, social assistance and labour market standards originating in European welfare states were adapted to address the social consequences of neoliberal policies in Asia, Latin America and Sub Saharan Africa. Unlike rights based development, the mandate of social protection is modest. Social protection is about building household capacities to cope with adverse effects of shocks due to periodic economic crises and also to act as a check against social and political unrest in response

to such crises. While rights based perspectives seek to expand the scope of social protection, competing frameworks such as the World Bank's social risk management, reduce it to standardized targeted programs like minimum income support through conditional cash transfers to vulnerable population groups.

From a rights based perspective poverty causation was linked to structural inequality and social injustice, while the risk perspective viewed the problem as related to conditions associated with poverty. While social protection from the rights perspective shows significant synergy with rights based development, the increasingly influential risk management framework is principally focused on the sustainability of economic growth where poverty becomes a marginal concern, viewed as deficit of human capital or impediment to growth. Emphasis on social protection constitutes admission of the failure of dominant economic growth centric development policy in creating widespread human wellbeing for all. However in the absence of the moral and ethical foundation that the rights perspective brings to social protection, development processes will surely fail to secure human rights.

This article explores the interconnections between development and human rights in the context of contemporary processes of economic development in India. It begins with the analysis of internal debates within human rights and how these inform rights based perspectives on development. It goes on to focus on key social legislations in the context of India and analyses how these have sought to interpreted development deficits and remedy them in terms of rights. Finally, it demonstrates how rights based understanding of contemporary social problems strengthens realization of human development outcomes while mainstream development policies create the need for strident human rights campaign through democratic processes.

2.   Development and Human Rights

Human right is a 'prescriptive moral account' of not how people are at present but what they can possibly become (Donnelly 2003) and serve as ethical pronouncement of what should be done? (Sen 2009). According to Turner (1993)[1], human rights were 'social claims for institutionalized protection and moral communities with collective sympathy for the plight of others, supported the institution of rights. Human rights constitute

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[1]   Turner, B. 1993. Outline of a Theory of Human Rights. Sociology, 27 (3):489-512

standards and norms of progressive change for right-holding citizens and duty-bearing institutions that also empowered citizens and states to act in order to demand these changes (Mazur 2004, Donnelly 2003). Within human rights philosophy, political perspectives are contrasted with the humanist viewpoint. From a political perspective human rights constituted interested claims of individuals from institutional structures of which they were members. The humanists viewed human rights as claims that emerged from shared humanity, not citizenship of nation-states rights and were concerned with human entitlements and more abstract rights (Gilabert 2013). Human rights impose obligation on governments to provide for the protection or realization of those rights (Ife 2009).

Simmering controversies through the twentieth century between what were referred to as different generations of rights are of some relevance to the development human rights debate. While the separation between civil and political rights (CP rights) and economic, social and cultural rights (ESC rights) was formally ended by the Vienna Conference 1993 which proclaimed the indivisibility and interdependence of CP and ESC rights, national and international human rights institutions continued to direct their actions towards violations of CP rights (Cornwal et al 2004). CP rights are usually associated with 'negative rights', meaning that government has to abstain from certain behaviours (arbitrary imprisonments, torture, limitations on free speech). ESC rights on the other hand are a category of 'positive rights', to fulfill which the government has to take appropriate action (Uvin 2004:39). In current global political economic context, socioeconomic rights are being reduced to 'formal procedural guarantees rather than substantive material entitlements.'(O'Connell 2011:533). Since predominant neoliberal worldview favors negative over positive rights it tends to be 'antagonistic to the recognition and protection of socio-economic rights' (ibid:537). Rights based perspectives on development have primarily drawn upon ESC rights.

Forging a close link between civil and political rights and economic, social and cultural rights, the right to development merged concern for material improvement with aspirations of freedom and dignity (D Bunn 2012). The United Nations general assembly adopted the Declaration on the Right to Development (UNDRD)' in 1986 (resolution 41/128) and formally recognized it as an integral part of fundamental human rights in 1993 Vienna Declaration and Programme of Action. By including, sovereignty over

natural resources, self-determination, popular participation in development and equality of opportunity, the right to development created favourable conditions for the enjoyment of CP and ESC rights. The right to development can be invoked both by individuals and by peoples and imposes obligations on individual States to ensure equal and adequate access to essential resources and on the international community to promote fair development policies and effective international cooperation' (OHCHR 2011).[2] Since the right to development came to be conceptualized as a human right, rather than right of nations, reconciling the individual and collective dimensions of the right remained challenging (De Bunn 2012) though these aspects are not irreconcilable (see Sengupta 2001, Sen 2004, 2009).

Right Based approaches re-frame development as an entitlement that is secured through political or legal contract with the state or other actors. Right-based approaches entail recognition of economic and social rights and provide the tools to operationalize rights (Gready 2008). In the field of development human rights tend to be articulated through identification of outcomes or processes, as forms of entitlements and corresponding duty bearer are held accountable if they fail to fulfill certain obligations. (Langford et al 2013:24). Here, absence of rights is viewed in terms of the failure of duty-bearers and attempts are made to build their capacity to implement rights (ibid). For development practitioners, Gready (2008) argues, a distinct contribution of human rights is the use of law to claim entitlements from duty bearers accountable for fulfilling some obligations. This takes place when individuals bring cases to court of law to secure economic and social rights or when they participate in making and implementing law. Rights based approaches provide space for what has been described as a 'genuinely democratic process of popular involvement in decision making about resources and institutions that affect people's lives' (Cornwall et al 2004: 1424).

Human rights are significant for contemporary social struggles waged by excluded and marginalized groups. With increasing democratization and penetration of international norms, human rights values have been adopted everywhere by domestic groups shaping local social action. 'For social movements human rights are simultaneously a system of laws, a set of values, and a vision of good governance. Each of these dimensions of human rights

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2   http://www.ohchr.org/EN/Issues/Development/Pages/RealizingaVisionforTransformativeDevel opment.aspx

offers resources for grassroots social movements and enables human rights to work as 'law from below'. An important instance of this phenomenon is the global indigenous movements normative shaping of international law. For some, human rights are best viewed as 'an indigenous process and response to new realities, not simply a function of western pressures' (Chakraborty 2000:3498). Emphasis on contextual and dynamic nature of human rights along with its universalist aspiration are useful for countering moral relativism in development thinking and outcomes.

A major contribution of rights based approaches to development is the way in which it analyzes and interprets standard development problems as violation of rights. The language of right ensures that developmental gaps and deficits are not seen as natural or inevitable but effects of specific decisions or policies. Securing the means of livelihood together with those of health and education are major challenges in the realization of dignified life' (Mazur 2004:63). Processes and policies that reduce the possibilities of attaining such rights, therefore, indicate violation of rights, those that significantly enhance them are upholding the right to development. Poverty and inequality constitute severe development deficits that increase the precariousness of social, political and economic rights. Eradication of poverty is the essential first step towards the progressive realization of the human right to development (Sengupta 2000 cited in Mazur 2004:63). Rights based approaches demand explanation and accountability revealing the underlying conditions that creates poverty. Usually judicial action is necessary for social and economic rights to materialize. For instance, while the Indian constitution guarantees a wide range of human rights, broad public endorsement, active press and civil society and enforcement by a strong Supreme Court, are necessary preconditions for realizing rights.

There is growing evidence that non compliance with human rights standards will result in uneven or inappropriate development outcomes, just as incorporation of rights perspective will aid transformation towards greater wellbeing by promoting accountability of duty holders towards right-bearers with regards to development rights. Human rights should also be integrated into development policies and practices because they are intrinsically valuable

in protecting human dignity that maybe negatively affected by development (Langford et al 2013:52).

What is the outcome when human rights principles are used to evaluate ongoing development processes? In the following sections rights perspective is used to study selected social legislations and rights initiative critical for survival and sustenance of the rural poor, in India. The objective is to understand the extent to which the relationship between rights and development are being shaped by contemporary development policy trends and in turn interpreted and applied by both state and non-state actors including rights-based social movements.

3.   Natural Resources, Development Policies and Tribal People

A recent news article about the proposed development of the Andaman and Nicobar islands by promoting tourism, security activities, port and other industries, brings the issues of the rights and development of the Jarawa tribal inhabitants to the fore. Speaking to the news media, the tribal welfare secretary articulated a standard argument opposing development to rights. According to the official, "There are two schools of thought. One is to protect and preserve their cultural identity and avoid intermingling…the with the outside world other is to mainstream them into the outside world so that they can enjoy the fruits of development (Reuters 2015).[3] Would the ingress of mainstream economic activities into the pristine forested environment lead to the fulfillment of the Jarawa's 'right to development' as the official seem to suggest? Or would the proposed development lead to the violation of the human rights of the indigenous Jarawa through loss of livelihood and dignity as other more strident claims on the resources that they have used for generations, gain ground? Like many other tribal communities in India, it is not surprising that the Jarawa are in the eye of a development storm.

Tribal people, classified as scheduled tribes (ST) under the constitution, number 104 million people and constitute 8 percent of India's population. According to the latest census, 93 million scheduled tribal people lived in rural areas. In 2004-05, 60% of the tribal population lived below the poverty line as compared to 30% of the general population and infant mortality and under-five mortality rates were higher among them than the averages for the

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[3] http://uk.reuters.com/article/2015/07/25/uk-india-andamans-development-feature-idUKKCN0PZ0S720150725

general population. With the exception of Northeastern region, people from non-tribal communities in most states numerically outnumber scheduled tribes. For instance, in the Andaman and Nicobar islands, mentioned above, the proportion of tribal people is only 8.3 percent. Notwithstanding the heterogeneity among the ST population, (there are 533 communities listed as ST under article 342 of the Indian constitution), which comprises of a number of linguistic and culturally distinct and disparate groups, the category as a whole exhibit poorer development achievements compared to other groups in India and high levels of poverty. That tribal people have benefitted the least from post independent India's development policies is well established today (see MOTA 2014). One of the causal reasons for development deficit among them has been involuntary displacement from land and forests including other commonly held natural resources. An estimated 30 million tribal people have experienced involuntary displacement in post independence India (MOTA 2014:258) Administrative survey and settlement operations have also eroded tribal customary and collective rights over land, which had been reclassified as forests, wastelands or pastures (Mearns and Sinha 1999).

Large scale industrial and infrastructure projects in the wake of modernization, industrialization and economic globalization have affected the livelihoods of millions of rural and tribal people in India. While not suggesting that these processes existed in seamless continuity, the outcomes for some population groups have been alarmingly predictable. More recently rising conflicts in parts of the country attributed to economic development policies is attracting a great deal of attention. For instance, a recent report prepared by the Society for Promotion of Wasteland Development (SPWD) and the Rights and Resources Initiative, has mapped 252 land conflicts in 165 (out of 664) districts in India. According to the report, most of these conflicts have arisen from acquisition of private land, diversion of forestland, or transfer of common lands, by the state on behalf of private investors. The report forecasts that major projects for the next 15 years, would require over 11 million hectares of land which would affect the livelihoods and welfare of millions of rural poor.[4] For instance issue of Chromite mining leases to private companies in the state of Manipur from 2007-12, in contravention of environmental and social legislation and despite local discontent, has

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[4]   http://www.rightsandresources.org/news/as-modi-government-in-india-proceeds-with-economic-development-agenda-new-map-tracking-land-disputes-shows-disturbing-rise-in-conflicts-with-local-people/

raised the specter of displacement, deforestation, loss of livelihood and toxic contamination of the habitats of tribal communities (Varah 2014). Clearly, adverse consequences of development have often been borne by those who have benefitted the least from these processes.

Throughout the development decades social movements and civil society activism have created space for public debate on better development policies and protective legislation to prevent harm and failing which to identify losses, compensate and provide reparation for losses suffered, taking first steps towards actualizing rights based development. In civil society activism, the perspective of the human right to development has been used to reinterpret the 'public purpose' till then conflated with national development based on money metric indicators and situating such concerns within normative ideas about expansion of individual freedom and capacities through democratic processes.[5] In the democratic process of promoting human rights in development, the Supreme Court has played a critical role through its interpretation of constitutional guarantees and making new social legislations based on public interest litigation (Wolf 2015). Fundamental contribution of the judicial activism by the Supreme Court has been the expansion of the meaning of right to life under article 21 of the Indian constitution in order to enforce socio-economic rights (Dam 2007). For instance, in a series of landmark judgments, in 2014, the Supreme Court of India cancelled the licenses of 200 coal mining companies. It was argued that the Ministry of Environment had granted clearances without adequate consultation with the local communities who would experience multiple adverse effects from the polluting industries and face widespread displacement due to the acquisition of land for industrial and infrastructure projects. [6] At an earlier date, the 1997 Samatha Judgment, the Supreme Court interpreted a the Scheduled Tribe Land Transfer Regulation, 1959, to declare the issue of private mining leases on tribal land as illegal and unconstitutional violating the land rights of tribal people (see MOTA 2014).

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[5] Social movements against land acquisition and involuntary displacement in India are attributed with making important contributions towards the reformed legislations on land acquisition. Some of these organizations are listed in a recent EPW editorial as, Bhumi Uched Pratirodh Committee in Nandigram, the Krishi Jomi Bachao Committee in Singur, the Niyamgiri Suraksha Samiti in Lanjigarh and Niyamgiri, the POSCO pratirodh Sangram samiti in Jagatsinghpur, Keonjhar and Sundergarh and the Narmada Bachao Andolan (Editorial 2013:

[6] https://www.amnesty.org/en/countries/asia-and-the-pacific/india/report-india/

Key recent social legislations that recognized the debilitating consequences of land acquisition and the absence of protective and empowering mechanisms such as legal instruments necessary to realize the right to development, includes the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act' (LARR 2013) and the 'Recognition of Tribal and other Traditional Forest Dwellers Forest Rights Act' (FRA 2006). The LARR and FRA are both informed by rights based development perspective and stress inclusion of the most vulnerable as well as participatory and democratic processes of decision making around natural resource. The Land Acquisition Act provides the legal framework for the state to acquire land in public interest for the purpose of Development. The LARR replaces a prior colonial era legislation (The Land Acquisition Act of 1894) that had become a byword for involuntary displacement of thousands of people for development projects: mines, hydroelectric dams, power plants and other industrial infrastructure since the 1950s. Failure to recognize and provide protection for existing rights or compensate for lost rights with changing land use and control meant that displaced people, often members of the rural poor experienced grave livelihood insecurities and became further impoverished. The new Land acquisition Act sought to remedy these wrongs in future development projects by putting in place mechanisms such as prior consent, improved compensation, participatory decision making, better enumeration of existing rights and recognition of diverse range of right-holders, decentralised grievance redress and most importantly decisive role of the mandatory social impact assessment.

While the LARR 2013 functions when land for development projects are sought, the FRA is focused on locating and restituting rights that have been eclipsed or alienated due to historical processes. It lends legal and political visibility to the diversity of rights and right-holders to land that maybe claimed by development projects or proponents of pristine nature. It seeks broadly to remedy the historical injustices inflicted on tribal and forest dwelling communities as their lands and resources were appropriated and diverted to various development, industrial and conservation projects and because in many cases they have been evicted without compensation. Much of the traditional livelihood activities involving forest resources were deemed illegal in the past causing hardship and continuous harassment for tribal people by forest officials (Vasan 2009 cited in MOTA 2014:255). Thus the other objective of the FRA is to strengthen tribal individual and community

control over forestland that they have traditionally occupied, through legal rights. The FRA therefore confers both negative and positive rights on tribal and other forest dwelling people, by protecting against involuntary displacement and through securing legal rights over land and commons traditionally used for making a living.

Recently, the Baiga, categorized as particularly vulnerable tribal group, in the state of Chattisgarh became among the first communities to obtain community habitat rights under the FRA.[7] (ET 2015). The Baigas who lost access to forest livelihoods in the late nineteenth century, during British colonial rule, after the practice of shifting cultivation was prohibited in reserve forests, had once told the anthropologist Verrier Elwin that the only thing that they wished the administration would give them back was their 'Kondabari', the forest land where they used to cultivate root crops.[8] More dramatic events took place in the Niyamgiri hills, Odisha where, the enforcement of community land rights under FRA led to the Ministry of Environment and Forest to refuse the Orissa Mining Corporation (OMC) permission to mine Bauxite in 660.75 ha of forestland. When the Mining Corporation took the case to the Supreme Court, the state government was directed to seek consent from the villages leading to the an environmental referendum taking place on the Niyamgiri hills. Eventually, 12 gram sabhas held over two months and attended by 400 forest dwellers refused to grant permission to mining companies to extract bauxite from the proposed areas in the Niyamgiri Hills (Padel and Das 2010, Jena 2013). Diversion or destruction of forestland inhabited by the Kutia and Dongaria Kondhs required the free, prior and informed consent of the tribal communities. The phrase Free, Prior, Informed Consent (FPIC) derives from Indigenous Peoples' Right to Self Determination protected under International Human Rights Law. Though a tenet of customary international law, under FRA and LARR, national legislations, it has become a legal right.

While proponents of the rights based development see the new legislations around land rights as an improvement on existing provisions,

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[7]   Economic Times, Oct. 2, 2015. How Rules fail in the Jungle

[8]   Elwin described the Baigas who practised dhya cultivation as extremely poor and as people who had suffered disproportionately from the loss of their forest root gardens (kanda-bari) through conservation policies (1986). The Central Provinces Forest rules of 1862 and the Forest Act of 1878, made the practice of 'dhya' by hill tribes on areas with valuable timber trees like Teak and Sal and on ground that had been left fallow for less than twelve years illegal (Rangarajan 1996:99, 107).

there has been some criticism about the dilution of the original ideas about these rights, to make space for economic growth. For instance the Tribal Committee report argues that the definition of 'public purpose' was broad enough for divergent interpretations that may aid displacement and how the new law extends the mandate of the private sector to acquire land even in Scheduled areas, that was prohibited under the older law (MOTA 2014). It is feared that in the absence of adequate monitoring mechanisms community consent maybe obtained under duress and displaced tribal people would not be able to effect economic recovery with cash compensation (ibid). Others have observed and commented on the administrative emphasis on conferring individual rather than community rights, obtaining less than what was claimed, complex procedures and poor implementation of FRA provisions (Sarap et al 2013).

Proposed changes in the provisions under LARR and FRA have generated disquiet among rights based civil society groups. The LARR ordinance passed by the parliament in 2014 alters various provisions of the LARR 2013, describing the law as 'anti-development' (Verma 2015). The 2014 ordinance ruled that projects in defense, rural electrification, rural housing and industrial corridors would not need to seek the consent of 80 percent of the affected landowners as mandated in the 2013 LARR Act. These projects will also be exempt from holding a social impact study involving public hearings procedures since that would lengthen the time taken for acquisition process. Debates between the proponents and critics of recent land right laws in India reveal the prevailing dominance of growth orientation over human development model. At the same time the plight of tribal people living in natural resource rich areas threatened with imminent dislocation underscore the necessity for persisting with a strong human rights position such that securing the human rights of tribal people are counted as the true outcome of development.

4. Food Security and Human Rights

While expansion of markets in modern economies have created avenues for gaining prosperity, capitalism also create vulnerability for some groups Most famine victims in the modern era came from the group of landless wage laborers. During periods of unemployment, wage laborers would starve without institutionalized social security to supplement market mechanisms (Dreze and Sen 1990). While famine has largely been conquered, chronic

hunger or sustained nutritional deprivation for a long period of time is a reality for many people. Surveys of adivasi hamlets routinely report the extent of households that do without regular meals (Dreze 2004:1724). Incidents of starvation also direct attention to state inaction and advocate welfare intervention (NHRC 2011). If the pursuit of economic development policies by nation states endangers food security of a large number of people, then from a rights perspective, an important tenet of development is being infringed. Sustained campaign around hunger in India resulted in the right to food becoming an enforceable right in 2013. As Dreze (2004:1726) has argued, the Right to Food is best viewed as a socio-economic and constitutional right based on the assertion that 'the society has enough resources, economic and institutional, to ensure that everyone is adequately nourished.'

Despite witnessing a third decade of economic growth and decline in absolute poverty, persistence of high levels of undernutrition in India is a cause of great concern. In recent decades, not only have Indians been consuming less calories, they also seem to be cutting back on beneficial calories such as those from proteins and increasing consumption of fat based calories (Deaton and Dreze 2009). Diets that are mainly cereal based, lack in diversity and are deficient in essential minerals and vitamins. Absence of dietary diversity may be concentrated among some social and population groups. Successive NFHS surveys have found low frequency of consumption of milk, curd, eggs and fruit among adult women in India (ibid: 61). The unfolding situation of hidden hunger has been described as a 'nutrition emergency'.

The historic National Food Security Act (NFSA) 2013 was passed by the parliament after decades of sustained campaign by rights based civil society groups and community based organizations. The NFSA seeks to provide nutritional security by ensuring access to adequate quantity of quality food at affordable prices to people and entitles one third of India's population to 5 kg of Rice, Wheat or Coarse Grains per person per month at the subsidized price of Rs.1-3 per kg. Judicial activism by the Supreme Court following a

writ petition by Peoples union for Civil Liberties (PUCL) Rajasthan heralded the turning point in this campaign (PUCL versus Union of India and others, Civil Writ Petition 196 of 2001). A case was made against Government of India, the Food Corporation of India and six state governments for violating the 'Right to Life'. It was argued that while people starved to death and suffered chronic hunger in drought-affected India huge quantities of food grain rotted in public stores. Focus was on the failure of the targeted Public distribution system and inadequate drought response by the government leading to violation of peoples' right to food and in extension their right to life. The state was held responsible for their inability to provide food security either through social security measures or by promoting and protecting rural livelihoods.[9] The first interim order of the Supreme Court in response to the social litigation issued in November 2001 focused on food and cash transfer schemes, converting the provisions under each into legal entitlements.

While welfare support to vulnerable population during drought or other calamity years was well established, legal guarantee of food distributed through public distribution system (TPDS), school meals in government and aided schools (MDM), maternal and child nutrition support (ICDS) to below poverty line families was a radical proposition. Food transfers through the PDS and MDM had significant poverty reducing effects for the rural poor especially in distress years and when market price of food rose (Himanshu and Sen 2013). According to proponents in kind transfer schemes enhanced food security by ensuring availability, access and affordability of food at times of distress, thereby raising food intake and nutritional status of vulnerable population (ibid). However inefficient, non-transparent operations also meant that large proportion of subsidized grains distributed through the PDS did not reach the targeted below poverty line families (Radhakrishna 2005, GOI 2005, Suryanarayana 2008, Kattumuri 2011:16, Khera 2011). In recent years there has been some evidence of improved performance of the PDS in many

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[9]   A very large literature on various aspects of the Right to Food Campaign can be found on their website. http://www.righttofoodcampaign.in

states (Himanshu and Sen 2013, Dreze etal. 2015) and the ICDS attributed to administrative and political will, higher budgetary spends and devolution of responsibilities (Khera 2015).

A constant criticism aimed at NFSA 2013 has been the cost of food transfer to the government and whether or not such public funded schemes were sustainable. As the implementation of the NFSA gets further delayed, evidence is mounting that the free market proponents are getting a hearing from the Government. The rights based groups have also raised the concern that the provisions of the NFSA 2013 have not been implemented by the states, eligible people are yet to be identified and financial allocation for some components (the ICDS, MDM, Maternal Entitlement schemes) has been substantially reduced in the Union budget, certain key components such as the Antyodaya Anna Yojana (AAY) being phased out, number of eligible persons for PDS access linked to the Decadal census rather than more recent population enumeration (Mander 2015, Patnaik 2015).

Contemporary development policies in India are hurting the right to food in more ways than one. Food subsidy consists of three components namely, price support for farmers, price stabilization for consumers and food security for poorer households. Shifting focus of economic policies away from agriculture has meant that measures supportive of interlinked issues of farming livelihoods and food security are being affected. One of the stated aims of the Agricultural price policy in India is to attain food security by protecting the livelihood and income of farmers by offering them remunerative prices for the crops grown. Since high rates of food inflation is a concern for the poor and the vulnerable, increase in domestic supplies is necessary for providing food to the poor (and others) at reasonable prices and to run the PDS. India runs the largest food safety net program in the world through the public distribution system. In 2011-12 the Food Corporation of India procured 63.4 million metric tons of rice and wheat and the PDS delivered 51.3 million tons of grains at subsidized prices to

530 million people. Recent protests by farmers and farm labour organization in the wealthy state of Punjab was triggered by government indifference to pest affected cotton crop and dying farmers and refusal to increase the procurement price of rice.[10]

Farmers' protesting for remunerative price or the campaign for NFSA implementation and right to food underscores the point that social and economic rights owe their existence as much to democratic political practices as they do to legal institutions (see Dreze 2004). Human rights therefore acquire critical social significance in diverse contexts through bottom up interpretation and political practice. As Dreze (2004:1728) argues, public pressure and mobilization must supplement court orders in order to realize rights.

5.   Social Protection: Substituting Rights with Risks?

Despite being a middle-income country, India is home to the largest number of population in the world living in absolute poverty and this number is rising since the 1990s (Sumner 2010). Most of the poor people live in rural areas. As economic opportunities concentrate in some parts of the country, there is a danger that people living in rural and tribal pockets may become even more impoverished. Development thus would need to be more evenly spread with sustainable livelihood opportunities, basic services and social protection measures for vast numbers of people who are not directly benefitting from the emergent economic activities and processes.

Social Protection is increasingly described as a strategy for economic and social development. It is also defined as a key instrument that works with economic policy to ensure equitable and socially sustainable development through income or consumption transfers to the poor, protecting them against livelihood loss and reducing their vulnerability (Devereaux and

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[10] http://www.tribuneindia.com/news/punjab/punjab-farmers-end-rail-roko-stir/145455.html

Sabates-Wheeler 2004). The traditional function of social protection was to enable individuals to maintain their living standards when affected by shocks or crises. Emphasis on social protection suggests a shift away from rights based development towards risk-based strategies such as those promoted by the World Bank Group. Here, providing risk management instruments to the poor, rather than realization of their right to development is viewed as the 'ends and means of development'. There is some evidence that narrow safety net approaches are being increasingly applied to erode the gains made from recent rights based social legislations in India, namely the Right to Food and the MGNREGS (See WBG 2015).

In a sharp contrast to the capabilities approach, the WB describes targeted social assistance programmes or social safety net as 'investment in human capital.' As part of its interventions, the WBG would enable low-income countries to build 'affordable and sustainable' social safety nets. But as critics point out, safety net approaches were too narrowly focused on smoothing consumption in response to declining or fluctuating incomes. To be transformative, social protection measures should go beyond cash transfers to include, redistribution of assets, creation of sustainable livelihoods and policies to integrate excluded groups. From a rights-based approach anchored in principles of social justice and human rights, broader, more normative visions can be woven into simple social welfare objectives such as no one should live below a certain income level or that they should have access to basic social services. However to be truly rights based such an approach must also lead to fairer distribution of developmental benefits, constant improvement of individuals and meaningful participation in the process, as envisioned by the right to development.

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Important Recommendations of the Commission

NHRC Recommendations on Prison Reforms[*]

Perception

1. As part of the criminal justice system, prisons are necessary for the custody and care of persons charged with or convicted for criminal offences. But the main objective of such custody and care should be correction and reformation of the prisoner and to prepare him for rehabilitation and reintegration in the society after his release. The prison should be perceived as a "Home for Corrective and Reformative Custody and Care" and a prisoner should be allowed to exercise and enjoy all human rights within the limitations of imprisonment.

Review

2. The Action Taken Reports submitted by the various States showed that the recommendations of the National Seminar held on 15th April 2011 were not completely implemented and hence the State Governments require to be reminded about it again.

Legislative Action

3. The Prisons Act 1894, being very old, contains archaic provisions some of which are no longer relevant. Hence, it requires drastic changes. The NHRC shall constitute a Committee of Experts to suggest amendments to the Prisons Act 1894, to make it conform to human rights norms, Supreme Court judgements and International Conventions / Covenants binding on India.

4. There is need for uniformity in the Prison Manuals / Prison Rules followed in the States and Union Territories. The Government of India should take steps to suitably amend the Model Prison Manual which was drawn up in 2003, to ensure that it is in conformity with human rights norms, Supreme Court judgements and International Conventions / Covenants binding on India.

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* These recommendations were made on the basis of National Seminar on "Prison Reforms" held on 13 and 14 November 2014 at New Delhi.

5.   The States shall also prepare or suitably amend their Prison Manuals / Rules to make them conform to human rights norms, Supreme Court judgements and International Conventions / Covenants binding on India.

6.   Since `Prisons' is a State subject, apart from the funds which would be provided by the Central Govt. towards modernization of prisons in the proposed Second Phase, the State Governments should take steps for ensuring adequate allocation of funds towards improvement of prisons.

Over Crowding

7.   A major problem faced by many of the States is overcrowding in the prisons. The reasons for such over-crowding include :

   i)   Absence of adequate number of jails;

   ii)   Presence of too many undertrial prisoners in the jails;

   iii)   Failure to produce the undertrial prisoners before the court for want of escorts;

   iv)   Failure to invoke the provisions of Section 436A of the Cr.P.C. to release the undertrial prisoners who have undergone detention for a period extending upto one-half of the maximum period of imprisonment specified for the offence charged with.

8.   Hence the Governments concerned shall construct more number of jails wherever necessary.

9.   The Government should give necessary directions to the police authorities concerned to provide the required number of escorts for producing the undertrial prisoners before the court, when their cases are posted.

10.   The Superintendent of the jail shall promptly report to the police / public prosecutor / court cases covered by section 436A of Cr.P.C.

11.   As many number of courts and jails as possible shall be connected through Video Conferencing for the purpose of court proceedings without the physical production of the undertrial prisoners. This may be done first in the case of Central Jails and the District Jails and thereafter in the sub-jails over a total period of 5 years.

12. The State Governments shall take necessary steps to constitute a District Level Undertrial Review Committee comprising the District & Sessions Judge, District Superintendent of Police, the Superintendent of the Jail concerned, the Public Prosecutor and the Secretary of the District Legal Services Authority. The District & Sessions Judge shall be the Chairman of the Committee. The Undertrial Review Committee shall meet at least once in three months and review the implementation of the recommendations at Para 7 to 10 above.

Prisoners of Foreign Nationality

13. It was reported that many foreign nationals are detained in the prisons even after completing their terms of sentence on the ground that there is delay in deporting them. Such detention is a violation of their human rights. Hence, it was recommended that on completion of their terms of sentence, the foreign nationals shall be shifted from the prison to detention centres set-up for the purpose.

Prison Administration

14. An effective Grievance Redressal System shall be put in place in every jail and it shall be periodically monitored by the Inspecting Judicial Officers. It was specifically suggested that a "Complaint Box" shall be installed in every barrack and it shall be periodically opened only by the Inspecting Judge who shall take necessary action to redress the grievance.

15. CCTV cameras and alert systems should be installed in the jail and these devices should be properly monitored by setting up a control room. The data of the CCTV and alert system should be preserved for a specified period.

16. An effective system for E-governance of prisons shall be set up within two years. All prison records must be digitized and data bank in respect of all the prisoners must be maintained and updated regularly.

17. In the case of undertrial prisoners, the data entered at the time of entering the prison should include nature of offence, maximum period of imprisonment prescribed for the offence and the date on which the half way mark of the said period will be reached. The data should be made accessible to the undertrial prisoner.

18. Every Central and District Jail must develop its own website within two years and all the essential and relevant information relating to the prisoners and the staff shall be available on the website.

19. A charter of rights and duties of prisoners shall be prepared in multiple languages including the local language and shall be notified on the Notice Board and copy of the same shall be made available to the prisoner at the time of his entering the prison.

20. When prisoners are taken to courts located at long distances, they are not provided with food in the absence of budgetary allocation for food allowance for this purpose. The State Governments shall therefore ensure that necessary budgetary allocations are made to provide for food allowances on such occasions.

21. In addition to providing common televisions for the use of the prisoners, they shall be encouraged and motivated to organize and participate in educational, literary, cultural, spiritual and outdoor programmes which will help their physical and mental development. Wherever possible Yoga practice may be included in the daily schedule of the prisoners.

22. It was observed that regular visits by the Board of Visitors and the effective functioning of the Board can enhance the welfare of the prisoners and the protection of their human rights. However, it was noted that Board of Visitors has not been constituted in many of the States and Union Territories. Therefore it was recommended that a Board of Visitors shall be constituted for each prison and the Board shall periodically visit the prison to review and advise the prison authorities regarding infrastructure facilities, extent and quality of training and correctional work, and proper management of the prison in accordance with the Prison Rules / Manual.

23. There should be a separate cadre of Prison and Correctional Service to which regular appointments should be made from persons possessing qualifications like Sociology, Psychology, Criminology, Law, Social Work etc., instead of appointing persons from other Services on deputation.

24. Members of the Prison and Correctional Service shall be given a holistic training to equip them to administer the prison as a "home for corrective and reformative custody and care".

25. More training institutes for the administrative staff of prisons should be set up to enable the staff from all regions to get adequate and effective training.

26. Considering the reported shortage of personnel to administer the prisons, a staff-prisoner ratio of 1:6 was suggested. The Commission recommends that this suggestion may be considered and additional staff should be sanctioned and appointed wherever necessary. At any rate, the existing vacancies should be filled up immediately.

27. Convict prisoners must be categorized into different groups on the basis of type of offence, age of convict, duration of imprisonment etc., for the purpose of conducting programmes for reformation, rehabilitation and subsequent re-integration in the society.

Women Prisoners

28. It is desirable to have separate prisons for women prisoners. The separate prison or the Female ward / enclosure of a common prison, shall cater to the gender specific needs, especially needs relating to health, hygiene and sanitation, of women prisoners and shall be administered by the female staff.

29. Female doctors and counsellors should be available in every jail having women prisoners.

30. Facilities like crèche and play school may be provided in or near the jail premises for the benefit of the children who are with the women prisoners. The help and cooperation of social workers / NGOs can be taken in this regard.

Skill Development and Capacity Building

31. There should be programmes for skill development and capacity building of the prisoners. The Public Private Participation (PPP) Model must be encouraged. Industrial and manufacturing units started in the prisons should be primarily driven by the motive of skill development and capacity building, rather than earning profits.

32. To the extent practicable, prisoners should be allowed the liberty to choose the field of their choice in the matter of skill development and capacity building.

Health Care of Prisoners

33. Right to Health is an important human right of the prisoners, in view of their custodial status and the limited medical facilities available in the prison. Hence, the State has the responsibility to provide adequate manpower and equipments for effective medical treatment of the prisoners.

34. There should be at least one resident doctor within the jail premises, to be available at all times.

35. Arrangements should be made for regular visit of specialist doctors to treat the prisoners.

36. To facilitate better health care, tele-medicine system should be set up with the cooperation of local medical colleges or multi-speciality hospitals.

37. In the light of the guidelines issued by the National Aid Control Organisation, special measures should be taken to deal with HIV positive prisoners, balancing the right of privacy of a HIV positive prisoner and the health concerns of other prisoners.

38. The Prison Administration should conduct special de-addiction programme for prisoners addicted to alcohol, drugs, narcotics and other forms of substance abuse. The cooperation of Social Workers / NGOs can be taken for the purpose.

39. Persons with mental illness who cannot be detained in prison under the law, shall not be detained in prison. Arrangements shall be made to provide special treatment to such prisoners till their release or transfer to a mental health establishment.

40. It was observed that the present health check-up conducted at the time of admission of the prisoner, is basic in nature and hence there is need for a more comprehensive health check-up covering also contagious diseases and life style diseases like diabetes, hyper tension and ailments of the heart. The diagnostic tests which could not be conducted at the time of admission for practical reasons should be conducted immediately thereafter.

41. Medical equipments like X-ray and ECG and the required technicians to operate them shall be provided to all the Central Prisons and if possible to the District Jails.

42. A well-equipped Pathology Lab alongwith requisite manpower should be provided to the Central Jails and the District Jails in a phased manner.

Sanitation and Drinking Water

43. The prisoners have the right to be provided with clean potable water and therefore, adequate water treatment facilities should be installed in every prison.

44. It was observed that most of the prisons do not have adequate number of toilets and that even some of the existing toilets are not in usable condition. It was recommended that provision should be made for adequate number of toilets and their cleanliness and maintenance.

45. Considering the presence of aged or physically disabled prisoners who cannot use Indian-style toilets, it was recommended that a few western-style toilets shall be constructed in each barrack.

Environmental Issues

46. The Kerala model of channelizing Solar Energy to bring down carbon dioxide levels within the prison premises may be replicated in other States also. Apart from being eco-friendly, it cuts down the expenditure on cooking gas. Solar Energy can be used for power back up in prisons by using solar batteries.

47. Steps should be taken for installation of bio-gas digesters in prisons for recycling of human waste into fuel that can be used for heating and lighting purposes and also can be used as manure.

48. As far as practicable, there must be provision for rain-water harvesting.

49. Provision should be made for recycling waste water for being used for agriculture, cleaning, washing etc.

Reformation

50. It shall be the duty of the prison administration to conduct special programmes for the correction and reformation of the prisoners so that the prisoner undergoes a change of heart or transformation during

the period of imprisonment and prepares himself for re-integration in the society after his release. The prison administration can enlist the cooperation and services of NGOs and civil society institutions in this regard.

Rehabilitation

51. There is dearth of data relating to the conditions of the released prisoners, the extent of their reformation, rehabilitation and reintegration in the society after release from the prison. No formal and scientific study has been conducted on the subject. Hence, it was recommended that the NHRC should conduct a study on the condition of the released prisoners and their experience when they try to reintegrate in the society.

NGOs and Social Workers

52. The important role being played by the NGOs, Civil Society Institutions and Social Workers in the process of reformation and rehabilitation of the prisoners was recognized and appreciated. It was recommended that the prison administration should make better use of the NGOs, Civil Society Institutions and Social Workers for strengthening the efforts for reformation and rehabilitation of the prisoners.

NHRC Recommendations on Human Rights Defenders*

1. India must ratify the International Convention against Torture and bring in a domestic legislation against Torture on priority in accordance with the International Convention.

2. Foreign funding of Non Governmental Organisations should not be at the cost of security concerns. However, at the same time, government may also not misuse the provisions of the Foreign Contribution Regulation Act to thwart the work of HRDs and silence dissent.

3. There is a need to create a HRD Emergency Fund for providing for relief and assistance to HRDs in emergency situations, including medical treatment etc.

4. The post of Secretary General, NHRC & Secretary of SHRCs should be having a fixed tenure of 2 years. PHR Act may be amended for this purpose.

5. There should be sensitization of the security as well as Armed Forces and law enforcement officials at all levels to promote understanding about the role of HRDs so that they can work together for the promotion and protection of human rights.

6. Legal Service Authorities must be supported and strengthened throughout the country for providing necessary and free legal aid to the deprived sections of society.

7. There is a need for greater transparency in the process of government funding of NGOs.

8. The telephone numbers of the Focal Points of NHRC/SHRCs must be made toll free.

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* These recommendations were made on the basis of the National Workshop on Human Rights Defenders held on 19 February 2015.

9. There is need for establishment of SHRCs in all States and where they exist, strengthen them by providing adequate infrastructure viz., human, financial and other resources.

10. There is also a need for training for capacity building of HRDs on issues like safety/security of HRDs, data safety etc.

11. There is a need to sensitize the Judiciary towards the challenges being faced by HRDs in the discharge of their work so that they may receive prompt assistance and relief whenever they are targeted by state and non-state actors.

12. The National Human Rights Commission must call for the Action Taken by the States on the letter dated 11.12.2013 from Secretary General, NHRC to all States regarding the provision of a conducive environment to HRDs for the performance of their work.

13. The NHRC must recommend to the States to set up Human Rights Courts under Section 30 of the PHR Act, 1993 in their respective States.

14. NHRC, India must monitor and take necessary steps for the implementation of the UPR recommendations, especially those concerning HRDs.

15. The NHRC must consider observing 9th December every year by acknowledging the work done by HRDs and also to encourage SHRCs to observe the same.

16. An interactive window can be created on the NHRC website for HRDs.

17. All SHRCs must set up Focal Points for HRDs as has been done by the NHRC and the role and functions of these focal points must be strengthened. A fast track procedure could also be devised in NHRC/ SHRCs to deal with cases of harassment and intimidation of HRDs.

18. The NHRC and SHRCs must consider organising workshops on HRDs once in 2 years, both at the National and State levels.

19. Sensitization of the Parliamentarians/ Legislators on human rights issues.

20. Like the NHRC, SHRCs should also have a separate section in their Annual Reports on HRDs.

21. HRDs should bring to the notice of these Commissions (NHRC and SHRCs), the instances where NGOs misuse the names of these Commissions and mislead the public for their own benefit.

22. There is need for greater solidarity even among various human rights defenders so that the cause of human rights protection is not diluted.

NHRC Recommendations on Leprosy[*]

1. There is need for vigorous dissemination of recommendations of the Conference organized by NHRC earlier on the issue of leprosy on 18 September 2012 for proper implementation by all concerned authorities. SHRCs involvement in implementation of recommendations of 2012 Conference and present Conference is a must, then only implementation is possible.

2. The detailed recommendations made by the Committee on Petitions of Rajya Sabha in its 131st Report should be followed up for implementation. The Action Taken Report of the Government(s) covered in the 138th Report of the Committee of Petition indicates that a large number of recommendations have still not been completely implemented. Hence, there is need to take up these recommendations for logical conclusion especially those relating to social and economic discrimination of leprosy affected persons and their families.

3. There is need to suitably address the issue of disability certificate to leprosy affected persons by evolving a separate set of criteria even when they do not fulfil the minimum disability of 40 per cent. The Department for Empowerment of Persons with Disabilities should revisit the guidelines issued on the subject in 2001 and also hold special camps for leprosy affected persons for distribution of disability certificate to them.

4. There is need to explore a sub quota of reservations in jobs for leprosy affected persons. In aggregate 5 per cent reservation may be provided for in the pending Bill for Persons with Disabilities.

5. In order to empower children of leprosy affected persons, there is need to provide free school education and free higher education to them. The children of leprosy affected parents need utmost help for their proper education. If the second generation is uplifted through education and

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[*] These recommendations were made on the basis of the National Conference on Leprosy held on 17 April 2015 at New Delhi.

employment, the poverty circle of the family would be broken and their quality of life will improve.

6.   The Ministry of Social Justice & Empowerment have educational promotion scheme for persons with disabilities. These schemes need to be extended to children of persons affected with leprosy in view of the stigma and discrimination they face.

7.   Centre and State Governments should elicit the support of the corporate sector in adopting leprosy colonies for rehabilitation and empowerment of the leprosy affected persons and their families under their corporate social responsibility.

8.   Ministry of Social Justice and Empowerment have proposed to hold a camp for distributing assistive devices at New Delhi for especially leprosy cured persons. Such camps for leprosy cured persons should be organized countrywide.

9.   Different State Governments are giving pensions to leprosy affected persons which are meagre. There are also some States which are giving no pension at all. It is necessary for the States to give a reasonable amount of pension for the disabled leprosy affected persons for their day-to-day sustenance.

10. There is need to prepare a comprehensive document of good practices being witnessed in various States of India, with regard to rehabilitation and empowerment of persons affected by leprosy and their children. NHRC will assist these efforts.

11. State Acts should be amended to remove discriminatory provisions in these as has been done in Odisha to allow leprosy affected persons to contest elections.

12. There is need for capacity building among new doctors to enable them to handle cases of leprosy.

13. There is a need to conduct a countrywide survey to find out, among others, new cases of leprosy, existing number of leprosy affected persons in colonies, and total number of leprosy cured persons integrated into the mainstream of society.

14. There is need to follow up on the recent 256th Law Commission Report on 'Eliminating Discrimination Against Persons Affected by Leprosy'

which comprehensively deals with discriminatory nature of laws towards leprosy affected persons which need amendment or repeal. The model draft legislation, titled "Eliminating Discrimination Against Persons Affected by Leprosy" Bill, 2015 prepared by the Law Commission needs to be examined and enacted into a legislation at the earliest.

15. Furthermore, there is need to bring about greater synergy between different Departments to address the problems of leprosy affected persons and then families.

16. There is need for empowerment of leprosy affected persons and their families not only through education but also through vocational training and capacity building of various skills leading to self-employment as well as through self-help groups.

17. Most of the leprosy colonies are situated on the Government's land. It is necessary to give the land ownership/pattas to the leprosy affected persons and help them to build houses under the Government Schemes. The civic amenities in the leprosy colonies also need to be improved.

18. The social & economic empowerment of persons affected by leprosy and their family members is very important to integrate them into the main stream of the society. The Government should develop a special programme to support the affected persons.

19. WHO Guidelines for participation of persons affected by leprosy in leprosy services have been prepared involving the people affected by leprosy & professionals. These needs to be implemented by the Central and State Governments.

20. There is a need to develop a multifaceted strategic plan on reduction of stigma & discrimination and include the same in the National Leprosy Eradication Programme.

21. There is a need to make an absolute shift in our approach while dealing with concerns of leprosy affected persons and their children from welfare oriented to entitlement & empowerment approach. And, its ultimate aim should be to lead them away from marginalization to total reintegration in the mainstream of society. For this to happen, there is also a need to bring about an overall attitudinal change in the mindset of the community.

NHRC Recommendations on Mental Health*

1. Non-communicable diseases like cancer, diabetes, cerebral stroke, cardio vascular diseases, chronic pulmonary diseases, etc are getting much more attention, within the medical community and in the media. At the same time, one finds a gross lack of attention on mental health issues, which is a matter of great concern. The problems related to mental health deserve much greater attention and need more discussion in the society.

2. There is a need to strengthen the five aspects regarding mental health care. These are; (a)human resources, of which, at present there is a significant shortage; (b)treatment linkages, that is linkages with other specialists like neurologists, anaesthetists, etc; (c)inter-sectoral action, that is promoting the fact that mental health care is not the responsibility of the medical community alone, but also that of the departments of social welfare, revenue, police and judiciary; (d)institutional framework, both at the Central and State Government level, civil society, State Legal Services Authority (SLSAs), NHRC, SHRCs etc.; and (e)physical infrastructure, in the field of mental healthcare. All these 5 pillars of mental health care must be fortified and nurtured simultaneously.

3. There is a need for developing guidelines on the standards of treatment in the field of Mental Health Care and NIMHANS may take a lead in this direction.

4. There is an under-utilisation of funds by States/UTs Government, including for infrastructural and manpower development. To this end, all state governments must initiate a quarterly review by State Health Secretaries so that responsibility and accountability may be clearly fixed.

5. The Ministry of Health & Family Welfare, Government of India, should consider for extending the DMHP to a minimum period of 10 years so that funds availability for this programme is assured.

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* These recommendations were made on the basis of Meeting of the State Mental Health Secretaries held on 5 September 2015 at New Dehi.

6.   While the popular perception is that States are inefficient in so far as utilisation of funds is concerned, there are also certain impediments which the States face which must be recognised and attempts should be made to resolve these problems. There are several instances when there is delay in approval of funds and consequent delay in release of funds, delay in hiring manpower leading to under-utilisation of funds. This problem thus, needs to be addressed both, at the Central and State levels.

7.   Funds are difficult to access and are mired in bureaucracy, thus, causing delayed receipt of funds, irregular dispersal of funds as well as other administrative bottlenecks. This needs to be addressed jointly by the Centre and States.

8.   Training is a vital requirement in mental healthcare. All general medical practitioners must be provided training on basic mental healthcare so as to deal more effectively with the demands of mental health treatment.

9.   During visits to mental healthcare institutions, it has been observed that healthcare staff, such as, nurses, were being transferred across general and mental healthcare institutions/hospitals, and that these nurses had not necessarily received any specialised training on mental healthcare. This is an issue that requires immediate attention and specialised training on mental healthcare must be provided to medical staff who are likely to be transferred from general to mental healthcare institutions.

10. Mental hospitals across the country must be converted to Mental Health Institutions and be enabled to develop the capacity to initiate their own academic courses and other training programmes for students and mental healthcare professionals.

11. There is need to train civil servants regarding the aspects of converging mental health with other areas like Social Welfare, rehabilitation etc. Convergence of DMHP with other flagship programmes like NRHM should also be looked into seriously.

12. There is a need for greater involvement of and better inter-ministerial coordination between the Ministries of Health, Social Justice and Empowerment, Education, Labour etc. to ensure more effective mental health care in general and DMHP in particular.

13. There is also a need for 'action research', which essentially means that mental healthcare institutions must learn from their experiences and put their learning back into action as a continual process of improvement of their mental healthcare services. Thus, all research must be action oriented.

14. Training of mental healthcare professionals through the internet/ online, as is being currently done by NIMHANS, must also be looked into by the Centre and States.

15. Currently, the DMHP places too much stress on four categories of mental healthcare professionals viz-a-viz Psychiatrists, Clinical Psychologists, Psychiatric Social Worker and Psychiatric Nurses. We must consider providing incentives to other categories of professionals such as ASHA workers/ANMs etc. to get them involved in the implementation of the DMHP, to ensure greater efficacy of service delivery and accessibility.

16. There is an urgent need for decentralising the outreach programme of DMHP to the PHC level. Special focus is required in the outreach programme of DMHP in this respect.

17. The Government of India must take steps to activate District Health Societies and ensure that they take up the task of monitoring the implementation of the DMHP.

18. It is important for institutions such as the NHRC, India to shift focus from the macro to the micro level – that is, from the level of policy and programmes to the community level.

19. One of the drawbacks of the DMHP in its present form is that it does not lay adequate emphasis on the aspect of rehabilitation of mentally ill persons who have received treatment and have been cured. Thus, the aspect of rehabilitation under the DMHP requires to be strengthened.

20. The issue of livelihood must be linked to the treatment and rehabilitation of mentally ill persons.

21. There is a need to innovate and fine-tune the DMHP when applying it to urban areas so as to meet specific urban needs which may differ from rural requirements.

22. The GOI must consider bestowing upon IHBAS the status of a National Institution like NIMHANS, thus, providing States in the North Region

an example to look upto, collaborate with and emulate with a view towards strengthening their respective mental healthcare systems.

23. States and UTs must consider adopting some of the good practices which have been seen in the State of Tamil Nadu regarding implementation of the DMHP, as well as setting up of (a) Family Federations, which act as support groups for families who have members who suffer from mental illness;(b)Women Self Help Groups, comprising Mothers and Care Givers from such families, who are engaged in microeconomic activities which enable such families to provide for finances to take care of treatment expenses of their family members; (c) Job Fairs for cured mentally ill persons; (d) coverage for employment under the MGNREGA for persons with mental illness, and (e) the Engagement of Religious Leaders in spreading awareness among families of those suffering from mental illness about scientific mental healthcare treatment and perhaps also collaborating with them for extending requisite facilities to mental health patients, as has been demonstrated by the Erwadi Dargah Committee, Tamil Nadu.

24. There is a need to put together the best practices of all States with respect to mental healthcare in general and the DMHP in particular, in the form of a booklet for dissemination and generating greater awareness.

25. It is vital that the partnership between the public and private sectors be enhanced so as to bridge the treatment gaps which exist in the area of mental healthcare.

26. There is a need to strengthen the NGO support base in the mental healthcare sector so that these NGOs may act as an effective interface between the Government and people and help strengthen the overall service delivery of mental healthcare services. NGO support and partnership with the Government will be vital for the long-term sustainability and efficacy of the DMHP.

27. A major challenge to the mental healthcare sector is the issue of homeless mentally-ill persons. There is need to pay special attention to this section of mentally ill persons, who are perhaps amongst the most vulnerable.

28. The GOI must develop clear guidelines on salaries of various categories of mental healthcare professionals who are generally hired on contract and paid low wages. There is also need to ensure regular disbursement of funds for this purpose. So that this may act as an incentive to draw more professionals into the public mental healthcare sector.

29. Provision should be made for free distribution of psychotropic drugs to mentally ill persons at district/ CHC level across the all States.

30. There should be a provision of single window programme for identification of disabilities at Block Level including mental illness.

31. Private Sector General Practitioner's (GPs) should be involved in mental health care as for as possible.

32. There is a need for shift in training of mental health professionals to mental issues relating to simpler mental disorders such as stress, anxiety, etc.

Book Review

Matthias Lutz-Bachmann and Amos Nascimento (ed.), Human Rights, Human Dignity and Cosmopolitan Ideals – Essays on Critical Theory and Human Rights, Surrey, England, Ashgate Publishing Limited, 2014

*Ranbir Singh**

Here is a commendable book edited by Prof. Matthias Lutz-Bachmann and Prof. Amos Nascimento bringing together seven articles in one publication by Ashgate Publishing Ltd., England. A quick glance at the contents may give a misleading impression that each is a separate disconnected article. The strikingly remarkable feature about the book is that there is a running thread through all the said articles.

Each chapter primarily revolves around three goals: to reconstruct modern philosophical theories that have contributed to the views on human rights and issues of global justice; to highlight the importance of humanity and human dignity as a complementary dimension to liberal rights; and finally, to integrate these issues more directly in contemporary discussions about cosmopolitanism. The authors present theoretical perspectives on how to rethink political and international theory in terms of the normativity of human rights as well as promote an international dialogue on the prospects for a critical theory of human rights discourse in the 21st century.

The book significantly aims to contribute to the delineation and institution of an emerging field narrated as "Critical Theory of Human Rights" informed by debates in the fields of philosophy, law, political theory, sociology, and international relations. The authors in the book locate themselves within the context of an ongoing conversation involving the two poles represented by the philosophies of John Rawls and Jurgen Habermas. John Rawls' political liberalism represents a very influential position that has yielded a plethora of publications and debates on human rights and cosmopolitanism understood as a theory of global justice.

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The contemporary discussions seem to have overlooked an important aspect in the first article of the Universal Declaration of Human Rights, which states that "All human beings are born free and equal in dignity and historical background of the Holocaust that the idea of human rights becomes, as it were retrospectively morally charged-and possible overcharged-with the concept of human dignity"? The authors contributing to this book move further to such an attempt to address issues implicit to the title of the book. The implicit approach followed by these writers indicate that there is a trend of growing pressure on various aspects of human rights, human dignity and, cosmopolitanism which needs to be considered while discussing human rights.

There is a fine blend of an introductory chapter which brings out a picture of few important challenges and situation drawn in this debate, and then goes ahead with two parts to illustrate the complementary connection between human rights, human dignity, and cosmopolitan principles. The first chapter deals with a string of challenges in world politics having been inadequately accosted by contemporary mainstream political theories. To attend to this difficulty the author asserts the need to tie ethics and politics at the international level by shifting from a "philosophy of the polis" to a "philosophy of cosmopolis (international relations)" on the foundation of human rights. In this course of action, Matthias questions the positions depicted by realism, liberalism, and communitarianism due to their incapacity to make available means of analysis for the international perspective. He suggests a ken of human rights with respect to ethical norms and ethico-juridical principles.

Moving to the first part: 'Human Rights and Human Dignity beyond the State', it points the debate around political liberalism and interrogation regarding the state-centric approaches to human rights, and concerns in moral theory. The second chapter emanates by noting the moral transformation which have historically happened due to a turn to human rights. The author then connects these transformations to the idea of human dignity, and asks what explains the contours of human rights and what exactly, does respecting human dignity require? The author answers these questions based on Rawl's construction to propose an Expanded Original Position (EOP) as a test to discover, describe, and foresee consensus in the advance of human rights. The author suggests that the principles implied in EOP could be stretched

out at the international level and extend a new defense of human rights due to the process of moral transformations.

The third chapter asserts that the ubiquity intrinsic in the concept of human rights articulates a cosmopolitan model of balanced moral concern for all human beings. However, it depicts that the protection and allotment of human rights obligations are usually attributed to states which recognize human rights as a duty towards their own members. In the background of such inadequacy, the author presents an array of arguments that highlight how the realistic approach of existing institutions has been able to bring improved conclusions than the state-centric view which relies on a theoretical approach to human freedom, thus proposing acknowledgement of plural actors and develop mechanisms in order to endorse global democracy and human rights across nations. The fourth article finely acknowledges presence of institutions promoting universal human rights though with less optimism. The author poses the question if human rights can be treated as legal, political or moral rights? He strongly favour the concept that moral rights surpasses contingencies of empirical background. For him moral rights are indeterminate in both universal or reconstructive approach. In view of the dilemma that moral rights are encompassing in the former while in the latter it appears to be an answer to precise situation with increased acceptance, the function of philosophy is to identify disagreements and examine the legitimacy of human rights claims.

The second part concentrates on the theme Human Rights and Cosmopolitanism with a Human Face and suggests shifting beyond the epistemic approaches. In the fifth chapter on "Human Rights and the Paradigms of Cosmopolitanism: From Rights to Humanity" the author recommends study of human rights concepts on the basis of philosophical stages - metaphysical, postmetaphysical, and communicative. He moves on to conclude that there is a need for a fresh outlook of cosmopolitanism which concentrates on the human instead of merely the rights part of human rights dialogues. The author of the sixth chapter suggests that cosmopolitanism is both an epistemic and moral relationship to the historical world of humans. It is the dialectical interplay between singularity and universality, placidness and displacement, rootedness and rootlessness, home and homelessness, stationariness and mobility. He analyzes the two forms of cosmopolitanism by taking a look at Kant's contributions towards development of

cosmopolitanism and concludes that this is an instance of a Eurocentric and "imperial cosmopolitanism". Further relying on the various philosophers, he defines the form of "dialogical cosmopolitanism."

The final chapter brings to light the dissimilar features of the two traditions of human rights. The first tradition claims that human rights can be unilaterally declared by an authority since they are universal truths beyond debate. The second tradition claims that human rights need to be proposed to fellow humans by fellow humans, instead of being declared by an authority. The author concludes that human rights must be spread by democratic and non-violent means and not coercively imposed giving various examples like the non-violent initiative spearheaded by Mahatma Gandhi. He finally explains that enlightenment consists in the continuous deepening of the co-articulation of human rights and democratic participation in exercising and improving them.

The distinguished group of contributors of various chapters seek to break new ground in considering certain fundamental issues of the global age. The articles in the book mould us to ponder and transform some of the central, important and long-held normative conceptions that have become part of our fundamental conceptions of justice: 'human rights, human dignity and cosmopolitanism'.

The collaborators of this book have tried to build a framework to address the global challenges faced in the 21st century through a collective effort and react on the premise of dialogues on human rights. Though the writers of each article provide different approaches to human rights, human dignity, and cosmopolitanism there is a common thread navigating the contributions in this book. The authors have attempted to address issues like the challenge of examining social and political change with respect to the transformation of global normative ideals. On the whole this book is a welcome addition in understanding the 'Human Rights, Human Dignity and Cosmopolitan Ideals.'

The book significantly contributes to the rethinking on human rights critically in the light of challenges faced by human rights at the national and international level. In spite of a very strong theoretical foundations of human rights, the violations are so many across the globe that it appears in the face of growing violence, ethnic conflicts, endless killings, religious murders that are we not at sea as to first principles on human rights. The recent challenges

in the form of refugees across the globe brings in sharp focus the hollowness of human rights norms, the institutions which are responsible for effective implementation of such rights. The 21st century has brought to the front much more challenges being faced by human rights than at any other time. The book throws some light on some issues but many cry for immediate solutions, if human rights have to have a meaningful discourse in the present globalized world full of disparities of all kinds.

NATIONAL HUMAN RIGHTS COMMISSION