

## ***Human Rights Redefined: The New Universe of Human Rights***

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Justice J.S. Verma

**H**uman dignity is the quintessence of human rights. It is the wide comprehension of this aspect and appreciation of the amplitude of dignity of the individual, unit of the human family, which must define the true scope of human rights. 'All human rights for all' and 'the world is one family' are concepts which have depended on the expanded meaning of human rights assuring full human dignity to every member of the human race in the global village. Globalization of human rights by making it universally accepted and eradicating global inequities is the clarion call of the current human rights movement. Achieving this end must be the agenda of the human rights movement in the new millennium.

The emphasis on human dignity is laid in the UN Charter, Universal Declaration of Human Rights and several international covenants as also in the Constitution of India, which mentions 'dignity of the individual' as a core value in its Preamble. Human rights are indivisible, inter-dependent and inter-related, and have a definite linkage with human development; both share a common vision with a common purpose. The debate on the classification of human rights based on different generation of these rights is purely academic since all of them must co-exist. Respect for human rights is the route for human development and realization of the full potential of each individual, which in turn leads to augmentation of the human resources with progress of the nation. Empowerment of the people through human development is the aim of human rights.

The Human Development Index (HDI) is the new measure of development recognized in 1990s. It is said: 'a nation's ability

to convert knowledge into wealth and social good through the process of innovation is going to determine its future'. If the emphasis earlier was on tangible assets as the index of wealth, there is now a paradigm shift towards emphasis on intangible intellectual assets. That is why the 21<sup>st</sup> Century is considered to be the century of knowledge. Economics of knowledge is the scientific study of improving governance through human development and, therefore, it assumes great significance. Today, knowledge has come to be identified not only as a significant form of wealth but also as power. Acquiring knowledge and using it profitably to convert it into wealth and social good has to be the goal. Human development linked with human rights to achieve this end must be the aim. Human rights have to be understood and appreciated in this manner.

Education is the most effective tool for empowerment and human development. Human rights education must include also the component of obligations towards others. Mahatma Gandhi, in a letter to Julien Huxley in 1947, had said:

"I learned from my illiterate but wise mother that all rights to be deserved and preserved come from duty well done. Thus, the very right to live accrues to us when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of man and woman and correlate every right to some corresponding duty to be first performed....."

This concept is reflected in Article 51A of the Constitution of India which enumerates the fundamental duties of every citizen and is required to be read along with the fundamental rights guaranteed in Part III thereof. This concept is gaining international recognition in as much as a draft Universal Declaration of Human Responsibilities (1997) on similar lines has been prepared for adoption by the General Assembly of the United Nations as complementary to the Universal Declaration of Human Rights. Right to education itself must be a basic human right. In India, the promise in Article 45 of the Constitution of free and compulsory education for all children until they complete the age of 14 years as a directive principle remains a mirage and only now the process has begun to convert it into a fundamental right. Illiteracy, described as one of the

'unfreedoms' by Amartya Sen, being a primary cause of lack of empowerment, due emphasis on education has to be given to produce the knowledge makers in the century of knowledge.

With recognition of the Human Development Index (HDI) as a new measure of development, the Human Development Reports in the last decade have analyzed and focused on new vistas of human rights while integrating human rights with human development as a true measure of progress.

The 1995 Human Development Report points out the four essential components of human development paradigm, namely, Productivity – economic growth with people's participation in income generation; Equity – people's access to equal opportunities; Sustainability – access to opportunities must be not only for the present generations but also for future generations to all forms of capital i.e. physical, human, environmental; and Empowerment – opportunity with developed capabilities of all people to participate in policy and decision making processes that shape and affect their lives.

The wide global disparities in different parts of the world are shown to be linked with varying levels of human development. A bird's eye view of some glaring disparities prevailing in different parts of the world and those which are gender related indicate the areas where greater emphasis is needed for uniform human development.

In his report to the Millennium Session of the United Nations General Assembly, Secretary-General Kofi Annan asked to consider the nature of the global village:

For every 1000 inhabitants of the globe, only 150 live in the affluent areas; 780 live in the poorer areas; while 70 live in 'areas in transition';

- 86% of all wealth is enjoyed by just 1/5<sup>th</sup> of the population;
- Nearly 500 out of every 1000 persons eke out an existence on just \$2 a day;
- While literacy is increasing, 22% of the global village remains illiterate, of whom 2/3rds are women;
- 390 out of every 1000 persons are less than 20 years of age and many are desperately seeking jobs;
- Life expectancy is 78 years for the affluent, 64 years for the poorer, but only 52 years for the poorest;

- Poorer areas are afflicted by a far higher incidence of infectious disease, malnutrition, lack of access to safe drinking water, education, housing and employment.

The Secretary-General also emphasized the need to eradicate poverty and provide for public health as priority items in the agenda for the new millennium. The greatest challenge to mankind in the 21<sup>st</sup> Century is poverty, which is also a major impediment to development that is sustainable. South Asia, with its large population and, therefore, greater potential for human development continues to be starved in many ways because of lower human development index which is related to economic growth. Poverty has to be eradicated through the process of human development combined with economic growth. The millennium declaration of the world leaders has committed to achieve certain targets by the year 2015 which include reduction of poverty by half, improvement in health care, arresting the spread of HIV/AIDS and then reducing the number of infections. The need is to fulfill this promise. This is the human rights agenda to be met.

#### **Agenda for the Twenty-first Century**

All human rights for all should be the goal of the century and it must be ensured that human rights are universally accepted and respected. The aim has to be to secure the freedom, well-being and dignity of all people everywhere. The seven essential freedoms are:

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

Global disparities must be reduced to ensure that the minimum reasonable needs of everyone throughout the world

are met. Dr. Amartya Sen says that there can be no reason for starvation or any kind of want in any part of the world with there being surplus elsewhere, together with adequate means of quick transport also available for movement of the supplies to any part of the world. Fifty-five percent of the world's poor live in Asia and Africa. This region is the worst affected by poverty.

Eradication of poverty is a human rights issue, not merely a development project and the agenda must include provision for health care and all the basic amenities for every individual such as safe drinking water, adequate nutrition, adequate means of livelihood and freedom from want of any kind. The large population in this region can be converted to our benefit by human development, which would make every individual an asset instead of a liability. Amartya Sen's message of 'development as freedom' requires the banishment of the three unfreedoms 'illiteracy, lack of health care and malnutrition' to achieve this result.

Mahbub Ul Haq had emphasized that South Asia's real asset is its people and that we can completely change the economic and political destiny of the region if we show the imagination to invest in these people. The population explosion in this region, particularly in India, which is next only to China in numbers, is a matter of great concern. China has adopted measures, some of which may be questionable but it is on the road to control its population growth. In India we need to tackle this issue of great concern with imagination ensuring that the programme is not counter-productive and is consistent with respect for human rights of all sections of the society. In other words, the programme should be such that it motivates people to adopt it readily, and appreciate its benefit without adversely affecting human dignity. Such measures must be at the core of every such programme. We should aim at human resource development, which enables us to 'count on them' instead of 'counting them'. Strategies must be developed to achieve this result.

The task in the twenty-first century is to make all this a reality. Adaptation of some variations to adjust to local needs and conditions may be necessary, but the essence of these rights

must be available to every individual and all sections of the people throughout the entire global village.

It is a hard reality as demonstrated by Mahbub Ul Haq that economic growth does not automatically translate into human development: a link between growth and human lives must be created through conscious national policies. As such, the quality and distribution of GNP growth become as important as the quantum of the growth. The growth in GNP needs to be centered around the dicta of distributive justice to redress the growing and disparate imbalance amongst the nations and within the nations, between rich and poor, the affluent and needy by designing ambitious human investment plans, schemes and programmes, which is one of the major tasks in the new millennium. If we fail here, all talk of human rights movement would only sound a verbal jugglery against large portion of humanity suffering destitution and indignity. The promise of distributive justice in the Constitution of India, particularly Article 39, is yet a distant dream.

Thus one key challenge to human rights in the new millennium is to ensure distributive justice in the national as well as the global context. Distributive justice and new international economic order is the need of the new millennium. One of the principles we have derived from the upheavals of seventeenth and eighteenth centuries is the primacy of democracy, but it is a principle which carries with it a baggage of inchoate assumptions that are capable of subverting the principle itself. Both in enacting rights and in applying them, it is necessary to understand that such principles are not self-implementing and that in their application they can readily be hijacked by those who already possess the greatest power in the society. It is only by being rigorous about a second such ground rule or principle, substantive equality before the law, that it becomes feasible to go about fire-proofing the juridical elements of life in a democracy and be serious about preventing the appropriation of legal rights and democratic processes for private or partial ends. It has been said with some justification that there is potential tension between the principle of democratic government and the principle of equality before the law. If human rights theory has an urgent job in the new millennium it

is to turn this tension from its present destructive motion towards a creative balance between the individual whom democracy offers to empower and the sources and repositories of power, both within and outside the apparatus of state, which a democracy has both to license and to control. Democracy must mean inclusive democracy, involving all sections including minorities in decision-making and governance, not mere rule by the majority.

This is why the human rights movement in the new millennium needs to address the imbalances and appropriations of poor, which threaten the values – possibly even the meaning of democracy; and it is equally why a judiciary charged with upholding the rule of law in a democracy has in making its adjudication to address the same questions. In India the judiciary has shown a fair degree of sensitivity to these questions. Through various techniques like Public Interest Litigation, giving expansive interpretation to right to life and liberty, protecting minority rights, promoting gender justice, creating new kind of compensatory jurisprudence, holding executive responsible for avoiding public duty and requiring transparency and probity in conduct of public affairs, the judiciary in India has attempted to strike the balance. The task remains incomplete and sporadic aberrations need to be firmly curbed. Commitment of the institutions of governance to the democratic principles is the real safeguard against the apprehended dangers. The need is to strengthen these institutions for vigilant monitoring.

The Human Development Report (1995) engineered a shift in the debate of gender inequality in the world wherein Mahbub ul Haq had said that 'human development, if not engendered, is fatally endangered'. The talk of human development ignoring the potential of half the population comprising females is an exercise in futility. It was emphasized in the report that human development is a process of enlarging the choices of all people, not merely of one or a few sections of the society. Women, minorities or any other disadvantaged group could not, therefore, be any longer ignored in the talk of human development. Removing gender inequality is not related with national income as has been shown by Sri Lanka and Zimbabwe, which could raise women's literacy to over 70 percent. A major

index of neglect is that many of women's economic contributions, amounting to approximately US \$ 11 trillion a year, are either grossly undervalued or not valued at all. Their contribution to the household and the family is taken for granted as unproductive which is obviously incorrect and unjust. The report advocated gender equality propelled by 'concrete strategy for accelerating progress' for which government's intervention is necessary through policy reforms and affirmative actions. Only when the potential of all human beings is fully realized, can we talk of true human development. It is disturbing that three-fourth of the world's people live in developing countries, but they enjoy only 16 percent of world's income. For South Asia, it is a matter of deep concern.

The 1996 Human Development Report emphasized that human development is the goal for which economic growth is a means. Emphasis was re-laid on investing in women's capabilities and empowering them as the surest way to contribute to economic growth and overall development. A strategy for economic growth, which emphasized people and their productive potential is the only way to open opportunities and provide equal opportunities to all people which empowers them to participate effectively in the decision making process.

The report on Human Development in South Asia, 2000 dealing with 'The Gender Question' focuses on the disproportionate share of the burden of deprivation borne by women of South Asia. The foreword quotes Mahbub ul Haq, who had earlier said:

*"As we approach the 21<sup>st</sup> century, we hear the quiet steps of a rising revolution for gender equality. The basic parameters of such a revolution have already changed. Women have greatly expanded their capabilities over the last few decades through a liberal investment in their education. At the same time, women are acquiring much greater control over their lives through dramatic improvements in reproductive health. They stand ready and prepared to assume greater economic and political responsibilities. And technological advances and democratic processes are on their side in this struggle. Progress in technology is already overcoming the handicaps women suffer in holding jobs in the market, since jobs in the future industrial societies will be based not on muscular strength but on skills and discipline. And the democratic transition that is sweeping the globe will make sure*



that women exercise more political power as they begin to realize the real value of the majority votes that they control. *It is quite clear that the 21<sup>st</sup> century will be a century of much greater gender equality than the world has ever seen before.*" (emphasis supplied)

Mahbub ul Haq wrote gender into human development indicators. The human rights concept for the new millennium must focus on these issues and the education must cover every aspect of human development of all people to be truly effective. Empowerment of women through education has shown positive results and achievement of greater human development by means of gender equality should be an important item in the Human Rights Agenda for the next century.

The need is to emphasise on Gender Justice, which is a wider concept encompassing gender equality. Justice must include 'equality' and also something more. Human Rights in the 21<sup>st</sup> Century must beckon gender justice.

The World Health Organization (WHO) declares that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being' and 'health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' The International Covenant on Economic, Social and Cultural Rights also recognizes that 'the enjoyment of highest attainable standard of health' is the right of every human being. Nobel Peace Laureate, Elie Wiesel has observed that 'one cannot, one must not, approach public health today without looking into the human rights component.' The directive principles in Article 47 and 48A in the Constitution of India require the State to raise the level of nutrition and standard of living and to improve public health, as also to protect and improve the environment and to safeguard the forests and wild life of the country. Article 51 (A) (g) imposes a corresponding fundamental duty on every citizen. These provisions have been read in the 'right to life' guaranteed as a fundamental right in Article 21 of the Constitution to expand its meaning and scope. Improvement of public health and protection and improvement of environment and ecology is, therefore, a responsibility of the state with corresponding duty of every citizen to that effect.

Health for all must be an important item in the human rights agenda. The Constitution of India guarantees that right and the international covenants emphasize the point. The *Vishaka*<sup>1</sup> judgment enables reading the provisions of the international covenants into the fundamental rights guaranteed in the Constitution to enlarge its meaning and scope. It can no longer be doubted that this is a basic human right which needs to be adequately and urgently addressed and protected. The goal of linking health and human rights is to contribute to advancing human well-being beyond what could be achieved through an isolated health or human rights based approach.

HIV/AIDS is posing a serious threat and is spreading dangerously fast in the region of South Asia. Among the most vulnerable are the youth and women. Urgent strategies are needed to meet the threat. Access to critical drugs at affordable cost to every infected person must be ensured. This is necessary not merely for the victim but also for protection of others in the community. International trade and patent regime must be controlled by global cooperation to achieve this result in respect of HIV/AIDS and other critical health hazards. Such a resolve was made in the recent UN Millennium Summit Declaration but the need is to honour the pledge. Commercial and political interests must not influence humane considerations.

Right against torture is an aspect of 'right to life' guaranteed in the international instruments as well as the Constitution of India. Article 5 of the UDHR and Article 7 of ICCPR are relevant along with the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment, which came into force from 26 June 1987. India signed the treaty on 14 October 1997 "to uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights." However, even after announcement of its intention to ratify the treaty, that ratification by India is still awaited. Supreme Court of India in *Francis Coralie Mullin*<sup>2</sup> held that right against torture is a part of right to life guaranteed under Article 21. Article 20 (prohibition against ex post facto penal law, double jeopardy and testimonial compulsion) and Article 21 (right to life and liberty) are non-derogable as is Article 7 of the ICCPR. The aftermath of

September 11, 2001, giving rise to the global frenzy of war against terrorism has increased the significance of the right against torture because of the growing danger of its erosion under the anti-terrorism laws. This danger looms large notwithstanding UN resolutions administering the caution that in combating terrorism care must be taken to ensure that the methods used are consistent with respect for human rights.

Right to reparation of torture victims has the 'purpose of relieving the suffering of, and according justice to the victims by removing or reducing to the extent possible the consequences of the wrongful act..... Reparation should respond to the needs and wishes of the victims.' Right to reparation is internationally recognized and must be enforceable in the national courts under the domestic law. The decision of the Supreme Court of India in *Vishakha* enables reading into the domestic law provisions of the international conventions not inconsistent with the fundamental rights guaranteed under the Constitution, to enlarge their scope or even to fill the gaps therein. It is settled that no circumstance can justify the use of torture. Neither war, nor insurgency, nor public emergency, nor orders from the superior can be invoked to explain away the practice. It is prohibited, absolutely, both under international humanitarian law and the human rights instruments of the United Nations as well as the Constitution of India.

Prof. Van Boven conducted a study of the right to restitution, compensation and rehabilitation for victims of gross violation of human rights and fundamental freedoms under the aegis of the United Nations. He concluded in the Draft Basic Principles and Guidelines (1997) that the only appropriate response to such victims is one of reparation; and that the victim's right encompasses access to justice, reparation for the harm suffered, and access to factual information concerning the violations. It is stated that reparation should be 'adequate, effective, prompt, proportional to the gravity of the violation and the harm suffered.' The four main forms of reparation outlined by Van Boven are restitution, compensation, rehabilitation and guarantee of non-repetition. Duty to prosecute the perpetrators is included in these forms of reparation. One of the principles mentioned by Van Boven is

that “Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators; impunity is in conflict with this principle.”

It may be mentioned that the provision to award ‘immediate interim relief’ under Section 18(3) of the Protection of Human Rights Act, 1993 available to the National Human Rights Commission is, for this purpose, in addition to the power under Section 18(1) to recommend the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the persons responsible for the violation of the human rights or negligence in the prevention of violation of human rights. The Supreme Court judgment in *Nilabati Behara*<sup>3</sup> recognizes the public law remedy in writ jurisdiction of the Supreme Court and the High Courts for award of compensation, distinct from, and in addition to the general private law remedy to recover damages/compensation for the tort.

Right to corruption free governance is also a human right. Non-discrimination or the right to equality is undoubtedly an essential human right. Corruption in the institutions of governance derogates human dignity of the people and also adversely affects them in many ways violating their human rights. The effect is greater in developing countries where the development programmes and the right to development of every individual get impaired by prevalent corruption resulting in denial to the people of their legitimate rights. It is on this basis that the Supreme Court of India took up this issue for enforcing probity in public life and accountability of public men in the *Hawala*<sup>4</sup> case because the Central Bureau of Investigation was discriminating by not investigating the allegations of corruption made against highly placed public functionaries. The Supreme Court treated it as a violation, *inter alia*, of the people’s right to equality (Article 14) which right can be enforced in the Supreme Court even by an individual through the constitutional remedy guaranteed under Article 32 of the Constitution. The quality of governance determines the realization of the human rights of people. Good governance transcending to the level of humane governance is the people’s right. Corruption negates good governance. Right to corruption-free governance, particularly

in developing nations, must be a basic human right upon which the other rights depend.

Sustainable development requires a holistic view to be taken of all interests. In recent times, there is a vigorous debate on the utility of big dams as development projects. The recent Supreme Court decision in Narmada case<sup>5</sup> has also generated strong critical comments by many. However, the report of the World Commission on Dams (WCD) makes the central suggestion that a 'right-and-risks approach' should determine whether large-scale dams are built rather than the usual 'cost-benefit' calculations. In suggesting guidelines for the future, it has used important international conventions to arrive at the core values, which, it is suggested, should govern decision-making. The human rights issue is central to the decision making process.

The new millennium is going to be led by science and technology revolution. We have already witnessed the emergence of gene-technology, biologically manipulated products and many other such wonders. The real challenge is to ensure that through modern development in science and technology, it does not acquire arrogance and be the carrier of new kinds of human exploitation and miseries. It is needed to ensure that new science and technology become responsive and get dedicated to the cause of humanity and human development becoming an effective tool to spread humanism.

The UN Secretary General, Kofi Annan in his UN Day (24 October, 2000) message referred to the Millennium Summit Declaration and said:

*".....They pledged themselves to free their peoples - from the scourge of war, from abject and dehumanizing poverty, and from the threat of living on a polluted planet with few natural resources left. They undertook to promote democracy and the rule of law; to protect children and other vulnerable people; and to meet the special needs of Africa. And they promised to make the United Nations itself more effective, as an instrument for pursuing all those aims.*

*These pledges give us cause for hope. But they will change nothing if they are not followed by action....."*

Agenda 21, formulated to implement the Rio Declaration (1992), was expected to be carried forward after assessment of the progress made since Rio, in the recently concluded World Summit on Sustainable Development (WSSD) at Johannesburg on 4 September 2002. The impressions of the outcome of the Johannesburg Summit are mixed. The UN Secretary General, Kofi Annan has described the Johannesburg Conference as 'The Major Leap Forward' which 'will put us on a path that reduces poverty while protecting the environment, a path that works for all peoples, rich and poor, today and tomorrow.' He also pointed out that participating governments had agreed on an impressive range of concrete commitments, particularly in the five priority areas of water, energy, health, agriculture and biodiversity. He added that 'we do expect conferences like these to generate political commitment, momentum and energy for the attainment of goals'. Kofi Annan also emphasized that governments alone could not meet environmental challenges and civil society groups have a critical role "as partners, advocates and watchdogs." He added that commercial enterprises must also contribute in achieving sustainable development, not by doing something different from the normal business but by doing their normal business differently. Thus the call for forging partnerships marks an innovation that brings governments together with the private sector, civil society and international organizations. This is essential to ensure that there is real action toward sustainable development. The targets to be achieved by 2015 in the implementation plan called for halving the number of people living on less than \$1 a day, reduction of infant mortality under five by two thirds and maternal mortality by three fourths, and halving the number of people living without safe drinking water or basic sanitation. Johannesburg declaration has reaffirmed the commitment to Agenda 21 and the Rio Declaration emphasizing the focus on the indivisibility of human dignity.

Notwithstanding the above perception voiced by the UN Secretary General and many others, the absence from the Johannesburg Summit of the heads of Government of India and United States, the two countries whose policies matter for global environmental protection and development, has been viewed

as discouraging. Let us hope that the commitment to Johannesburg Declaration and the implementation plan of every head of the government, including the absentees, is the same and the Agenda 21 agreement drawn up at the 1992 Rio Summit would get the necessary boost from the Johannesburg Conference. Sustainable development is the only chance of saving the planet and therefore, the most effective programme for protection of human rights.

In this regard, some instances of intervention by the NHRC would help to focus attention on the redefined meaning of human rights.

The NHRC intervened to monitor the relief and rehabilitation work in the State of Orissa after the super-cyclone in October 1999 and the earthquake in Gujarat in January 2001. This was done on the basis that the rights of the affected people, particularly those more vulnerable because of tender or old age or any other disadvantage, had to be protected in the aftermath of these natural calamities from further violation resulting from mis-governance in relief and rehabilitation work. The NHRC monitored working of the State machinery and also mobilized support of, and forged partnerships with, the community to improve the relief and rehabilitation work.

Similarly, NHRC took suo-motu cognizance also of the communal disturbances in the State of Gujarat commencing with the Godhra tragedy on 27 February 2002 and its aftermath. In this context, the Commission observed that:

“It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights”.

In this matter, which is a manmade tragedy unlike a natural calamity, the Commission applied the principle of *res ipsa loquitur*, a principle in the law of torts, to place the burden on the State of Gujarat to rebut the presumption of its accountability for the

violation of the human rights of the victims of the communal disturbances. It is based on the premise that the obvious harm done to the victims was sufficient to raise the presumption that the government of Gujarat was responsible for the failure to protect the people within its jurisdiction even if it was due to mere inaction that may have caused or facilitated the violation of human rights. The Commission came to the conclusion that the Government of Gujarat was unable to rebut the presumption of its accountability for the communal holocaust. Necessary directions were given for reparation to the victims and to prevent further violation of human rights. The NHRC is continuing to monitor the situation since full normalcy has not yet been restored.

In Rakesh Vij case, the NHRC recognized that rehabilitation seeks to restore full health and normal life to the torture victim in addition to other forms of reparation. Accordingly, direction was given for payment of 'immediate interim relief' of a substantial amount in addition to direction for prosecution of the delinquent public servants and the State Government was to bear the expenses for lifetime medical treatment required by the victim at the All India Institute of Medical Sciences. The other case was of A.K. Sinha, who too was subjected to grave custodial torture resulting in serious injuries causing permanent harm to him. The defence taken was under Section 36(2) of the Protection of Human Rights Act, 1993 that the jurisdiction of the Commission was barred because of the expiry of one year from the date on which the act constituting violation of human rights was alleged to have been committed. This defence was rejected by making a purposive construction of the statutory provision. The principle applied was that the right to reparation of a torture victim is based on a recurring cause of action which survives till reparation is made, analogous to the right of redemption of a mortgage of which the cause of action is recurring. Denial of reparation itself is a violation of human rights. It was said:

*"The last technical objection is raised on the basis of limitation prescribed under section 36(2) of the Act. The violation of human rights is a continuing wrong unless due reparation is made. It gives rise to recurring cause of action till redressal of the grievance. The*



Protection of Human Rights Act, 1993 has been enacted with the object of providing better protection of Human Rights and *it cannot be assumed that the mere lapse of a certain period would be sufficient to render the violation immune from the remedy of redressal of the grievance.* The Commission has taken this view consistently from the time of its inception in cases of grave violation of Human Rights at the hands of public servants. *Such a course is necessary also for the prevention of such violations by the public servants in future.* This matter is one of that kind in which action against the delinquent public servants is necessary also for the prevention of such violations of Human Rights in future. This objection is also, therefore, rejected." (emphasis supplied)

However, this decision of the NHRC has been challenged and Supreme Court's interpretation of Section 36(2) is awaited.

'Human rights' have, in practice, been redefined to encompass every aspect of dignified human existence and to make every human being an equal member of the human family. The goal is still very far, but the road to it has been marked. I would end with the far sight of Mahatma Gandhi, who said:

"It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings."

It can not be doubted that any humiliation of a human being is an affront to his human dignity, and, thus, a violation of his human right.

**Notes:**

1. *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011).
2. *Francis Coralie Mullin v. Union Territory of Delhi* (AIR 1981 SC 746).
3. *Nilabati Behara v. State of Orissa* (AIR 1993 SC 1960).
4. *Vineet Narain & Ors v. Union of India & Anr* (AIR 1996 SC 3386).
5. (2000) 10 SCC 664.

## ***An Overview of the Provisions of the Constitution***

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Fali S.Nariman

### **Introduction**

**W**hen enacted, a written Constitution takes on a life of its own. It moves along under the guidance of its appointed functionaries. It develops its own ethos. It ultimately fulfils the destiny of the country for which it is written - *if it lasts!* The Indian Constitution was barely a year old when Sir Ivor Jennings, prolific author of Westminster type constitutions, was invited by the University of Madras to deliver a lecture on its provisions. Jennings did not think much of our document of governance - "too long, too detailed, too rigid" was his laconic comment. In the nineteen sixties, the same Ivor Jennings was commissioned to write a new Constitution - for the Island of Ceylon: the Soulbury Constitution - as it came to be known. But despite all precautions taken in its drafting, it lasted only seven years!

The first lesson then about written Constitutions is that they do not function on their own. A special effort has to be made by those entrusted to work them. As to how those in charge of the levers of power in India attempted this is set out in detail in Granville Austin's new book published in 1999<sup>1</sup>. For his analysis of the working of India's Constitution in the first fifty years, Austin drew on documentary material and (what historians now call) "personal information": painstakingly acquired through interviews with important functionaries at various levels. In the long and detailed Constitution of India 1950, Prof. Granville Austin sees three distinct strands: (i) protecting national unity and integrity, (ii) establishing the institution and spirit of democracy, and (iii) fostering social

reforms. The strands are mutually dependent, and inextricably intertwined in what he elegantly describes as “a seamless web”.

It is under this seamless web of a “lawyer’s Constitution”, (as Jennings had sneeringly characterised it) that we have regularly held elections every five years on the basis of adult franchise: as many as 600 million people went to the polls over two years ago, and despite the misgivings of constitutional historians, whenever Governments have been voted out whether in the Centre or in the States, transfer of power has been according to its provisions, even if occasionally not in consonance with its true spirit.

I recall with pride Prime Minister James Callaghan’s tribute to this event in our political history. Callaghan said that the ultimate mark of a true democracy is the willingness of a Government defeated at the ballot box to surrender power peacefully to its opponents. That is what happened when Mrs. Gandhi was defeated at the polls in March 1977, and this is what again happened when her opponents (the Janata Party) were in turn defeated at the elections of 1980 and Mrs. Gandhi came back to power.

#### **Some Basic Misconceptions About Written Constitutions**

In an overview of the Constitution, one must not overlook some basic misconceptions about written Constitutions:

(1) The first general fallacy about written constitutions is that they are essential for good governance. The United Kingdom did not have a written Constitution (till it adopted a Bill of Rights few years ago), and yet its Governments had continuously strived for several hundred years to uphold individual liberties, and have consistently and quite successfully worked for the betterment of the people living there. Israel gave up trying to agree on a written Constitution in the beginning itself, and has yet remained (despite all we read and see about the forced re-settlements on the West Bank), essentially a functioning democracy. It is said that Governments feel naked without a book of rules to obey, but experience in our own sub-continent shows that the moment you give rulers a book of rules, sooner or later they begin to bend them, and when uncontrolled by an independent judiciary, also to break and tear up the book itself

and rewrite it - a process known euphemistically as “bringing new hope to the people”!

(2) There is another popular misconception about written constitutions viz. that they work because of what they say or provide. Wrong again. The world’s oldest Constitution, that of the United States, says very little. It is the shortest written constitution and begins with the usual ringing introductory phrase - “We the people”. It sets out, with clarity and brevity, the delicate balance of power between an Executive President, and the Congress; it describes the role of the Senate (charged with approving all major appointments in the State) and the role of the Judiciary. And there it virtually stops. Yet it works - and has worked for more than two centuries - not because of what it says, but because its people have, over the years, imbibed and developed a spirit of Constitutionalism.

(3) It is also assumed that neither geography nor history has much place in Constitution making. True in general, but erroneous in the context of the Constitution of India 1950. Because of the vast diversity of India (which the 1950 Constitution makes provision for, and this diversity begins with its *geography*) the entire subcontinent (which today includes Pakistan, Bangladesh, Bhutan, Sri Lanka and of course, India) is, and was, a separate geographical entity bounded by high mountains in the North, and great oceans to the West, South and East. Until about sixty years ago, the subcontinent could be approached only by sea or through narrow passes in the North-West. Protected by natural barriers, it formed historically a cul-de-sac; successive migratory waves of invaders were halted and intermingled with the indigenous residents to such an extent that radically distinct racial traits became hard to identify. *Language* and *religion*, rather than ethnic origin, became the primary distinguishing feature of the myriad peoples of Hindustan. It still remains so. Religion and language are the single most distinguishing feature of Indian polity.

#### **Some Essential Features that Helped Shape the Constitution of India**

The Constitution of India, 1950 as enacted, contained 395 Articles (including a Bill of Rights) and an Appendix of eight

Schedules, occupying in the Official Edition, 251 printed pages. Its length - said to be the longest in the world - was due, not merely to the size of the country, but to the problems of accommodating, in a Parliamentary Westminster-style Constitution, divergent points of views of representatives of peoples, speaking different languages and observing varied faiths, while striving at the same time to transform a rigid hierarchical social order into an egalitarian society. Religion in India means not only the profession of one faith, but a plurality of faiths; it also encompasses places of worship; (temples, mosques, gurudwaras, churches, synagogues); it includes idols, deities and offerings to them, bathing places, graves, tombs, properties attached to and owned by religious institutions.

All this: faith, worship, rituals and secular activities of religious groups had to be provided for in the Constitution mainly in the Chapter on Fundamental Rights, so that they were placed beyond the reach of interference by the executive or by fleeting majorities in Parliament and in State Assemblies.

The Founding Fathers knew that they were making provision for one nation whose people were diverse and intensely religious - and they took care that no single religion was promoted or assumed dominance (an example is furnished by Art. 27).<sup>2</sup> They framed a Constitution that acknowledged several religions and respected each one of them. The concept of a "Secular" Republic introduced in the preamble (many years later - from January 1977) was a good ideal - and has become a useful exhortation against the "fundamentalists". But that was not how our Constitution was originally fashioned. The people of India have always been religious - propagating different faiths and adopting diverse religious practices. The bedrock of our Constitution, its basic philosophy, has been *pluralism*; its provisions mandate the State to be tolerant of different religions, religious customs and usages - this is what the Fundamental Rights Chapter is all about. Of course, the founding fathers omitted to mandate citizens professing one faith to be tolerant to those professing another: a grave omission. Pluralism, then, has been India's great strength; it is also our great weakness - because it has encouraged fissiparous tendencies.

### **Inconsistencies in the Constitution of India, 1950**

The Constitution is divided into twenty-two parts dealing with various aspects of the country's governance. In some places, it suffers from excessive emphasis on detail, which could have been left to ordinary legislation. It often shows a hybrid mixture of different, almost conflicting, concepts. India is a land of contrasts - the Ganga (the Ganges) is revered and worshipped by millions as its most sacred river; it is the same river which millions of its inhabitants have been polluting over the years. In this land of conflicting ideas and ideals, it is not surprising that the basic document of governance was (and remains) replete with incongruities:

*First* - With more than thirty principal indigenous languages and dialects from which to choose, the Constitution recognized English as one of the two official languages of the Union. English was the language that was first encouraged with the advent of Lord Macaulay's (infamous) Minute, which initially created the hope and possibility of an Indian nation.<sup>3</sup>

*Second* - The fourteen regional languages listed in the Eighth Schedule in 1950 (there are now eighteen) included Sanskrit, which (like Latin in the West) is spoken mainly in prayer.

*Third* - In a non-religious State, the Chapter on fundamental Rights recognized and protected India's six main religions and more than 200 "religious persuasions".<sup>3</sup>

*Fourth* - The provisions relating to "the Right of Equality" in the Constitution (Articles 14 to 18) reflect the grim reality of a developing country, slowly emerging out of a rigid, caste-bound social system. "The spirit of the Age," Nehru once wrote, "is in favor of equality, but practice denies it almost everywhere." In keeping with the spirit of the age, the Constitution guaranteed to all persons the equal protection of the laws and prohibited the State (which included all law making and law enforcement bodies) from denying to any person equality before the law (Article 14). Equality of opportunity was ensured to all citizens in matters relating to employment or appointment to any

office under the state (Article 16[1]); the state could not discriminate (either generally or in matters relating to public employment) against any citizen on grounds of religion, race, caste, sex, or place of birth (Article 15[2] and 16[2]; and no citizen could be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, or language (Article 29[2]).

And yet, the same Constitution indicated very clearly at the start the beneficiaries of preferential treatment:

- Women and children were exceptions to the general rule against any form of discrimination (Article 15[3]).
- Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes of citizens were also exceptions to the general rule against discrimination (Articles 15[4] and 16[4]).

The textual juxtaposition of guarantees of equality and the authorisation of compensatory discrimination reflected the deep conflict between divergent views on Equality, and varied notions as to the scope of protective discrimination.

*Fifth* - Whilst adopting adult suffrage as the basis for periodic elections to Parliament and to State Assemblies, and abolishing special electoral rolls based on race, religion, caste, or sex, the Constitution went on to provide for reservations of seats in the House of the People and in the Legislative Assembly of every State for the Scheduled Castes and Scheduled Tribes (for centuries, the outcastes of Hindu Society). Initially, this was to be for ten years, but has been continually extended every decade since then: “reservations” have now acquired an aura of permanence.<sup>5</sup>

These seemingly disparate and contradictory provisions were necessitated by social, geographical, historical and political considerations, they still are. But there is one overriding concept discernible in our Basic Law - *concern for the unity of India*, one citizenship encompassing the whole of India.

There are frequent references in judgments of the Supreme Court to the true nature of the political structure of the Indian Union - “federal” according to some judges, “Quasi-federal”

according to others.<sup>6</sup> Perhaps it was more accurately described in 1977 by Chief Justice Beg; he called it “amphibian” - more unitary than federal!<sup>7</sup> Since 1950, the lurking fear of a Balkanised and fragmented sub-continent has been “the inarticulate major premise” in the process of adjudication by the highest Court of all Centre-State disputes: for this reason a centrist bias has dominated judicial thinking. The objective has been laudable - to uphold and preserve the Union.

### **The Life of a Written Constitution is the Experience Gained in its Working**

Truly then, this Constitution embodying a Parliamentary form of Government was not only a compulsion of geography - shaken and divided by the “earthquake” of the Partition in 1947 - but was also a compelling accident of history.

In 1947, the British left us, somewhat in pique. Amidst the trauma of partition, the members of India’s Constituent Assembly, motivated by the urgent need to preserve the political and cultural unity of the rest of India rose to the occasion, and forged the document that became the Constitution of India 1950.

The life of a written Constitution - like the life of the law - is not logic (or draftsmanship), but experience. And, fifty years of experience on this subcontinent has shown us that it is easier to draft a Constitution, than to work it - Pakistan and Bangladesh have drafted and crafted different written Constitutions at different times, but they have been interspersed with long periods of martial law and civil and military dictatorships.

We will never be able to piece together a new Constitution in the present day and age even if we tried: Innovative ideas, however brilliant, howsoever beautifully expressed in Consultation Papers and Reports of Commissions, cannot give us a better Constitution. There are other forces in the making of a Constitution that cannot and must never be ignored - the spirit of *persuasion*, of *accommodation* and of *tolerance* - that bear their indelible imprint on all Constitution-making. All three are at a very low ebb today.

As for me, I am proud of our Constitution. The most eloquent words in it are: WE THE PEOPLE; they are also the



opening words of the modern world's oldest Constitution, that of the United States.

But what about the overwhelming majority of India's now overpopulated millions who were not born before 1950? They were not included in "We the People." How do they come in? A shrewd politician in the United States gave an answer to this conundrum some years ago. *She* said (yes, it was a woman, a Congresswoman), referring to the US Constitution:

*"We the people"* a very eloquent beginning. But, when that document was completed on 17<sup>th</sup> September, 1787, I was not included in that "We the People." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake.

But I realize that it is through the process of interpretation and Court decision that I have been finally included in "*We the People*."

Nicely put.

Well that in a nutshell describes what has been the role of *our* Supreme Court - by interpretation and Court decision it has broadened the reach of the Constitution's provisions; it has included within the range of its beneficent provisions those who were not born when India got independence.

That is why I am proud of our Judges, present and past, who have interpreted and sustained this Constitution - which was framed for only 350 million people most of whom are not alive today. This is one of the ways in which a written Constitution is made to grow into a dynamic living document.<sup>8</sup>

Another way is through Conventions: an amendable Constitution like ours has to evolve with experience. Before we think of revisions and amendments we must first establish working norms or conventions. That is how all Constitutions are run. Norms and conventions are known in India, and have been recognised in Court judgments. But unfortunately, they have been discarded by those in governance - both in the Centre and in the States.

The opening words of the Constitution - "We the People" - tell us at the start, who this Constitution is for? But in a pluralistic society like ours, in a vast sub-continent like this, in a

land of a "million mutinies" (as V.S. Naipaul has described it) - WHO really are the people? For me, they are all typified in that great cartoonist Laxman's "Common Man". Not long ago, a former President of India unveiled in Pune a eight-feet high bronze statue extolled as the "world's tallest metal statue of a cartoon character". It typifies, as no other single manifestation does, the quizzical doubts of the Common Man whom this great document is for; every generation throws up its Common Man; with a generation being defined as that whole body of individuals born about the same period (a generation as you know is usually computed at 30 years).

By this computation there have been two successive generations since 1950 and if we are to show the present generation (typified by the "Common Man") this document of Governance or tell him about it, he is bound to ask on behalf of the people he represents:

*"Tell-me-what has it done for us? How are we better off?"*

In answer, we can perhaps point to the Chapter on Fundamental Rights (Part III), which owed much to the standard setting Charter of the United Nations (1945) and the almost contemporaneous Universal Declaration of Human Rights (1948). But has the Chapter on Fundamental Rights worked as truly intended? A troublesome question indeed.

Judges in India have helped in the past - in stressing the important rights of minorities to establish and administer "educational institutions of their choice" (Art.30). But regrettably, the political winds of change have recently blown though Courtrooms as well: Judges are now reluctant to protect minorities as they once did; which, to me, is deeply disappointing. Without help from Courts, they are not worth much. The most famous footnote in constitutional history is footnote (4) in the *Carolene Products case* (in the judgment of Harlan Stone [1938-304] US 144, 152), where the Judge spoke of "discrete and insular minorities" deserving special judicial protection; those groups who are prevented by "prejudice" of majorities from protecting themselves through the democratic political processes upon which people ordinarily rely.

In his exhilarating Hamlyn Lectures, Justice Stephen Sedley<sup>9</sup> has reminded his readers that the *rule of law* of which we speak of so glibly, is a necessary but not a sufficient condition for a decent society. There is more to a decent society than the rule of law. For instance, judicial enforcement of rights by Courts of law do not necessarily guarantee public understanding and support for those rights; such understanding or awareness needs to be inculcated, which is only achieved by *education*.

### **The Rights culture - Problems in the Field of Fundamental Rights**

We are living in an age when there is an all-pervading rights-culture. The experience of fifty years of working a written Constitution has shown that a "rights culture" generates greater dissatisfaction amongst persons propounding different sets of rights.

For instance, to what extent should the claim based on merit and on the fundamental right of equality be ignored? How far does the Constitution, truly interpreted, direct us to go? How soon are we to atone for the oppression of centuries? Should we go on equalizing downwards? And then, for how long? These questions surface periodically. Yet the representation of the underprivileged in public employment continues to remain highly disproportionate, and, as Ralph Bunche once said, "Inalienable rights cannot be enjoyed posthumously." Amid all the controversy and vacillation one thing is certain: as long as poverty continues to stalk the land and gross disparities between the rich and poor remain, the ideal of an egalitarian society envisaged in our basic document of governance will remain a dream. Whatever be the nation's *karma*, the founding fathers cannot be faulted for a lack of idealism or providence. Truly, it is not in our stars but in ourselves that we are thus. It is not because of our Constitution but despite its provisions that we have failed to achieve what were naively assumed (in 1950) to be achievable goals. We have abolished untouchability and outlawed backwardness in the Constitution of India (Article 17). But alas, many of us have not eliminated it from our hearts.

Again, more topically - How far does the right to practise and profess one's religion (guaranteed by Article 25) extend?

Do Christians have a fundamental right to convert persons professing another faith, or no faith at all? And do Hindu religious bodies have a right to object? This mindless controversy has caused much disquiet and soul-searching in recent times. Christian minorities justifiably feel threatened. Hindus, in turn, resent what they believe to be an assault on their age-old culture. Too much of an emphasis on *rights* only serves to divide and fragment society, and spread discontent.

We have somehow forgotten our heritage of accommodation and tolerance. It is time we remembered.

Writing in the quiet seclusion of a British prison in 1944 (during his ninth term of imprisonment for revolting against the British), Jawaharlal Nehru contemplated “the variety and unity” of India. He wrote:

“.....There was something living and dynamic about the heritage which showed itself in ways of living and a philosophical attitude to life and its problems. Ancient India, like ancient China, was a world in itself, a culture and a civilization, which gave shape to all things. Foreign influences poured in and often influenced that culture and were absorbed. Disruptive tendencies gave rise immediately to an attempt to find a synthesis. Some kind of a dream of unity has occupied the mind of India since the dawn of civilization. That unity was not conceived as something imposed from outside, a standardization of externals or even of beliefs. It was something deeper and, within its fold, the widest tolerance of beliefs and customs was practiced and every variety acknowledged and even encouraged....”

In ancient and medieval times, the idea of the modern nation was non-existent, and feudal, religious, racial, and cultural bonds had more importance. Yet I think that at almost any time in recorded history an Indian would have felt more or less at home in any part of India, and would have felt as a stranger and alien in any other country. He would certainly have felt less of a stranger in countries which had partly adopted his culture or religion. Those, such as Christians, Jews, Parsees, or Moslems, who professed a religion of non-Indian origin or, coming to India, settled down there, became distinctively Indian in the course of a few generations. Indian converts to some of these religions never ceased to be Indians on account of a change of their faith. They were looked upon in other countries as Indians and foreigners, even though there might have been a community of faith between them.”<sup>10</sup>

A few years after Panditji wrote his *Discovery of India*, the Human Rights Commission of the UN carried out an inquiry into the theoretical problems raised by the Universal Declaration of Human Rights. A questionnaire was circulated to various thinkers and writers of Member-States of UNESCO; they were asked, as individual experts, to give their views. One of the chosen experts was Mohandas Gandhi. He responded in a brief letter to Dr. Julian Huxley, the Director of UNESCO. The letter was written in May 1947, in a moving train (those were troubled times - the days before India's independence). This is what Gandhiji wrote:

"I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. The very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Men and Women and correlate every right to some corresponding duty to be *first* performed. Every other right can be shown to be a usurpation hardly worth fighting for."

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. The subsequent inclusion in the Constitution of Fundamental Duties (Part IV A) has not inspired much enthusiasm amongst the citizenry - possibly because this Part was enacted during the period of the Internal Emergency of June 1975.

#### **The Directive Principles of State Policy**

Every Constitution must have an ideal and purpose, and the more I get acquainted with this the longest constitution in the world the more I believe that its heart is in *Part-IV*.

If we look for the reason why we have floundered, over five decades why we have not been able to successfully work the Constitution - despite the efforts of politicians, lawyers, commissions and committees - it is only because we have not had the will to implement the directive principles of State policy - principles declared fundamental in the governance of the country. The Constitution has imposed a duty on the State to

apply these principles in making laws but none of the provisions contained in Part IV are enforceable by any Court (Article 37).

Dr. Ambedkar had explained the purpose of these Directive Principles in the course of the debates in the Constituent Assembly:

“The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of Colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called “Directive Principles” is merely another name for the Instrument of Instructions. The only difference is that they are instructions to the legislature and the executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles”.<sup>11</sup>

The sanction behind these Directives was of course political and not juridical: “If any Government ignores them they will certainly have to answer for them before the electorate at the election time”.

The framers of the Constitution had not foreseen the proactive judiciary that we have today - a Judiciary which tells the Government when and how to distribute excess food, which crops to grow and what not to grow, which economic projects are good for the country and which are not, which fuel should be used in the engines of our motor-cars and scooters. If the framers had in fact envisaged or contemplated this, they would have been aghast and surprised. I believe that the Constitution Framers (adaptable as they were) would have promptly made Part-IV enforceable by Courts! However, as the role of the Judiciary was perceived in the forties and fifties, these directive principles were not conceived to be enforceable; they were looked upon as pious homilies, and left out in the cold by successive Governments that we have had in the Centre and in the States. Legislative and executive wings of State - the elected representatives of the people - were expected to provide for the welfare of the people. And they have miserably failed.

I believe they have miserably failed not because our laws (Central and State) do not take into account the provisions of Part-IV of the Constitution, but simply because making laws is

not enough: applying and enforcing laws, which is the primary duty of the State, requires a certain idealism which the Constitution foreshadowed-a certain awareness of Constitutional norms - which, alas, over the years, we the people, or rather the people in governance, have totally ignored.

It is to me a matter of great regret that our Constitution, which borrowed from a host of written documents around the world, did not choose to adopt those fine evocative words in that renowned democratic declaration of modern times - the Declaration of Independence adopted by the American colonies in 1776. This is how the material part read:

*"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*

*"That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it, and to institute a Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."*

The emphasis is on Safety of the People and Pursuit of Their Happiness - that is and should be the prime aim and object of any government.

The framers of our Constitution were not oblivious of it. They knew that giving freedom and rights to the people without the wherewithal for their exercise was meaningless.

If Part-IV then is the golden nugget in our Constitution, Article 45 is the jewel in the crown. It says:

*"The state shall endeavour to provide within a period of 10 years from the commencement of this Constitution for free and compulsory education for all children until they complete the age of 14 years."<sup>12</sup>*

If post-second World War democracies have gone to seed - replaced either by dictatorships or anarchy, the reason has been that when giving themselves freedom they forgot to educate themselves. Lack of education is at the root of all problems - the problems of poverty, of over population and of the intolerance that is tearing at the fabric of our civilised society.

The only article in Part-IV - an article fundamental to the governance of the country - that speaks of a time limit is the Article dealing with primary education: Article 45. Mark the time limit: ten years from the coming into force of the Constitution. The significance of these 50 long years is that the period stipulated in Article 45 has not even been attempted to be started viz. to give primary education to all children upto the age of 14 years.

The allocation of available funds to different sectors of education in India in the last 50 years has disclosed a total inversion of priorities indicated in the Constitution. The Constitution contemplated a crash programme being undertaken by the States to achieve the goal set out in Article 45 within ten years - and unlike matters of higher education mentioned in Article 41, was not subject to the limits of the State's economic capacity and development.

In 1954, in *Brown v. Board of Education*,<sup>13</sup> Chief Justice Earl Warren emphasised the importance of education in society. He said:

"Today, education is perhaps the most important function of State and local governments ....It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful if any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

Pearly words of wisdom by one of the great Chief Justices of modern times.<sup>14</sup>

According to the UNDP Human Development Report 2002,<sup>15</sup> India has a very high "polity score" - "institutional factors necessary for democracy" - a plus 9 in the range of minus-ten-plus-ten. And yet, our expenditure on public education as a percentage of GNP has remained abysmally low - during the entire ten-year period from 1985/1987 to 1995/1997, a miserable 3.2%. In the HDI ranking on education, India stands at 124 - even Namibia and Morocco rank higher; Swaziland and Botswana spend 5.7% and 8.6% respectively of their GNP on education, as contrasted with India's 3.2%.



Besides, Educational development in India, as the Report of the Education Commission said in 1996 is benefiting the “haves” more than the “have nots”, which is a negation of social justice and planning and only because we are spending less and less on primary education, and more and more on secondary and tertiary education.

The Supreme Court of India said in *Mohini Jain* (1992) and again in *Unnikrishan* (1993) that without primary education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. “*The Constitution would fail,*” they said. It did, and it has.

And when a vast range of Christian and other Missionary Schools (private institutions set up in the States in various parts of the country) are striving to ensure and give primary education, many States have adopted a policy of hounding out these missionaries without substituting anything worthwhile in their place. In fact the Ram Krishana Missions have shown the way (they too have established missionary schools) in the hope that children who study in it would become good Hindus (and therefore good Indians), and have helped in the spread of primary education.

The reason for my emphasis on Directive Principles of State Policy is because international trends point in the same direction. Many of the provisions of the ICESCR (1966) are similar to the Directive Principles of State Policy in Part IV of the Constitution of India.

A few months ago, Mrs. Mary Robinson, UN High Commissioner for Human Rights, specially flew to India to attend a one-day Workshop for Judges on the Justiciability of Economic, Social and Cultural Rights in South Asia. This is what she said:

“The topic of this workshop is well framed. It does not refer to “whether” economic, social and cultural rights are justiciable. Instead the focus is on how best to address them within the justice system. The practical perspective finally puts aside the jaded debate as to whether these rights can be considered as ‘rights’ at all. Similarly, it goes beyond the mistaken and anachronistic discussion as to whether economic, social and cultural rights are of equal standing with civil and political rights.

That we can take this approach is, in no small measure, thanks to the pioneering work of the judiciary over a number of years. Today, I express deep appreciation of these Judges and to the advocates who have argued before them. I am particularly pleased to be able to do so here in South Asia. For there can be no doubt that, in the field of economic and social rights, it is here in this sub-region that the most significant advances have been made and key precedents established. It is my hope that this workshop may harvest achievements, with a view to sharing the experience with the justice system of other Asia-Pacific sub-regions and indeed globally."

Mrs. Mary Robinson is no stranger to India. I had the privilege to welcome her before a large gathering of lawyers and Judges in 1993, when as President of Ireland she delivered the Bar Association of India Lecture on the role and record of the European Court of Human Rights. When she last visited New Delhi she spoke of "dreaming" the cases she would like to argue - and they were all cases concerning the Economic, Social and Cultural Rights! She has consistently spoken in support of Human Rights throughout the civilized world, and her major concern is the neglected area of Economic, Social and Cultural Rights.

If there is one single aspect in which Governments can be more popular with the people - not populist but popular - it is by speedily implementing programmes of primary education (as envisaged in Article 45 as originally enacted) and by refraining from interfering with the work of missionary schools - whether Christian, Muslim, Buddhist or Hindu - in the work of providing primary education. The international community has woken up to the need and importance of the right to education - emphasised in Article 13 of the Covenant on Economic, Social and Cultural Rights. I quote below a passage from the general comments of the committee on Economic, Social and Cultural Rights at its meeting in November/December 1999 on this important Article - the very first paragraph of this general comment - general comment No. 13 reads as follows:

*"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their*

communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments State can make. *But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*" (Emphasis supplied)

In other words it helps in the *pursuit of happiness*.

At this defining moment of history - a moment seared in human memory by the events of '9/11' in the US<sup>16</sup>, with its subsequent repercussions in our region as well - the role of economic, social and cultural rights is (I believe) critical.

Critical (as in one of the great epic stories in the English Language "A Christmas Carol"), the ghost of Christmas reveals the faces of two emaciated children and introduces them to Scrooge with these words:

*"This boy is ignorance, this girl is want: look upon them and beware of them both. Because on their brow is written Doom - unless the writing is erased".*

Ignorance and want spell Doom. They are fertile breeding ground for terrorists - and we must strive, as Dickens said, to see that "the writing is erased." One of the ways to do this is by empowering and enabling judges and lawyers around the world to better understand the true significance of economic, social and cultural rights in UN Instruments, and in our Constitution.

### **Conclusion**

Despite declaration of guarantees of fundamental rights, only such religious beliefs can be accommodated and protected in a pluralist society that do not conflict with strong sentiments of the vast majority of people. An instance in point is the frustration of a decree of the Supreme Court of India (upholding the fundamental right of freedom of conscience of a small minority group) on account of its unpopularity with a large cross-section of general public opinion. The case (decided in 1987) concerned adherents of a miniscule sect of Christians-known as Jehovah's Witnesses.<sup>17</sup>

They number a few thousand and live mostly in Kerala. They were accustomed to attend public schools in the State. In one such school the "Jana Gana Mana" was regularly sung during daily assembly. Children belonging to this Christian sect stood up respectfully but refused to sing, not because they were opposed to the words or thoughts expressed in the National Anthem, but because of the tenets of their religious faith. No one considered this disrespectful. There was no problem till July, 1985, when a member of the Legislative Assembly of Kerala on an inspection, noticed that three children (whose parents were Jehovah's Witnesses) did not sing the "Jana Gana Mana" at the morning assembly. He thought this unpatriotic. He raised a question in the Kerala Assembly. A Commission of Inquiry was appointed- it reported that the children were law-abiding, showed no disrespect to the national anthem, and stood in respectful silence when it was sung, *but they did not sing*. On the instructions of the Inspector of Schools, the three children were expelled.

A writ petition was filed in the High Court of Kerala seeking a restraint order against the authorities preventing the children from attending the school. The High Court rejected the Plea. In appeal, the Supreme Court of India reversed the verdict of the High Court. The Supreme Court held that the children did not join the singing of the National Anthem in the morning assembly because of their conscientiously-held religious faith, which did not permit them to join in any rituals, except prayers to Jehovah. The Court noted: "Jehovah's Witnesses wherever they are, do hold religious beliefs which may appear strange, even bizarre to us, but the sincerity of their beliefs is beyond question". It held that the expulsion violated the fundamental right of freedom of conscience guaranteed in Article 25(1) of the Constitution of India. At the end of their judgment, the Justices said:

"We only wish to add: our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it".

The Court then directed the authorities to readmit the children to the school and permit them to pursue their studies without insisting on their singing in the morning assembly.

But the public would have none of it: tolerance in the face of “unpatriotic” behaviour?

Never. The then Prime Minister expressed shock and amazement at the decision. The then Speaker said he could not understand how anyone who called himself Indian could refuse to sing the National Anthem. There were murmurs of “treason”. The then Attorney General of India petitioned the Supreme Court of India to review the judgment, and the petition was admitted. The Judge, who delivered the judgment was castigated by a high ranking leader of the ruling Congress party as having forfeited his right to be called “either an Indian or a Judge”! In short, the judgment, though correct in law, was unacceptable to a large majority of so-called “right thinking” people. The result was that despite the verdict of the highest Court the children would not be admitted to any school in Kerala. Unpopular beliefs evoke resentment. Jehovah’s Witnesses had won their constitutional case in Court, but lost their constitutional right, which the decision in the case had affirmed.

It is not a very comforting thought but it is true that in the end in a pluralist society no matter what the law or the Constitution says or how it is interpreted - it is only “*as good as it works*”.

**Notes:**

1. Granville Austin, *Working a Democratic Constitution - The Indian Experience* (New Delhi: Oxford University Press, 1999).
2. Article 27 provides:- “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”
3. The Warren Hastings tradition was based on the desire on the part of the Englishmen in India to acquaint themselves to the fullest extent with its language and culture in order to assimilate to their surroundings - this gave way to the proposition that it would be more desirable for Indians to become acquainted with Western culture and the English language so that they might be able to assimilate themselves and their rulers. The Orientalist Anglicist controversy was brought to a head and to an end, by Macaulay’s famous Minute of 1835. The translator of the Rig Veda (Max Mueller) more than 180 years ago was granted an interview by Macaulay at the end of 1855 - when “primed with every possible argument in favour of Oriental studies, he had to sit silent for an hour when the historian poured out his diametrically opposite views and then dismissed his visitor who tried in vain to utter a single word.” “I went back to Oxford” (he said) “a sadder and wiser man.”

4. The six major religions listed in the latest published census (1991) are Hindus, 82.00 percent of the population; Muslims, 12.2 percent; Christians, 2.34 percent; Sikhs, 1.94 percent; Buddhists, 0.76 percent; and Jains, 0.4 percent. Those having no religion - or no religion stated - constitute only 0.01 percent of the population. The Census also listed 183 "other religions and persuasions" (from Abutani, a small religious cult in the north - eastern state of Arunachal Pradesh, to one of the world's oldest religions, Zoroastrianism, whose adherents in India, the Parsis, number only 76,382).
5. By the Constitution (Seventy-ninth Amendment) Act, 1999 the period now stands extended till 24.1.2010.
6. K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1964) p. 29, says: "in the class of Quasi Federal Constitutions it is probably proper to include the Indian Constitution of 1950."
7. In 1977, Chief Justice Beg said: "A conspectus of the provisions of our Constitution will indicate that whatever appearances of a federal structure our Constitution may have, its operations are certainly judged by the contents of power which a number of its provisions carry with them, and the use that has been made of them, more unitary than federal" (*State of Rajasthan v. Union of India* (AIR 1977 SC 1361) p. 1378).
8. In a recently published book *The Law of Peoples* (Massachusetts: Harvard University Press, 1999) by John Rawls, the author contends that population - "peoples" - and not Governments should be treated as fundamental entities. Rawls believes that Governments may be meaningfully categorized on the basis of how they ordinarily deal with people within their territories (which is what he means methodologically by the "priorities of peoples versus governments"): liberal States are those that treat resident populations as liberal peoples; such States also treat the well being of the population in general as the ultimate preoccupation of a Government.
9. Lord Justice Sedley, *Freedom, Law and Justice*, The Hamlyn Lectures (London: Sweet & Maxwell, 1999).
10. Jawaharlal Nehru, *The Discovery of India* (Calcutta: Signet Press, 1946) pp. 55-57.
11. *Constituent Assembly Debates* Vol. VII, p. 84.
12. This Article has been severely truncated in recent times. Fifty years after the Constitution was enacted Parliament has passed, at the instance of the present Government, the Constitution (93<sup>rd</sup> Amendment) Bill, 2001 (which is still awaiting Presidential assent). The original article (Art. 45) has been substituted with the following words:-

"45. The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years".

And a fresh Article (21A) has been inserted in the Fundamental Rights Chapter reading as follows:

"21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". (emphasis supplied)

This has quite effectively put the clock back, not taken it forward. A Constitution Bench of our Supreme Court had held in *Unnikrishnan v. State of A.P* (AIR 1993 SC 2178) p. 2231 para 145, that since the framers of the Constitution had mentioned a specific time limit in Article 45 that had long since expired, the aspiration

mentioned in Article 45 had already matured into a fundamental right: all this has been ignored by the Government that introduced the Bill, and the Parliament that has passed it!

13. 98 L Ed 873: 347 US 483 (1954)
14. He believed that great constitutional decisions must be: "unanimous, short, readable by the lay public, non-rhetorical, un-emotional and above all non-accusatory....". A useful tip for all Justices around the world.
15. Published by the Oxford University Press, p.41.
16. "One illusion has been shattered on September 11<sup>th</sup> : that we can have the good life of the West irrespective of the State of the rest of the world. The dragon's teeth are planted in the fertile soil of wrongs unrighted, of disputes left to fester for years, of failed States of poverty and deprivation." Tony Blair, U.K.'s Prime Minister quoted in the *Human Development Report 2002*, p.101.
17. *Bijoe Emmanuel v. State of Kerala* (AIR 1987 SC 748).

***Evolution of the National Human  
Rights Commission, 1993-2002:  
A Decennial Review***

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Virendra Dayal

**I**ntrospection is a worthwhile attribute for institutions no less than for individuals. On 12 October 2002, the National Human Rights Commission (NHRC) completed nine years of its existence and entered the tenth. This is therefore an opportune time to reflect on how it has evolved since it was established.

**Initial Reactions: More Scepticism than Hope**

The announcement of the creation of the Commission and the adoption of the Protection of Human Rights Act, 1993 which contains the provisions on which it is based, was initially received with mixed reviews. While many had an open mind on how the Commission would fare and were prepared to withhold judgement, a significant number – and among them many who were strongly committed to the promotion and protection of human rights – felt that the Statute was fatally flawed, that the Commission would be a “toothless tiger”, that it would function as a “post office” and that, as a “sarkari” body it would, in the final analysis, invariably choose to provide the seal of good-housekeeping to governmental wrong-doing rather than ensure the “better protection of human rights” in the country – which was the avowed intention of the Protection of Human Rights Act, 1993, at least as stated in its “Objects and Reasons”. Some went so far as to argue that the establishment of the Commission would actually setback the “movement” for human rights in the country, as the Commission would distract activists from fighting the real fight for rights, while



offering them instead a placebo, a spurious cure concocted for political and psychological reasons with no real capacity to heal or remedy.

The Commission, therefore, had a great deal of “friendly fire” to deal with and much to disprove to the critics and sceptics alike. But far more importantly, it had much to prove to itself – and to the people of India, many of whom chose to repose their trust in it, the number of those addressing complaints to the Commission increasing exponentially with each passing year. By way of illustration: in the first six months of the Commission’s existence, October 1993 – 31 March 1994, the Commission received 486 complaints seeking its assistance for the redressal of grievances. This number grew to 6,987 in 1994-95; 10,195 in 1995-96; 20,514 in 1996-97; 36,800 in 1997-98; 40,723 in 1998-99; 50,634 in 1999-2000; 71,555 in 2000-01; and a similar number in 2001-2002.

No other national institution in the country, having a statutory basis, has functions of the diversity or order of magnitude of the National Human Rights Commission. No other national institution for human rights in the world has a remotely comparable case-load.

It has required a major effort by the Commission and constant innovation, organization and management to deal responsibly with such a case-load. And dealing with complaints is only one of ten major functions assigned to the Commission under section 12 of the Protection of Human Rights Act, 1993.

Before turning to the manner in which the Commission has set its priorities and evolved functionally and programmatically, it would be useful to comment on the Statute.

#### **“Anatomy is destiny”: A Retrospective Look at the Statute and the Manner in Which the Commission has Construed its Provisions**

Sigmund Freud once famously observed: “Anatomy is destiny” – a pronouncement that posthumously earned him the scorn of those striving for gender equality.

But Freud had a point, at least as far as statutory bodies are concerned. For a National Institution, its anatomy is, in a

sense, contained in the Act that establishes it. The Protection of Human Rights Act, 1993 however, suffered from a dichotomy. Its Statement of Objects and Reasons, which called for the "better protection of human rights and for matters connected therewith or incidental thereto," set a high goal for the Commission. This was, however, off-set by weaknesses in the anatomy of the Act itself, which rendered the fulfilment of that destiny more difficult.

From the very first year of its existence, therefore, the Commission felt constrained to make proposals to have its Act amended, so that its anatomy would help, rather than inhibit, or lend itself to inhibit, the proper fulfilment of its destiny. By its sixth year, the Commission felt that it was essential to request a former Chief Justice of India to head a high-level Advisory Committee to make a comprehensive assessment of the need for structural changes and amendments to the Act. The advice of the Advisory Committee was carefully considered by the Commission in February 2000 and its own proposals regarding amendments to the Act were transmitted to the Central Government in March 2000. Those proposals are annexed in full to the Commission's Annual Report for 1999-2000. It is a matter of some regret to the Commission that, two and a half years later, the proposals are still pending consideration as, in the words of the Government, they are "very sensitive and have far-reaching consequences."

In the meantime and over the years, therefore, it has been necessary for the Commission to build on such strengths as its Statute contains, and to construe the other provisions of the Statute in ways that are most compatible with the high purposes of the Objects and Reasons of the Act. In acting in this manner, the Commission has been guided by a well-established principle relating to the wording of Statutes, namely, that their texts must not lend themselves to interpretations that defeat the very intention of the legislation in question, or lead to unreasonable and untenable consequences.

A retrospective look at the strengths and weakness of the Act, from the experience of nine years, would now be in order.

Unquestionably, the greatest strength of the Statute has been to provide the Commission with the independence,



functional autonomy and broad mandate that are essential to the composition and proper functioning of a National Institution based on the "Principles relating to the status of National Institutions" (the "Paris Principles"). These Principles were originally adopted at the first International Workshop on National Institutions held in Paris in 1991 and later endorsed by the UN Commission on Human Rights in 1992, the World Conference on Human Rights held in Vienna in 1993 and by the UN General Assembly in its resolution 48/134 of 20 December, 1993.

Experience has shown that the independence of the Commission has been well-guaranteed by requirements of the Statute relating to:

- *Its composition:* the Chairperson must have been a Chief Justice of India; one Member must be or have been a Judge of the Supreme Court; one Member must be or have been a Chief Justice of a High Court; and two Members must be from amongst persons having knowledge of, or practical experience in, matters relating to human rights.
- *The method of appointment of the Chairperson and Members:* recommendations are required to be made to the President by a Committee comprising the Prime Minister (as Chairperson), the Speaker of the Lok Sabha, the Minister of Home Affairs, the Leaders of the Opposition in the Lok Sabha and Rajya Sabha and the Deputy Chairman of the Rajya Sabha; this has ensured the senior-most and widest political consideration of the matter; and,
- The clearly specified terms of office of the Chairperson and Members and the stringent provisions governing removal from office.

The strength of the Commission has also been greatly increased by

- The broad range of its functions under the Act, which are amongst the widest conferred on any National Institution in the world - and which have therefore served as a possible model for others to consider. The functions include the capacity to intervene in any proceeding involving any allegation of violation of human rights

pending before a court, with the approval of such court – a provision that has proven to be of exceptional value.

- The Commission's powers relating to inquiries: these have given it all of the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908.
- Its powers of investigation: the Commission has been able to utilize the services of any officer or investigating agency of the Central or any State Government, with the concurrence of that Government; the Commission has also been enabled to summon and enforce the attendance of persons; call for the production of any document; and requisition any public record. In addition, the Commission has been able to utilize the services of its own Investigation Division, which it has used to good effect over the years.
- The broad autonomy of the Commission in respect of all operational and financial matters has also been ensured by the provisions of the Act.

This being said, the past nine years have also increasingly made clear the weaknesses in the Act – i.e., in the “anatomy” of the Commission – that need to be remedied, preferably along the lines of the recommendations already made by the Commission for the amendment of its Statute. Principal among these are:

- The definition of “armed forces” [section 2.1(a)]: the Commission has proposed that the definition should include only the “naval, military and air forces” and exclude the para-military forces;
- The definition of “International Covenants” [section 2.1(f)]: this is at present limited to the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. The Commission has proposed that the wording should be examined to include “and any other Covenant or Convention which has been, or may hereafter be, adopted by the General Assembly of the United Nations.” The Commission has taken the view that such a change would be in keeping with the law of the land, as laid down by the Supreme Court in a landmark judgement, in which it was held:

“Any international convention not inconsistent with the fundamental rights and in harmony with their spirit must be read into these provisions to enlarge the meaning and content thereof..... regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in domestic laws” (*Vishaka v. State of Rajasthan* ((1997) 6 SCC 241).

- The procedures to be followed “with respect to the armed forces” [section 19 and section 19(2) in particular]. The Commission is of the view that the present wording has resulted in instances of a lack of accountability and, indeed, of opacity. Despite this difficulty, the Commission has chosen to construe section 19 in such a way that the principal Objects and Reasons of the Act are served as constructively as possible.

The Commission has thus made clear to the Central Government that the power of the Commission to make “recommendations” under section 19 must mean, as a corollary, that it has the power to do all that is necessary for the proper discharge of this responsibility. In the view of the Commission, the “report” that it seeks from the Central Government under section 19(1) must contain all the facts and occurrences relating to the alleged violation of human rights mentioned in the complaint; it must not merely be confined to the findings and conclusions reached by the Central Government on the basis of facts that are not disclosed to the Commission. The Commission has emphasized that only such a construction of section 19 would promote the “better protection of human rights in the country,” which is the principal object of the Protection of Human Rights Act, 1993 and that such a construction must be preferred since it is in consonance with a settled canon relating to the interpretation of statutes.

- A repetitive problem has arisen because of the delays that have occurred in tabling the Annual Reports of the Commission before Parliament, together with the Memorandum of Action Taken. The delays have not furthered the “better protection” of human rights, or “greater accountability” or “transparency”, two other purposes in the Statement of Objects and Reasons of the Act. The delays have, in fact, amounted to a denial of the

Right to Information of the people of the country. The Commission has, therefore, recommended that section 20(2) of the Act be amended to ensure that the Annual Reports of the Commission are placed before Parliament within a period of three months from the date of their receipt by the Central Government and that where the Report is not laid before Parliament within that period, it would be open to the Commission to publish the Report. In the meantime, the Commission has established a website, on which it posts its major opinions and decisions, together with its monthly newsletter and data relevant to the complaints before it. This ensures that the views of the Commission are disseminated widely, and in a timely manner; it also ensures that the Commission functions with transparency and accountability.

- Experience has shown that section 36 of the Act, dealing with “matters not subject to the jurisdiction of the Commission” has lent itself to efforts to thwart the purposes of the Act. On occasion, this has been done by bringing a matter before a State Human Rights Commission or some other Commission in similar, or slightly modified manner, in order to seek to block the jurisdiction of the National Human Rights Commission. On other occasions, this has been done by setting-up a Commission under the Commission of Inquiries Act, after the National Human Rights Commission has also taken cognisance of a matter, and then questioning the jurisdiction of the National Commission, in a court of law, to proceed with its efforts or monitor a situation. The Commission has therefore proposed that section 36(1) of the Act be amended to provide the National Human Rights Commission with an over-arching ability to oversee issues of human rights violations and their remedies.
- The Commission has observed that disparate Commissions have taken disparate positions on fundamental issues of human rights, including serious social issues such as bonded labour, the rights of women and children, and that this has resulted in a lack of clarity in respect of the jurisprudence of human rights in the country. The

Commission therefore considers it essential that certain powers of judicial superintendence, and powers similar to those under Article 136 of the Constitution, are provided to the National Human Rights Commission in order to prevent the adoption of erroneous positions in respect of violations of human rights, or the taking of actions by a variety of Commissions in ways that are contrary to established principles of human rights law and jurisprudence.

- The Commission also believes, in the light of its experience, that the provisions of section 36(2) need to be modified in the interests of justice where, for any reason, the National Commission or a State Commission is satisfied, for reasons that should be recorded, that there are good and sufficient reasons for taking cognisance of a matter after the expiry of one year.
- The Commission has additionally stated that the present section 37 of the Act should be omitted. Instead, it has proposed the inclusion of a provision similar to Article 139A of the Constitution, so that the National Human Rights Commission may be enabled, in appropriate cases, to establish uniformity in respect of the handling of cases that raise similar issues.

To sum-up, the Commission has taken the view that the language of the Statute must be such as to prevent those who have violated human rights from escaping its net. When there is an attempt at concealment, the Commission should be enabled to pierce the veil of evasion and reach the truth. That, in the view of the Commission, would strengthen the “anatomy” of the Act and the capacity of the Commission to fulfil the high “destiny” which was envisaged for it in the “Objects and Reasons” of the Act.

The experience of nine years has brought to the fore another home-truth. In the final analysis, it is the calibre and integrity of the Chairperson and Members, and their determination to promote and protect human rights with independence and without fear, that determines whether a Commission is viewed as effective and credible, or as neither. Despite the similarity in the strengths and weaknesses of their Statutes, the provisions

for the National Commission, in many important respects, being reproduced *mutatis mutandis* for the State Commissions, there has been wide variation in the performance and credibility of the various Commissions. The “human factor” is thus clearly the “variable”, both in respect of the membership of individual Commissions and in respect of the manner in which the Central/ State Governments cooperate – or fail to cooperate – with them. Over and above the wording of the Act, therefore, experience has shown that there must be a determination to act in good faith to fulfil the Objects and Reasons of the Act, and to do so with conviction and integrity. This, too, is a clear conclusion, in the tenth year of the application of the Protection of Human Rights Act, 1993.

#### **The Seamless Thread: Principal Concerns of the Commission**

A seamless thread connects the principal concerns of the Commission, diverse and varied though these may appear to be. That thread is the thread of human dignity, the defence of which is at the core of the Commission’s vocation and at the heart of the Constitution of our Republic.

For purposes of convenience, the concerns of the Commission can be grouped in three broad categories:

- The handling of individual complaints, of which the Commission has received 306,979 between October 1993 and 31 March 2002.
- The handling of key human rights issues facing the country, whether in respect of civil and political rights; economic, social and cultural rights; or the so-called third generation of rights including group rights.
- Matters relating to systemic reform and good governance, including policy choices, which are central to the “better protection” of human rights in the country and to “matters connected therewith” or “incidental thereto.”

Even while so grouping the Commission’s concerns, it is important to remember that it is the individual complaints that help to identify and illustrate the key human rights issues facing the country and, between them, both the complaints and the broader human rights issues to which they point, help to identify the areas that demand systemic reform, fresh and more “human-



rights friendly” policy choices, and specific measures to ensure “good governance”, on which the “better protection” of human rights and the well-being of the country finally depend.

In the experience of the Commission, there is no conflict between the reforms required for the better protection of human rights and those required to ensure good governance. To argue otherwise is to create a false dichotomy between human rights and good governance and to misread the intrinsic relationship between them. A central purpose of good governance, in the scheme of our Constitution, is to protect the Fundamental Rights contained in Part III, to observe the Directive Principles contained in Part IV, to uphold the laws enacted by Parliament and to fulfil in good faith the treaty obligations entered into by the State.

The systemic reforms and the re-ordering of priorities that the Commission has therefore sought over the years, for instance in respect of police reform, prison reform, and reforms in respect of the administration of criminal justice, have all endeavoured to further the purpose of upholding the Constitution and the laws of the land. This, the Commission has concluded, is a central purpose for which Government itself must exist, a purpose that gives legitimacy to the act of governance, without which the true purpose of the State and the social contract into which the people of India entered when they adopted the Constitution is itself called into question.

Let us now review the principal activities of the Commission in respect of the matters identified above, even while recognizing their inter-related nature and the seamless quality of the thread that binds them together.

#### **The Handling of Complaints**

As indicated earlier, the Commission has received the extraordinary number of 306,975 complaints in the period October 1993 - 31 March 2002, of which 295,072 had been taken up for consideration by the latter date. By any yardstick, this makes the case-load of the Commission exceedingly heavy – and by far heavier than that of any other National Institution for the Promotion and Protection of Human Rights anywhere else in the world.

Of the cases disposed of, some 64% have been dismissed in limini, 30% have been concluded after examining the reports received in response to notices issued by the Commission, and 6% have been disposed of with specific and often detailed directions of the Commission. These directions have included, in numerous instances, the payment of "immediate interim relief" under section 18(3) of the Act to the victims of human rights violations or to their family members; they have also frequently included directions for the institution of departmental proceedings or the prosecution of public servants responsible for the violation of human rights. In various instances, specific measures have been recommended for the remedying of the wrongs committed; in yet other situations, "guidelines" have been issued to regulate the conduct of public servants in respect of the manner in which they must view and handle matters relating, for instance, to "encounter" deaths, arrest and detention, the use of polygraph tests, the videography of post-mortem examinations, etc.

It has been the experience of the Commission, by and large, that its recommendations, directions and "guidelines" have been observed without being challenged, though, on occasions, a review has been sought of the Commission's decisions. In a limited number of instances, however, the authorities or public servants held responsible for the violation of rights have sought to block the jurisdiction of the Commission or challenge its decisions before the Superior Courts of the country or before other Commissions. Till now, while certain important challenges are still pending before the courts, it can be said that the Apex Court and the High Courts have invariably upheld the positions taken by the Commission. This has added great strength to the Commission. It has also underlined the fact that the Commission plays a role complementary to that of the Superior Courts of the country in the defence of human rights and constitutional guarantees, a role that has often been described as symbiotic.

Indeed, in important instances, the Supreme Court has itself remitted to the Commission matters that were before it. Notable among these are the remits from the Supreme Court in respect of the allegations of deaths by starvation in the "KBK" districts of Orissa; the monitoring of programmes to end bonded

and child labour in the country; the handling of allegations relating to the “mass cremation” of persons declared “lâvaris” in certain districts of the Punjab; the proper management of institutions for the mentally challenged in Ranchi, Gwalior and Agra; and of the Protective Home for Women in the latter city.

In one critical case, relating to the fate of members of the Chakma community in Arunchal Pradesh, the Commission itself approached the Supreme Court, which acted with great swiftness to protect this group, laying down, in the process, the obligations of the State in this matter under Article 21 of the Constitution and the relevant international instruments relating to the status of refugees.

It is important here to mention that the complaints received by the Commission have come from all segments of society and from all parts of country, including those affected by terrorism and insurgency. In that respect, the Commission has played a therapeutic role, holding out the hope of justice and fair-play even to the most deprived and alienated.

Nor has the role of the Commission remained reactive. Almost daily, the Commission has acted *suo motu* to intervene in instances when, on the face of it, human rights appear to have been violated. Numerous such cases, many of great significance, can be listed throughout the past nine years of the Commission’s existence, starting with the Bijbehara incident in Jammu and Kashmir in November 1993 when civilian lives were lost in a firing ordered by a para-military force, to the tragic developments in Gujarat earlier this year, starting with the events in Godhra on 27 February 2002 and persisting in the period that followed.

As the Commission is, in important respects, an institution of good governance, and a catalyst to such governance, its own house must be maintained in good order.

In terms of the prodigious number of complaints before it, the Commission has, therefore, constantly worked to improve its own handling of this caseload. As early as 1997-98, a pro-bono management study was undertaken to examine how best to do so and a number of significant steps were set in motion to ensure better management and productivity. These have stood

the Commission in good stead over the years and have been continuously reviewed and refined in the light of the Commission's needs. The measures included:

- computerization of the entire caseload;
- issuance of "practice directions" on a wide variety of matters;
- "fast-tracking" of certain categories of complaints;
- "clubbing" together of similar complaints for procedural purposes;
- appointment of "special rapporteurs" and "special representatives" of exceptional calibre and experience to assist the Commission;
- establishment of "Human Rights Cells," with the cooperation of the State Governments, in the Offices of the Directors-General of Police;
- establishment of Core Groups of experts on selected subjects, the membership of which was drawn from among the most eminent persons dealing with those subjects; and,
- specialized training for the staff of the Commission and of others, including NGO representatives, associated with the work of the Commission.

The Commission cannot say that it is satisfied with its handling of the complaints before it. In spite of the considerable efforts made, delays can and do occur at various stages of the processing of complaints, in the initial screening of complaints, in the receipt of reports from the competent authorities, in the passing of final directives and in ensuring compliance. But these are matters that must be worked on continuously. It would certainly help if Human Rights Commissions of true calibre were created, and then appropriately supported in all the States, but only 12 State-level Commissions exist at present and one, that was established earlier, has actually been wound-up. It has been encouraging to note, however, that after many years of hesitation, Uttar Pradesh has now established a Commission. As by far the largest number of complaints received by the National Commission have, thus far, come from that State, the creation of the Uttar Pradesh State Human Rights Commission should simultaneously ease the burden on the National

Commission and bring the apparatus for redressal of grievances closer to the complainants. It would also help with the better protection of human rights if the Human Rights Courts envisaged under section 30 of the Act were indeed set-up along the lines foreseen, and if matters relating to their competence and jurisdiction were properly and definitively clarified.

### **The Handling of Key Human Rights Issues, Systemic Reform and Good Governance**

The key human rights issues requiring the attention of the Commission were, in a sense, self-evident from the beginning. They became apparent from the nature of the complaints addressed to the Commission and the realities of our country. Looking back over the past nine years, it is interesting to see that the “core” issues identified by the Commission in its very first Annual Report have persisted over the years. But no less, it is interesting to see how – at different stages over the years and in the face of challenges that arose – the Commission’s understanding of those issues widened and deepened and how concerns were added to the “core” agenda of the Commission because human rights – as the experience of the Commission confirmed – are indivisible, inter-related and inter-dependent and because, in the final analysis, the defence of human dignity must be comprehensive if it is to be worthwhile.

Let us now trace this evolution, using the successive Annual Reports of the Commission to assist in the process.

### **Protection of Human Rights Despite Terrorism and Insurgency**

The painful issue of how to protect human rights in a time of terrorism and insurgency confronted the Commission within days of its establishment with the tragic death of civilians in Bijbehara, in the State of Jammu & Kashmir, in the course of a firing by a para-military force. The Commission took suo-motu cognisance of the incident and, after examining the reports for which it had asked, concluded that excessive force had been used. It accordingly called for appropriate action against those responsible, sought a thorough review of operating procedures, improvement in the training of para-military personnel, and immediate interim relief for the next-of-kin of the deceased and those who had been wounded.

At the same time, however, the Commission began to focus on the grave challenge that terrorism posed to human rights and the principles that should guide the country in dealing with this menace. The Commission also commenced an in-depth examination of the actual working and consequences of the Terrorist & Disruptive Activities (Prevention) Act, 1987 (TADA) and its effect on human rights. This examination culminated in a detailed letter dated 20 February 1995 from the then Chairperson of the Commission to all Members of Parliament, urging that TADA not be renewed when its life expired on 23 May 1995, on the grounds that it was “incompatible with our cultural traditions, legal history and treaty obligations.”

The problem of terrorism has, however, persisted, taking a grim toll in life and property. The Commission is convinced that the battle against terrorism must be fought boldly and won, for terrorism negates the most fundamental right of all – the right to life itself. After reflecting deeply on this matter, the Commission has, over the years, developed a consistent position on this issue, one that has been elaborated in greatest detail in the Opinions that it wrote on 14 July 2000 and 19 November 2001 in respect of the Draft Prevention of Terrorism Bill, 2000, and the subsequent Prevention of Terrorism Ordinance, 2001, both of which it opposed. The Commission stated, in essence, that the Constitution of our country had, as its core values, both the defence of national integrity and of individual dignity; these were not incompatible as objectives, but entirely consistent with each other; that there was a need to balance the two; and that any law or measures devised to combat terrorism had to be in harmony with the Constitution, the international treaties to which India was a party, and respectful of the principles of necessity and proportionality.

The Commission has also remained deeply involved in the effort to protect the rights of those who have been the victims of terrorism or insurgency. It has, since 1995-96, been seized of the problems facing some 300,000 Kashmiri Pundits who have been compelled to leave the Valley and it has made a series of recommendations to assist them in practical ways. It has, also, continuously monitored the situation in the North-Eastern States and in areas affected by “naxalite” activity, making observations and recommendations as the need arose.

### **Custodial Violence, "Encounters," Torture**

These issues too formed part of the "core" concerns of the Commission from its earliest days, but with each succeeding year the Commission has deepened and widened its analysis and directives in regard to such matters. As early as 14 December 1993, the Commission instructed all Chief Secretaries to ensure that all cases of custodial death and rape be reported to it within twenty-four hours of occurrence, failing which an adverse inference would be drawn by the Commission. Thereafter, on 10 August 1995, the Commission went a step further, Chief Ministers were requested to ensure that all post-mortem examinations of deaths in custody be videographed. On 27 March 1997, Chief Ministers were additionally requested to adopt a Model Autopsy Form, prepared by the Commission, and to use for this purpose. In all, over 5,500 cases of custodial death have been reported to the Commission since it was established. These cases have been meticulously reviewed in the Commission, with the help of its Investigation Division, and appropriate orders passed in respect of them.

The issue of "encounters" was the subject of detailed hearings by the Commission in 1996-97, comprehensive guidelines being sent to Chief Ministers on 27 March 1997 in respect of the manner in which such "encounters" should be investigated and reported upon. Guidelines were also issued in respect of certain other practices having a bearing on human rights. For instance, on 11 January 2000, guidelines were issued in regard to the use of polygraph tests, and on 22 November 2000, Chief Ministers were sent a letter providing detailed guidelines on the subject of arrest and detention.

As there was an implied challenge in the courts to the competence of the Commission to issue guidelines, the Commission commented on this matter in its Annual Report for 1999-2000. It then stated: "The recommendations, opinions, directives and guidelines must be seen in the deeper context of the objective for which it (the Commission) was established, which was to ensure the "better protection" of human rights in the country. The positions that the Commission has taken, the views it has expressed, and the guidelines it has issued have all had the central purpose of ensuring that the authorities of the

State, and all public servants, act more effectively to “better protect” constitutional guarantees and international human rights norms, as interpreted by the judgements of the Supreme Court of the country.”

The need for India to accede to the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was first raised by the Commission in 1994-95. As there was little progress in that direction, the Commission persisted in its effort to secure this objective in successive years, presenting a detailed memorandum to the Prime Minister on this subject in April 1997. This contributed to India signing the Convention on 14 October 1997. However, the ratification of the Convention is still required, a matter which remains a high priority of the Commission.

#### **Police, Prisons and the Administration of Criminal Justice**

The complaints addressed to the Commission have pointed to a stark conclusion: the three pillars of the criminal justice system – the police, the prisons, and the administration of criminal justice – all need substantial systemic reforms if the human rights of the people of India are to be “better protected” and if good governance is to have any real meaning. Indeed, in an important sense, the creation of an enabling environment for the proper defence of human rights is indistinguishable from the requirements of good governance.

The issue of police reform was first raised by the Commission in 1995-96 when it soon became apparent that the handling of individual complaints, important as it was, would not provide a lasting cure for human rights violations because the supposed protectors of rights were often themselves the predators. A more radical cure was required. The Commission therefore felt compelled to draw attention to the failure to implement key recommendations contained in Second Report of the Police Reforms Commission which dated back to 1979 and dealt, inter alia, with the need to insulate the investigative work of the police from political and other “extraneous” influences. In the succeeding year, the Commission made detailed submissions to the Supreme Court on this matter in the case *Prakash Singh v. Union of India*. The Court, thereafter,



received the views of the Ribeiro Committee which was set-up by the Ministry of Home Affairs, and the views of the Padmanabhaiah Committee - also set up by that Ministry - became available thereafter. The needed reforms, however, remain elusive and the country has continued to pay an unconscionable price as a result. Indeed, the Commission has recently been constrained to revert to this matter in a different context: its Proceedings of 1 April and 31 May 2002 in respect of the situation in Gujarat deal at some length with the imperative need to proceed expeditiously with police reform and the grave consequences that can and have resulted - in more than one State - from a failure to act on this subject.

The need to re-write the Indian Prisons Act, 1894 was initially raised by the Commission in 1994-95 and has been pursued ever since, progress to alter their Acts and Manuals along contemporary lines having recently been made in certain States. In addition, the Commission has made continuous efforts to address issues such as over-crowding in jails, the lack of sanitation, delays in trial, the health of prisoners, the payment of wages, the remission of sentences and the release of prisoners sentenced to life imprisonment.

As to the administration of criminal justice, substantive proposals were first made by the Commission in 1996-97 and elaborated in succeeding years. It is greatly to be hoped that the Committee since appointed by the Union Government under the Chairmanship of a former Member of the Commission, will propel this matter forward in a comprehensive manner.

**The Three "Unfreedoms" - Hunger, Illiteracy, Early Death: Striving for Economic and Social Rights**

In his remarkable study "Development as Freedom," Professor Amartya Sen observed that the achievements of democracy depend not only on electoral politics and the rules of procedure that are adopted and safeguarded, but also on the ways in which the opportunities that democracy opens are used. In particular, Professor Sen wrote of the need to remove the major sources of "unfreedom" that afflict a society - the condition characterized by the denial of elementary freedoms to vast numbers of persons - if democracy is to have true meaning and content.

Transposed to the lexicon of human rights, this has meant to the Commission, over the years, the need to ensure freedom from hunger, illiteracy and early death.

The International Covenant on Economic, Social and Cultural Rights, to which India is a State party, specifically recognizes the “fundamental right of everyone to be free from hunger” and the right of everyone to “adequate food;” it also recognizes the “right of everyone to education” and asserts that “primary education shall be compulsory and available free to all;” it further recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The Commission has construed these requirements to mean that the State has the obligation to ensure that these rights are respected. It has taken the view that, in the Indian context, the provisions of Article 21 of the Constitution have been judicially interpreted to expand the meaning and scope of the right to life to include these rights and to make the latter guaranteed fundamental rights which are enforceable by virtue of the remedy provided under Article 32 of the Constitution.

For the Commission it has thus been important to link the issues of adequate food, education and health to that of human rights. It has been the view of the Commission that, when linked together, more can be done to advance human well-being than when food, education and health, on the one hand, and human rights, on the other, are considered in isolation. By setting these issues, additionally, in the context of combating the “unfreedoms” that thwart the promise of democracy, the Commission has made the fulfilment of these rights a further measure of the quality of governance both at the Centre and in the States.

It is in this light that the work of the Commission in respect of economic and social rights should be seen and, particularly, in respect of:

- Its monitoring, since 1997, of the situation in the “KBK” districts of Orissa and the manner in which it has handled recurrent allegations of death by starvation both in that State and elsewhere in the country;
- Its insistence, since 1994, on the right to free and

compulsory education, not least as a means of ending child labour;

- Its emphasis, in a Workshop organized in April 2000, on the need to end iron and iodine deficiency and maternal anaemia, which were adversely affecting the right to health of women, and the mental and physical health of the unborn and infant child;
- Its holding of a major Regional Consultation on Public Health and Human Rights in April 2001, dealing inter alia with access to health care, tobacco control and nutrition;
- Its holding of a National Consultation on HIV/AIDS and Human Rights in November 2001.

On each of these matters, the recommendations of the Commission have been pursued with Government at the highest level.

#### **The Rights of Women and Children**

The Commission's efforts to protect and promote the rights of women and children evolved in a variety of inter-connected ways over the past nine years. Thus:

- Issues relating to discrimination against women and children and gender-related violence were touched upon in the Annual Report for 1993-94.
- In the next year, the Commission concentrated on the need for the provision of free and compulsory primary education upto the age of 14 years and amendments to the Child Labour (Prohibition & Regulation) Act, 1976 as being essential to the ending of child labour in the country. This position was reiterated in succeeding years.
- The violation of the rights of women and children was next considered from the angle of health. The issue of maternal anaemia was first identified as a human rights issue in 1996-97. Thereafter, in 2000, as indicated earlier, came the workshops and consultations on Public Health and Human Rights, and Human Rights and HIV/AIDS, both of which had direct relevance to the rights of women and children.
- In 1997-98, the Commission began its efforts to amend the Child Marriage Restraint Act 1929, a matter on which it

submitted detailed proposals to Government in the year 2000-2001.

- In 1998-99, the Commission recommended the prohibiting of employment of children below the age of 14 years by Government servants, a matter on which appropriate orders were subsequently issued by the Central and a number of State Governments.
- The issue of “discrimination” as a cause of human rights violations was examined in great detail in the Commission’s Annual Report for 1999-2000, especially in relation to gender and caste-based discrimination. A series of recommendations were made on these issues, the performance of the country being measured against the Fundamental Rights and Directive Principles enshrined in the Constitution, the international instruments to which India was a State Party, the decisions of the Supreme Court (notably in *Vishaka and Others v. State of Rajasthan*), and the laws of the land. For the first time, the Commission examined the proceedings and recommendations of certain Treaty Bodies before which India had presented its country reports and made its own recommendations concerning the steps that Government should take. Specifically, the Commission commented on matters relating to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and discrimination affecting dalits, an issue which had been considered by the Treaty Body constituted under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In so doing, the Commission also dealt with the issue of “multiple” forms of discrimination experienced by women, children and dalits.
- The succeeding Annual Report, covering the year 2000-2001, analysed the Human Rights dimensions of “Census 2001,” commenting on the male:female sex ratio in the country at large, and in certain States in particular where the ratio of females was especially low. The Commission called for policies, programmes and laws to reduce the disparities that continued to exist between males and

females in respect of access to education, nutrition and health care. It also called for a concerted effort to end the misuse of sex-determination tests which had encouraged the evil practice of female foeticide, a gross violation of the right to life and the worst possible form of discrimination based on sex.

- During the year 2000-2001, the Commission appointed one of its members to serve as its Focal Point on the Human Rights of Women, including matters relating to Trafficking, and a series of research and practical programmes were initiated thereafter.
- The issue of Sexual Harassment at the Workplace also began to receive the concentrated attention of the Commission.
- A number of other programmes and issues relating to women were pursued including, inter alia, the increase in the maintenance allowance for divorced women as provided for in section 125 CrPC; the protection of the anonymity of victims of rape; the condition of widows in Vrindavan; the nomenclature to be used in official documents for addressing the wives of persons who have died; the establishment of a cell within the Commission to examine complaints received from women.
- As regards child labour, throughout the past nine years, the Commission has sought to end the employment of children in hazardous industries. In particular, programmes have been pursued in the carpet belt of Uttar Pradesh, in the glass and bangle industries of Ferozabad and the lock industry of Aligarh. Of special importance has been the rigorous monitoring undertaken by Special Rapporteurs of the Commission, both in respect of child labour and bonded labour in a number of key States around the country. A constant leitmotif of the Commission has been its insistence on the provision of free and compulsory education for children up to the age of 14 years, and the allocation of an appropriate level of resources to achieve this objective.

From this catalogue of actions, it will be seen that the Commission has approached the rights of women and children

in a variety of ways: legal, social, cultural, through the route of the right to health and the right to education. At all times, it has sought to break down the discriminations, often multiple, that have affected women and children. And with each succeeding year, the efforts of the Commission have grown in range and complexity – as the proper protection of these rights demanded.

**The issue of “Inclusiveness”: Rights of the Marginalized and Vulnerable Sections of Society**

Just as the seamless thread of “human dignity” connects all rights making them indivisible, so does the protection of those rights rest on the pillars of equality under the law and the prohibition of discrimination, inter alia on grounds of religion, race, caste, sex or place of birth.

For the Commission, the struggle for such equality and non-discrimination has taken the additional dimension of striving for a polity that is truly democratic and “inclusive” in character. As with other concepts that have been central to the Commission’s beliefs over the past nine years, so in respect of these matters, there has been an evolution in the manner in which the Commission has articulated its views and given practical expression to them in its programmes and actions. Here again, the inter-locking themes of human rights and dignity have had, as their necessary accompaniment, the themes of human development and good governance.

Let us turn once again to the Annual Reports of the Commission to examine this evolution further:

- From its earliest years, the Commission took note of the “ancient societal wrongs” that made some Indians less equal than others and the tenacity of long-standing attitudes that – based ostensibly on religion or custom – were inimical to a proper respect for the rights of all the people of the country. The Commission made it its mission to combat the prejudices that had resulted in the persistence of such a situation, despite the demands of the Constitution and a variety of laws.
- Rights of Dalits and Adivasis: The Commission has paid most careful attention to the complaints that it received from Dalits and Adivasis alleging acts of discrimination,

“untouchability”, violence against the human person, atrocities of various kinds, and high-handedness by public servants and others.

- It sought, in particular, to bring to an end two pernicious and demeaning practices which affected members of the Scheduled Castes and Scheduled Tribes in large measure: manual scavenging and bonded labour. The former issue was first taken up by the Commission in 1996-97. In recent years, it has been the matter of successive communications at the highest level from the Chairperson of the Commission to the Prime Minister of India and the Chief Ministers of States. The latter subject, the eradication of bonded labour, as mentioned earlier, has been a “core” concern of the Commission from its very first year; in addition, it is a responsibility especially entrusted to it through a 1998 remit of the Supreme Court.
- The views of the Commission in respect of discrimination based on “race”, “caste” and “descent” were crystallized and most authoritatively enunciated in the statement that was made on its behalf at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban between 31 August-8 September 2001. The Commission expressed the opinion that “the exchange of views on human rights matters, whether at the national, regional or international level, can all contribute constructively to the promotion and protection of such rights.” It added that it was not the “nomenclature” of the form of discrimination that must engage our attention, but the fact of its persistence. The Commission observed that the Constitution of India, in Article 15, expressly prohibits discrimination on grounds both of “race” and “caste” and that constitutional guarantee had to be vigorously implemented. The Commission held the view that the instruments of governance in the country, and the energetic and committed non-governmental sector of society that existed, could unitedly triumph over historical injustices that had hurt the weakest sections of our country, particularly Dalits and Adivasis. The Commission concluded that this was, above all, a national

responsibility and a moral imperative that can and must be honoured.

- Subsequent to the Durban Conference, the Commission set in train a number of measures to ensure appropriate follow-up to the decisions taken in respect of the issues discussed at that Conference.
- Rights of Persons displaced by Mega Projects: this has concerned the Commission continuously since 1996-97 when the plight of those dispossessed by the Bargi dam first came before the Commission. In the light of that situation, and other comparable situations, the Commission in 2000-2001 spelt out the need for a revised national policy to deal with greater sensitivity with this issue. Specifically, the Commission has urged that the resettlement and rehabilitation of persons displaced through the acquisition of land for such projects should be part of the provisions of the Land Acquisition Act itself, or be the subject of appropriate separate legislation, so that they are justiciable. The views of the Commission have been transmitted to the Cabinet.
- Rights of the Disabled: the Commission urged the adoption and proper implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In 2000-2001, however, it considered it appropriate and necessary to propose a number of detailed amendments to that Act. The Commission also intervened in numerous instances to assist individuals experiencing harassment, intolerance or discrimination on grounds of disabilities. In a notable case concluded in 2002 after a number of hearings, a medical student, who had lost his eyesight while still studying for an MBBS degree at the All India Institute of Medical Sciences (AIIMS), was enabled to complete his studies and take his final examination. A Core Group on Disability was appointed in 2001-2002, as also a Special Rapporteur to assist the Commission in the better fulfilment of its responsibilities.
- Rights of the Elderly: while, over the years, the Commission often acted upon complaints received from



the elderly, its involvement in respect of this issue increased substantially in 2000 when it participated in the work of the National Council for Older Persons and commented on the Action Plan (2000-2005) prepared by the competent Ministry. From that year onward, the Commission has been in close touch with groups involved with the rights of older persons and has been transmitting suggestions to the Union Government as and when necessary.

- **The Rights of Denotified and Nomadic Tribes:** the Commission has, over the years, been seized of numerous complaints alleging harassment and brutality in the treatment accorded to members of the “denotified and nomadic tribes” by public servants, especially the police. A number of recommendations have been made by the Commission in this respect and efforts are also being made through training institutes, to reorient the thinking of public servants in regards to problems faced by members of this group.
- **Rights of Minorities:** the most critical test of the “inclusiveness” of a society is the manner in which it protects the rights of its minorities. For the Commission, the Constitution, the laws of the land and the treaty obligations of the State have been the constant measure by which it has judged the conduct of those against whom allegations have been brought of the violation of the rights of members of minority communities of the country. In addition to handling numerous individual complaints containing allegations of discrimination or victimization, the Commission has accorded the highest priority to reminding public servants throughout the country – and particularly in States from which such complaints have come in large measure – that they must uphold the Constitution and laws of the land or face the censure of the Commission if they fail to discharge their solemn responsibilities in this respect. The issue has therefore featured prominently in meetings that the Commission has called of Chief Secretaries and Director-Generals of Police and in visits undertaken by the Chairperson and others of the Commission to the States. On occasions, the

Commission has also added the weight of its own opinion to issues that have been taken up by the National Commission for Minorities and on which the latter has sought its support.

- Rights of Persons affected by Natural Disasters: there was a quantum leap in the Commission's construction of its responsibility to promote and protect economic and social rights when it chose to take suo motu cognisance of the situation arising from the devastating cyclone that struck Orissa in October 1999. The Commission considered it essential to intervene in order to ensure that the rights of the affected population – particularly the most vulnerable – were properly protected and that the most disadvantaged did not become the least assisted in the wake of the catastrophe. In a pioneering move to extend the perimeter of human rights and to ensure good governance, the Commission immediately asked its Secretary-General and Special Rapporteur to visit the devastated areas and it continued thereafter to monitor the relief and rehabilitation measures being undertaken. The intervention of the Commission, its periodic reports and recommendations were well-received by the State Government which was consistently responsive to the criticisms and recommendations of the Commission. The positive consequences of the Commission's intervention in Orissa, set the precedent for similar action by the Commission in the aftermath of the catastrophic earthquake that devastated large areas of Gujarat in January 2001. Here again, the focus of the Commission on issues of good governance and on the needs of the most vulnerable sections of society helped ensure that an appropriate perspective – imbued with human rights values – was maintained in dispensing assistance to the affected population.

#### **Review of Legislations and Treaties**

The Commission has taken seriously the responsibility entrusted to it under its Statute to review the safeguards provided by or under the Constitution or any law that could have a bearing on the protection of human rights. In the course

of the years, starting with its views on TADA, the Commission has commented on some twenty Acts, Bills or Ordinances having human rights implications. These have related, *inter alia*, to anti-terrorism legislation, the special powers of the armed forces, certain provisions of the Indian Penal Code and the Criminal Procedure Code, the Police and Prisons Acts, the rights of women and children, bonded labour, the rights of Dalits and Adivasis, issues relating to health and education, refugees, and the right to information.

The *Vishaka* judgement of the Supreme Court, referred to earlier in this article, has greatly strengthened the hand of the Commission in fulfilling its statutory responsibility to study treaties and other international instruments on human rights and to make recommendations to ensure that they are effectively implemented. In a number of instances, notably in respect of torture, the rights of women and children, and refugees, the Commission has taken the initiative to call for an examination of the existing position and the taking of specific steps that would ensure the better protection of human rights.

#### **Human Rights Education and the “Multiplier Effect” of Core Groups**

All the work of the Commission since its earliest days has, in a sense, aimed at creating a “culture of human rights” in the country. In the course of the past nine years, however, the Commission has specifically taken a number of steps to further human rights education. These steps have, *inter alia*, included:

- Working with the Ministry of Human Resource Development, the National Council for Educational Research and Training (NCERT) and the National Council for Teacher Education (NCTE) to prepare materials for education at all levels of schooling;
- Working with the University Grants Commission (UGC) for the development of courses at the university level;
- Endowing a chair for Human Rights at the National Law School of India University in Bangalore;
- Encouraging courses on human rights in the training institutes for public servants, the police, para-military forces and army;

- Producing a handbook for judicial officers;
- Interacting with diverse groups, ranging from medical practitioners to Rotarians and the leadership of political parties, urging them to keep human rights issues on their respective agenda.
- Encouraging and supporting the efforts of non-governmental organizations, as their role is of central importance to the better protection of human rights in the country.

Critical to the out-reach of the Commission has been the extraordinary manner in which persons of the highest talent and repute have unhesitatingly rallied to the cause of human rights. In the work of the Commission, this has most readily been manifested in the membership of the “Core Groups” that the Commission has variously established of experts on health, on disability related issues, for coordination and cooperation with non-governmental organizations, and of lawyers. Together with the Special Rapporteurs and Special Representatives appointed by the Commission, they have truly provided a “multiplier effect” to the efforts of the Commission, giving to it a vast infusion of high ability and public support.

### **Gujarat**

No account of the Commission’s principal preoccupations can be complete without a comment on the human rights situation in Gujarat, beginning with the tragedy that occurred in Godhra on 27 February 2002 and continuing with the violence that ensued subsequently.

The views of the Commission are recounted in detail in its Proceedings of 1 & 6 March 2002, 1 April 2002, 31 May 2002 and 1 July 2002, all of which may be seen on the Commission’s website ([www.nhrc.nic.in](http://www.nhrc.nic.in)).

In those Proceedings, the Commission concluded that, in its opinion, there could be no doubt that there had been a comprehensive failure on the part of the State Government to control the persistent violation of the rights relating to life, liberty, equality and dignity of the people of Gujarat. By early July 2002, the Commission noted there had been a decline in

violence in recent weeks and that certain positive developments had taken place. However, while recognizing that it was essential to heal the wounds and look to a future of peace and harmony, the Commission emphasized that the pursuit of these high ideals must be based on justice and the upholding of the values of the Constitution and the laws of the land. The Commission remained deeply disturbed, in this connection, by persisting press reports stating that charge-sheets filed in respect of certain grave incidents lacked credibility in as much as they were reported to depict the victims of violence as the provocateurs; that FIRs were neither promptly nor accurately recorded in respect of atrocities against women, including acts of rape; that compensation for damaged property was often set at unreasonably low amounts; that pressure was being put on some of the victims to the effect that they could return to their homes only if they dropped or altered the cases they had lodged; while yet others had been pressured to leave the relief camps even though they had been unwilling to do so in the absence of viable alternatives.

As the Commission continues to be seized of this matter, it would be improper to comment further on this subject in the present article. Suffice it to recall at this stage, that the tragic events that occurred in Gujarat had serious implications for the country as a whole, affecting both its sense of self-esteem and the esteem in which it is held in the comity of nations. In the view of the Commission, grave questions arose of fidelity to the Constitution and to treaty obligations. There were obvious implications in respect of the protection of civil and political rights, as well as of economic, social and cultural rights. But most of all, in the view of the Commission, the events raised serious questions regarding the violation of the Fundamental Rights to life, liberty, equality and dignity of citizens of India as guaranteed in the Constitution.

The Commission has observed that it is its statutory obligation to uphold the Fundamental Rights guaranteed in the Constitution and the treaties to which India is a State party. It is therefore also a duty of the Commission to contribute to the jurisprudence on human rights in a manner that is consistent

with that role. In respect of the situation in Gujarat, therefore, the Commission held that:

“ ..... it is the primary responsibility of the State to protect the right to life, liberty, equality and dignity of all those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence.”

The Commission added that:

“ ..... it is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.”

### **Conclusion**

The work for human rights requires stamina and a long vision and those who strive for the promotion and protection of such rights can never be satisfied with their endeavours. Commenting on its work a year after it was established, the Commission observed:

“The Commission cannot begin to assert that its efforts have transformed the human rights ethos in the country or that it has as yet adequately developed a capacity to defend the least powerful of the citizens of India. But it can assert that its efforts have begun to strengthen the hands of the just and the compassionate, of whom there are legion in this country, in all States and in all walks of life”

That statement remains substantially true today: there is still a long way to go.

But much has also been achieved. For the Commission, the defence of human rights has become the defence of democracy itself, a democracy that is inclusive in character and caring in respect of its most vulnerable citizens. That democracy, in turn, has enabled the Commission to function without fear or hesitation and to draw attention to those acts of the State and its agents that can or do result in the violation of human rights – whether through acts of commission, omission, abetment or negligence.

In the past nine years, in the fulfilment of its duties the Commission has frequently had to take positions at variance

with those of the Central and State Governments even on matters of great sensitivity to the country. It is a tribute to the strength and resilience of the Indian polity that the Commission has never lacked the democratic space in which to function or to express its views as it thought fit and appropriate. Those views have been listened to with respect, even if not always with agreement. But at all times the dialogue for the better protection of human rights has been sustained, involving all elements of the State and civil society.

In the process, the Commission has evolved from a body whose establishment was initially viewed with unconcealed scepticism, to an instrument of good governance, on which increasing reliance is being placed by the citizens of India to ensure the defence of their rights and the verities of the Constitution of their Republic.

## ***Domestic Violence and the Law***

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Indira Jaising

**A**ccording to the myth of the family as a sanctuary of tranquillity and harmony, domestic violence is a veritable incongruity, a contradiction in terms. Violence shatters the peaceful image of the home, the safety that kinship provides. Nonetheless, the insidious nature of domestic violence has been documented across nations and cultures worldwide. It is a universal phenomenon. Domestic violence is violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law. Despite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women<sup>1</sup>. It may be defined in accordance with the United Nations Declaration on the Elimination of Violence Against Women, 1993 as encompassing, but not being limited to

“physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.”

### **Domestic Violence as a Violation of Human Rights**

State policies, as manifested by its action or inaction, may perpetuate/condone violence; although, in the modern world it is the duty of the State to ensure that men do not commit crimes with impunity. In the case of intimate violence, male supremacy, ideology and conditions; rather than a distinct, consciously coordinated military establishment; confer upon men the sense of entitlement, if not the duty, to chastise their wives. Wife-beating is, therefore, not an individual, isolated, or aberrant act, but a social license, a duty or sign of masculinity,



deeply ingrained in culture, widely practised, denied and completely or largely immune from legal sanction<sup>2</sup>. Where State through its inaction fails to prevent violence within homes and fails to effectively address murders, rapes and assault of women in intimate relations and punish those who are responsible for the same, the message that is sent is that such acts of violence will not be punished and are in a sense justified/acceptable. It is, therefore, argued that the role of State inaction in the perpetuation of the violence combined with the gender-specific nature of domestic violence require that domestic violence be classified and treated as a human rights concern rather than as a mere domestic criminal justice concern.

#### **Existing Laws in India**

Domestic Violence in India is not an unknown phenomenon, though the State has been very reluctant to accept the same. It was only recently, in 1983 and 1986 that through the two Criminal Amendment Acts, the criminal law was amended to include some forms of violence within the home and make them punishable. Section 498A was inserted in the Indian Penal Code punishing husband and his relatives for perpetrating cruelty upon the wives. Cruelty was defined broadly enough to encompass physical as well as mental cruelty. However, initially the police refused to register cases under this provision unless there were allegations of dowry demand and it was after much struggle that women are now able to get the same registered, even if there is no demand of dowry. However, its linkage with the dowry has considerably reduced its efficacy for women.

The 1986 amendment added a provision in the IPC categorising and penalising dowry deaths separately under Section 304B. Under the law, where an unnatural death of a woman happens within seven years of her marriage and it is shown that she was harassed soon before her death for or in connection with dowry by her husband or his relatives, the accused would be deemed to have caused her death. The offence is punishable with a minimum of seven years and a maximum of life imprisonment. So far as this provision is concerned there have been many positive judgements. Most of the acquittals

however, are based on the fact that the acts of cruelty or harassment in connection with dowry were not committed “soon before her death”. The interpretation of the expression “soon before her death” wavers from judge to judge depending on their individual sensitivity.

### **Problems**

The law has been very unhelpful when the domestic violence is not linked to dowry. Further, the law addresses only the daughter-in-laws and the situation of daughters, sisters and old mothers within the family and the domestic violence faced by them has not been addressed. With the passage of time, the women’s movement started agitating for a civil law on domestic violence as it was felt that criminalisation was not the answer to the problems faced by the women in their homes. Sending the husband to the jail might not solve any of her problems, ranging from maintenance to a shelter to stay with her children. Further, given the delay in the criminal justice system, the cases are usually not followed by women who do not have access to enough resources to follow both her matrimonial and the criminal case.

The Lawyers Collective, an NGO working in the field of human rights, drafted a model law on domestic violence in 1992, which was widely circulated. In 1994, the National Commission for Women set up a Committee to look at this law. It then drafted a proposed law to safeguard women from domestic violence. Thereafter in 1998, the Lawyers Collective, drafted the Domestic Violence to Women (Prevention) Bill in consultation with various women’s groups. This Bill was drafted in accordance with the UN Framework for Model Legislation on Domestic Violence and had the broad support of the women’s movement for its major provisions. After much pressure from the women’s groups, the Government of India introduced a Bill on domestic violence in the Lok Sabha, (Bill No 133 of 2001), titled The Protection From Domestic Violence Bill 2001. This Bill invited sharp criticism from the women’s movement. Activists feel that this Bill, if passed and implemented, might turn out to be very dangerous in its implications for women facing domestic violence.

### **The GOI Bill on Domestic Violence**

There are many problems that have been identified in the definition of domestic violence itself as proposed by the GOI Bill. Firstly it defines domestic violence as a conduct whereby the abuser “habitually assaults” the person aggrieved or makes her life ‘miserable’ by his conduct. Why does the assault need to be “habitual” for it to amount to domestic violence? What does one mean by making the life of a person ‘miserable’, which is a highly subjective term and does not help the judge at all in deciding whether a said conduct amounts to domestic violence or not? Why then has the government chosen a definition, which hides rather than reveals the true dimensions of violence against women? The answer given is that all forms of violence will be covered by the expression in Section 4(1) (c) of the GOI Bill “*Otherwise injures or harms the aggrieved person*”. That leaves everything to the imagination of the judge and to his/her individual perception of what is violence and what is not. The purpose of a law is to provide the framework of guidelines within which judges are to make decisions. There are certain acts, which must be considered acts of domestic violence and it is for the law to lay down what those acts are. This is how all laws are framed. Residuary clauses are meant to cover unforeseen acts of domestic violence, which fall into a pattern similar to the one defined.

The proposed law fails to define domestic violence and washes itself off the responsibility of defining it and leaves it to judges to decide. This leaves too much to the mercy of the judge and too little to rights of the person aggrieved.

Section 4(2) suggests that a plea of “*self defence*” will be available to a man when faced with a complaint of domestic violence. This is a ploy to undo the main provision as a man can always say that he was trying to get out of a scuffle, a fight between himself and his wife or between his wife and his mother and caused the injury complained of, not intentionally, but, in order to protect himself. This provision must be dropped if the woman is intended to be protected from violence.

### **Person Aggrieved**

After the definition of domestic violence, the next important thing that a law on domestic violence needs to address

is who are the persons who can avail the benefit of this law. The GOI Bill allows only a woman who is related to the Respondent by blood, marriage or adoption to take recourse to the reliefs under the proposed law. This means that sisters, daughters and mothers will be in a position to file a complaint against the abuser. However, it is debatable whether a woman who has been led to believe that she is married to a man but is not actually married for want of compliance of essential ceremonies will be able to use the law. This will also be the case in bigamous marriages as the husband who enters in a second marriage will not be considered to be legally and validly married to the second wife, leaving such a woman vulnerable to abuse without a remedy. This is because marriage, under the law, is a legally valid marriage performed in accordance with all the essential rites and ceremonies.

There is need for a comprehensive and broad definition of the person aggrieved so that more and more women, who are in a domestic relationship within a family, can demand a right to be free from violence and seek recourse to the law.

#### **Reliefs that are Available to a woman**

Section 14 of the GOI Bill deals with 'Protection Orders' enabling a Magistrate to pass three kinds of orders against the respondent:

- (i) refrain from committing any act of domestic violence;
- (ii) pay such monetary relief as the magistrate deems just; and
- (iii) pass such other directions as may be considered necessary.

If the purpose of any law was to be brief, then this drafting would get full marks. Indeed, it could have only said that the magistrate may pass any order as he/she deems fit!

Domestic violence law is in the nature of an emergency legislation and is intended to give immediate relief from violence. Often the violence is directed not only against the woman but is intended to cut off all her support structures, deny access to essential services and to withhold a woman's own property or children in an attempt to blackmail. The most obvious way of achieving this aim is to throw the woman out of the household. *Unless the power of restoration of the matrimonial*

*home or the power to remove an abusive spouse exists there is no purpose in having this law at all.* Indeed, it is even possible for judges to argue that the absence of such provisions was intentional by the legislature and hence, no such orders can be given. It is just not good enough to argue that such orders can be given under the provisions “pass any other direction as may be considered necessary.” Considered necessary by whom? We know what are the necessities of women who face domestic violence, why are those necessities not spelt out? What is the reluctance all about? It seems at the root of the reluctance is the belief in male supremacy, and the desire to safeguard the property of the man, even over the life of the woman. First, we need clarity that *through this law, the women’s movement does not seek to transfer property from the man to the woman, but only seeks a guarantee of the right of a woman in a domestic situation to live in the home free from violence.* Her long-term rights will have to be worked out in matrimonial litigation as and when it is commenced.

There is an imminent need for this law to provide for her right to reside in the matrimonial home. The law also needs to provide for the relief of temporary custody of her child to the woman so that she cannot be blackmailed into exchanging her right to property and *stridhan* for her children, compensation for injuries sustained as a result of domestic violence, apart from injunction restraining acts of domestic violence and payment of maintenance for her and her child. It is not that she cannot get any of the above reliefs (except perhaps the right to reside in the matrimonial home), but this would require enough monetary resources to litigate for all these rights in four-five different fora and a woman usually would not have access to as many resources, and any law on domestic violence, therefore, needs to address her problem of access to resources and allow her to seek varied reliefs under a ‘single window clearance’ system.

The present law is a complete sell-out of the rights of women. We must resist this attempt and demand that the State perform its most elementary duty, the duty to protect the life and liberty of its citizens in an effective way, consistent with its Constitutional and International obligations.

### **Other Features of the Proposed Law**

Section 11 contains a very dangerous provision providing for the woman to undergo mandatory counselling with the abuser. This goes against all accepted principles of counselling. Mandatory counselling is one of the methods of correcting abusive behaviour. It is ridiculous to enable the Magistrate to insist on “mandatory” counselling of the innocent party. Such counselling can only end up ‘convincing’ her to accept her situation of disempowerment as being normal and to continue in a violent marriage. Counselling for the innocent party can and should only be voluntary. This is especially dangerous given the fact that even under the existing dispensation, judges and Crimes Against Women Cells of the Police constantly goad women into so-called “reconciliation” sessions where they are made to “agree” to “settlements”.

The problems with this law are manifold and range from appointment and qualifications of the protection officers to the jurisdiction of Magistrates to cognizability of the breach of a protection order passed by the magistrate. It is, however, impossible to discuss all of them through this piece and suffice to say that this law, if enacted in its present form, will turn out to be extremely dangerous in its implications for women who are survivors of domestic violence. At the moment, the Bill is pending before the Standing Committee for the Ministry of HRD, GOI for its recommendations. Various women’s groups have appeared before the Committee and stated their problem with the GOI Bill to the Committee. As per information received, the Committee is to present its recommendations to the Parliament by December. The women of this country are all awaiting these recommendations with bated breath and it is for the Committee to live up to the expectations of the womankind of this largest democracy in the world!

### **Notes:**

1. Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, U.N. Doc. E/CN.4/1996/53. See para 22 and 23.
2. *Ibid.*

## ***Rights of Tribals***

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B.D. Sharma

### **The General Background**

**I**ndian has been a land of great convergence. People from all sides particularly the north-western passes of Great Himalayas have been moving in, some times in waves, attracted by the bounty of nature and enchanting climate. Most of these groups have retained their identities in the land believing in *vasudhaiva kutumbkam*, respect for all cultural forms and a thousand paths to attain the ultimate reality. These identities are also expressed in numerous forms such as exclusive communities, religions, and castes, loose and rigid, *panthic* and animistic denominations. *India, thus, represents a mosaic of vivacious diversity, contrary to the imaginary mainstream proposition*

Tribal communities comprise a significant proportion of Indian population. These communities are generally associated with a territory or a habitat, mostly in hilly and forest regions. They are self-governing and guided by their own customs and tradition in a holistic frame. The social and economic systems are simple, largely non-monetised. Many of them have their own language. Nevertheless, there are no sharp dividing lines, either geographically or socially, between tribes and others in most cases. *There is generally caste-tribe continuum with a wide twilight zone of transition.*

Their size may vary from just a few hundreds to a million and more located at different stages in the progression of humankind-hunters and gathers, pastorals, shifting cultivators and settled agriculture. While bulk of the tribals still live in tribal-majority tracts, a substantial population is dispersed. A small section with spread of education has also joined the modern sector through vertical mobility. Some tribals have been caught unawares in the whirl of industrialisation and urbanization.

The tribes in India, thus, comprise all stages in the progression of humankind from Stone Age to modern industrial phase spanning more than ten thousand years of evolution. Even amongst hunters and gathers, the situation may be very different. The Sentenials of Andaman & Nicobar Islands have no contact with the outside world. The Jenu Kurubas of Karnataka are still honey collectors. The Birhores of Chotanagpur have now hardly any place to live between advancing agriculture and dwindling forests with impregnable boundary lines drawn behind them by the state. Most of the tribal people in the North-Eastern hills, Southern Orissa and across the border in Andhra Pradesh (A.P.) are shifting cultivators. The Gujjars and Bakarwals in Western Utter Pradesh (U.P.), Himachal and Jammu and Kashmir (J&K) are best-known pastoral communities. Some of the tribal communities have taken to settled agriculture. But they still subsist on the entire habitat with varying dependence on its fauna and flora depending on the local situation. *Each stage from hunting to settled cultivation represents a way of life complete in itself in fine tune with the natural endowments of concerned habitats.*

The primary unit of people's life in all stages up to settled agriculture is *swyambhu* (self-created) face-to-face community comprising a habitation. The command over the habitat by the community is a natural right, acknowledged and honoured by all concerned particularly the neighbouring communities. The carrying capacity of resources in each case is related to the level of technology attained and used by a people. Thus, hunters and gatherers require about one square mile per family, shifting cultivations can make do with much less, say, about a hundred hectares in a forty-year cycle, and settled cultivators need a kernel of just a couple of hectares each with the support of surrounding habitat. The carrying capacity increases significantly with advances in technology in agriculture and related activities.

The growing pressure of population has been responsible for incessant search for new areas, struggles to enlarge the command and technological advances, gradual and mutational. The communities with more advanced technologies have had an edge over others who, in many cases, were obliged to recede in to remoter regions. This process is still continuing. For



example, Hikki Pikkis in Karnataka complain that they clear the forests and prepare agricultural fields. They are not disturbed till the area is inaccessible and/or is unsafe because of wild animals. They are forced to recede as area become safe by stronger groups. There are occasional backlashes as well for recapturing traditional habitats. As simple agricultural economies become more complex with advancement of technologies, division of labour and formation of other occupational groups, the concerned communities tend to lose tribal characteristics. Some of these groups, unable to cope up with new advances, recede to remoter areas on their own, while some of them are pushed out by stronger groups. Those in remote forests and hilly regions, caught at a niche, have remained at the same stage largely undisturbed until stronger groups appeared on the scene.

The emergence of rulers in India did not make much difference for the tribal people. The natural right of the community over the resources even with rulers on the scene remained undisturbed. Each village functioned virtually as a republic. The ruler was entitled to a share in the produce like other village functioned virtually as a republic. The ruler was entitled to a share in the produce like other occupational groups. The tribal communities in remote areas remained virtually outside this system. The rulers, where extant, had magical religious roles and were entitled to token tributes. The tribal communities, thus, remained masters of their respective habitats with no challenge from higher political formations.

#### **Legal State**

There was a qualitative and quantum change in this situation with the on-set of British rule in India. For the first time in our history, a legal State was established which formally defined not only the subsisting natural relationship of the community with its habitat, but also the rights of individuals for exclusive possession and use of the same. The State became the ultimate owner of all resources with implicit superimposition of *eminent domain*, an European premise unknown to this country. While the general areas under the rulers surrendered

before the British, *albeit*, after long struggles the tribal people in most cases doggedly defended their territories. In fact,

“the tribal people never acknowledged the authority of exotic centres of power including the authority which the British established notwithstanding the record which they had created, as per their perception as also their practice in the form of promulgations regulations etc. These formalities had no meaning for the tribal people. In any case, they were beyond their comprehension, hence irrelevant”.<sup>1</sup>

Nevertheless the new regime formalized this situation by declaring many tribal areas as non-regulation areas. These areas were later categorized under the Government of India Act, 1935 as ‘excluded area’ and ‘partially excluded areas’. Any law of the Centre or a Province could be extended to these areas only under a specific order of the Governor of the Province with such modifications, if any, as may be deemed necessary in each case. The tribal communities, therefore, largely continued to command and use of resources particularly forests, on which the State was keen to consolidate its authority, albeit, cautiously in tribal tracts. The enforcement of India Forest Act in 1886 and acquisition of land for public purpose under the Land Acquisition Act, 1893, led to unrest and even ubiquitous remained undisturbed and continued to manage all their affairs in accordance with their customs and tradition. The conflicts with the State were rare. They related revolts, which were suppressed ruthlessly.

The Formal division of the country and even drawing up of international boundaries has had serious implications for the tribal people. The territories of tribal people comprise largely remote hilly and forest regions while the centres of political authority and administration are largely in the plain areas. The geo-political/administrative jurisdiction of these centres got notionally extended to some prominent physical features such as ridges of hills or streams with reference to visual maps, or even otherwise, without any one setting his feet in the concerned tract and without inhabitants of those regions having any idea about what was going on. The tribal territories are, thus vivisected by accident of history reinforced by political, economic interests or just administrative expediency.

### **The Fall-Out**

A necessary concomitant of legal State is that formalisation of all relationships of people, which generally reflects the perception of the rulers, be it an imperial power, a king or elected representatives of people themselves. These perceptions, at best, may reflect the general situation, the exceptional or even a substation minority perception may or may not find a place therein. What is not provided in the legal frame is, by definition, *non-est*. The systems outside the legal frame, notwithstanding the support of the customs and tradition of the concerned people, have a weaker position in the face of legally recognised systems. In some cases they may be rendered patently illegal with penal liability.

The British legal frame superimposed on India largely followed European precepts with some adaptations for the Indian situation. Accordingly, the natural right of the community over the resources on which it depends for its living got extinguished. In respect of forests, however, certain rights and concessions were conceded by the State in deference to the persisting symbiotic relationship and other local factors. The hunters and gatherers were largely ignored as an aberration. Their way of life was supposed to fade out with the march of civilization. Shifting cultivation was deemed to be a pernicious practice. It was supposed to be banned and suitably phased out. However, in view of the extensive areas and large number of people involved no precipitate action was taken except in a few pockets like Bastar. The pastoral communities also did not have a clear legal status but for conceding some grazing rights in certain areas. In some cases, certain areas were formally recorded as 'grass lands' to be used as such. The settled agriculture under a variety of tenures was the only land-use formally and firmly incorporated in the legal frame.

The Indian legal system created by the British ironically had no place for the community. The system of self-governance in accordance with the customs and tradition became *non-est* and irrelevant in the eyes of law. The community's command over resources could no longer be asserted against the powerful State. Moreover, the new law either superimposed intermediaries like Zamindars or recognized directly individual

cultivators of land with associated rights and liabilities thereof. Thus, individual members of the community themselves emerged as contenders of rights against the hoary tradition of community's collective command over the habitat.

In this process those communities faced the greatest tragedy, whose style of resource-use pertaining to their way of life was not in consonance with the legally recognised land-use. The agricultural communities, both tribal and others, gradually extended their control under the cover of law rendering the communities located at the earlier stages of progression resourceless. These comprise the well-known category of vanishing tribes. Similar was the situation of artisan communities such as *asurs*, *kathodis*, *garhwas* who could not face the competition from modern industry. Some of these communities, faced with the challenge of sheer survival with no resource base to fall back on, become predators even during the British rule. They were formally classified as 'criminal tribes' who, as a community were presumed to indulge in crime of various descriptions such as theft, robbery, bootlegging. The communities were re-designated as de-notified tribes after independence.

The hilly and forest regions inhabited by the simple tribal people have remained at the margin of agricultural civilization with limited use of their resource endowment. With industry becoming the lead sector of national economy, the resources of the hitherto marginal areas become priceless endowments, which brought these areas to the centre of stage. Thus, the harmonious frame of *'people at the margin and marginal areas'* got disrupted. Instead, we have the phenomenon of *'simple people occupying rich resource regions subsisting at rudimentary or pre-agricultural stages of economy.'* These communities face the spectre of displacement, the moment their lands or other resources in their area are needed for any purpose whatsoever, including construction of a dam, establishment of a firing range or holiday resort or simply mining and export because legally they belong to the State.

#### **Constitution of India**

The mid-twentieth century witnessed the end of Second World War, dawn of independence in India and many other

erstwhile colonies and adoption of the Charter of United Nations. India was one of the founding members of United Nations. The Charter reaffirmed faith in fundamental human rights, in the dignity and worth of human person and in equal rights of men and women. It was during this eventful period that the Constituent Assembly of India started its deliberations about the basic objectives of the new India and modalities for achieving the same. The General Assembly of United Nations adopted the Universal Declaration of Human Rights (UDHR) on 10th December 1948. The Constituent Assembly of India adopted the Constitution on 26<sup>th</sup> November 1949. The Indian Constitution imbibed the spirit of universal declaration, which is fully reflected in its Preamble and is elaborated in the provisions concerning Fundamental Rights and Directive Principles of State Policy. The Indian Constitution is founded on the basic premises of equality of status and opportunity, liberty of thought, expression, belief and worship and justice social, economic and political besides promotion of fraternity amongst all citizens assuring the dignity of individual. Nevertheless the Constitution takes special note of the fact about injustices on a number of counts rooted in the social system such as untouchability and in the economic system such as forced labour. Accordingly they were summarily abolished. The Constitution also acknowledges unequivocally that equality in terms of opportunities or even formal equality before the law may be meaningless amongst those who are otherwise unequal, socially, educationally or economically.

#### **Tribal People and Scheduled Tribes**

The tribal people have been treated as a very special category even amongst the backward classes. A number of provisions have been made in the Constitution for their protection and also for their advancement. The basic objective is to enable them to reach a stage as early as possible, where no special dispensation of any kind may be necessary. The scheme of the Constitution in this regard begins with the acknowledgement of the perplexing complexity of the social and economic situation and also the wide diversity on every count from one region to another or within the same region and also

from one tribal community to another or even parts of, or groups within each community. Accordingly, Article 342 of the Constitution provides for scheduling of tribes or tribal communities, which may be deemed to be 'Scheduled Tribes' for the purposes of this Constitution. There is no provision for scheduling for the entire country. Scheduling, therefore, has to be done in relation to each State or Union Territory. Similarly it is not necessary to schedule an entire tribe or tribal community. Only one or more parts of, or groups within a tribe or a tribal community may be scheduled in relation to a State or any special region therein. Needless to say that this exercise has to be based on careful assessment of the socio-economic situation in each case. As a corollary, the groups, which may attain the desired level of development, may be excluded from the Schedule. These Schedules are notified by the President in consultation with the Governor of the concerned State or Union Territory in the form of an Order. Any change in this Order by way of inclusion in or exclusion from the Schedules can be effected only the Parliament by law. Some 350 tribal communities, besides a number of sub groups, have been Scheduled in India whose population is 8.45 crores (84.50 million) according to 1991 census. They comprise 8.08 percent of the total population of India.

As stated earlier, the tribal people are associated with a territory and have strong and living tradition of self-governance. Accordingly, special provisions have been incorporated in the Constitution relating to the administration of the tribal areas. The relevant areas in the States of Assam, Meghalaya, Tripura and Mizoram have been formally designated as 'Tribal Areas,' while those in other States as 'Scheduled Areas.' The provisions of the Fifth Schedule and the Sixth Schedule apply to the administration and control of the 'Scheduled Areas' and 'Tribal Areas' respectively.

#### **A Critical Review**

The basic premises of Indian Constitution in general are in consonance with the basic premise of UDHR, that is, 'every one is born free and equal in dignity and rights'. Accordingly, Article 15 prohibits discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 19 confers the

right to freedom of speech, to assemble peaceably, to form unions, to move freely, to reside and settle in any place and to practice any profession. Right to life with dignity has been enjoined under Article 21. There is protection against arbitrary arrest and detention under Article 22 and conviction for offences without due process of law under Article 20. Some other human rights have been accepted as 'fundamental in the governance of the country,' such as those relating to a living wage, conditions of work, ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, free and compulsory education for all children up to the age of fourteen, raising the level of nutrition, and protection and improvement of environment. A duty has been cast on the State under Article 37 to apply the same in making laws even though they are not enforceable by a court of law. The ownership and control over material resources of the community under Article 39 have to be so distributed as best to sub-serve the common good and the operation of the economic system shall not result in the concentration of wealth and means of production to common detriment. The State shall strive to promote the welfare of the people by securing, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. In particular, it shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, not only, amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Thus, Constitution enjoins on the State to create conditions in general and wherever necessary in the case of disadvantaged groups including backward classes, Scheduled Castes and Scheduled Tribes in particular, to enable them to shed disabilities and take advantage of new opportunities in all spheres of national life.

Accordingly, cultural and educational rights of all groups, irrespective of their size, are protected under Article 29. The interests of the Scheduled Tribes can be protected by imposing reasonable restrictions under clause (5) of Article 19 on the right of other citizens to move freely and settle anywhere. Similarly special provisions can be made for Scheduled Tribes. In particular, there is provision under Article 16 for reservations

in public employment in favour of, *inter alia*, Scheduled Tribes until they are not adequately represented therein. Lastly, there is reservation of seats for Scheduled Tribes in all representative institutions right from the Parliament to the Gram Panchayat.

While above provisions deal with individual rights and protection and advancement of Scheduled Tribes as a special group, the aspects relatable to their association with specific territorial space are dealt with under the provisions of the Fifth and Sixth Schedules. A unique feature of the Sixth Schedule is establishment of Autonomous District Councils with legislative, judicial and executive functions, all rolled in one. The legislative functions under Para 3 of the Sixth Schedule cover management of land, water-courses, forests not being a reserved forest, regulation of *Jhum*, village/town administration including police, inheritance, social customs. No law of the State legislature shall extend to a District Council area unless the Council so directs and in doing so the District Council may direct that the Act shall apply with such exceptions or modification as it thinks fit. In the case of Assam, the Governor can direct by public notification that any Act of Parliament and of the State legislature shall not apply to 'an autonomous district/region or any part thereof or shall apply subject to such exceptions and modifications as he may specify. In the case of Meghalaya, Mizoram and Tripura, this power in respect of Acts of Parliament is, however, vested with the President of India.

In the case of Scheduled Areas, the Governor has a special responsibility in respect of administration and control of the Scheduled Area. The Governor has powers to direct non-application or application with suitable adaptation of any Act of Parliament or State Legislatures to the Scheduled Area or any part thereof. Moreover, the Governor can make regulations for peace and good administration of the Scheduled Areas in consultation with the Tribes Advisory Council, subject to their approval by the President. Such regulations may specifically prohibit or restrict the transfer of land, regulate allotment of land to Scheduled Tribes in such area and money lending to Scheduled Tribes. The Governor has to submit a report on the administration of Scheduled Areas to the President annually. The executive power of the State in respect of the Scheduled



Area is subject to the provisions of the Fifth Schedule and the executive power of the Union extends to the giving of directions as to the administration of the said areas. The financial outlays necessary for raising the level of administration to that of the rest of the State, as may be agreed to between the Union and the State, are not voted but are a Charge on the Consolidated Fund of India under First Proviso to Article 275 (1) of the Constitution. The financial sanction in these cases is automatic once a scheme is agreed to.

The National Commission for Scheduled Castes and Scheduled Tribes (to be referred as National Commission) constituted under Article 338 has the duty to investigate and monitor all matters relating to the safeguards under the Constitution or under any law or any order of the Government, evaluate the working of such safeguards, inquire into specific complaints in respect of the deprivation of rights and safeguard and present to the President annual and, if necessary, special Reports which are placed before the Parliament and concerned State Assemblies with a memorandum about Action taken. The Union and State Governments are mandated to consult the National Commission on all major policy matters affecting Scheduled tribes. The President under Article 339 of the Constitution can appoint at any time a Commission to report on the administration of the Scheduled Areas and welfare of the Scheduled Tribes. He can give directions to State as to the drawing up and execution of schemes essential for the Welfare of the Scheduled Tribes.

Thus, protection and advancement of the Scheduled Tribes has been accepted as a national task above party considerations to be accomplished by the executive under the authority of the Constitution, administrative, legal and financial. The legal frame particularly for the Scheduled Areas can be as flexible as the situation in each case down to the smallest unit, may demand 'notwithstanding anything in the Constitution' solely at the discretion of the Governor. Accordingly, the strategy for protection and advancement can be fully attuned to the specific needs of the smallest group and microhabitats. The Fifth Schedule, accordingly, has been described as 'Constitution within the Constitution' and as a near ideal frame for

administration of Scheduled Areas and welfare of the Scheduled Tribes broadly conforming to the UDHR.

### **The Shadow of Individualism**

The Indian Constitution and the UDHR are basically set in individualistic frame. Moreover, the principle of eminent domain of the State and land as personal property comprise implicit and also to some extent explicit premises of both of them. The omission of the community from the Constitution came under sharp attack in the Constituent Assembly. It negated the hoary tradition of village republics as also the moving spirit of the freedom struggle articulated by Gandhi who visualised Independent India as 'confederation' of seven lakh village republics. There was fervent appeal by representatives from tribal areas and of tribal people not to disturb the traditional tribal system, which could provide a few lessons in democracy to other areas, and according to which land belonged to the community. Accordingly, a provision was made in the Directive Principles of State Policy for establishment of Panchayats at the village level under Article 40 and for endowing them with such powers as might be necessary for them to function as units of self-government. In the case of tribal people, the special provisions discussed above were accepted as adequate to protect their traditional system.

So far as the UDHR is concerned, the special features in respect of tribal people at variance with its individualist frame were incorporated in International Labour Organisation (ILO) Convention No.107 concerning the Indigenous, Tribal and Semi-Tribal People in Independent Countries adopted in 1954. These include, (i) community as a basic unit of their life, (ii) command of the community over its habitat and (iii) customs and tradition governing all affair of tribals. This Convention frowns upon involuntary displacement of people from their habitat. It, however, concedes acquisition of land in accordance with the laws of the State provided that land of quality not inferior to the land lost is provided to the concerned people. The basic premise of this Convention is 'gradual assimilation' of the tribal people in the national main stream. In the mean time a new Convention 169 concerning Indigenous and Tribal People in Independent

Countries has been adopted in 1969. It underscores the identity of tribal communities and the right of self-definition and self-determination, in place of the assimilation premise of 107. India is a signatory of Convention 107 but not 169. The Indian Constitution basically conforms to the mosaic structure and not the so-called mainstream premise, an obsession of the elite. Nevertheless the basic reason for not signing Convention 169 by India relates to difficulty in accepting the concept of indigenous status for specific communities in view of the long Indian history as a 'land of convergence' with no colonial-indigenous interface comparable to Americas and Australia. All other premises of Convention 169 can be said to be implicit in the relevant Constitutional provisions. The focus so far, however, has remained on the person, not the community, and on protection and promotion of individual rights and interests, which are the main concerns of the western industrial world and accordingly a hallmark of the UDHR.

The exclusion of community from the legal frame by the British was with the clear objective of breaking it. The intrinsic power and capability for organisational mobilisation of the community had been amply demonstrated during 1857 freedom struggle. Besides superseding community's command over resources, the self-governing system of the community according to its hoary tradition and customs become a nullity in the eyes of law. All functions of the community including dispute resolution were taken over by state agencies, which functioned in accordance with due processes prescribed by law. This new world of law was totally unknown to the people. Ironically once a law is published in the Official Gazette, it is presumed that all the people in the entire country have been duly informed and that 'ignorance of law is no excuse' in any proceedings. The new rulers, thus, absolved themselves even of the responsibility of telling the people and keeping them informed about the law covering almost all aspects of their life. The vast multitude of Indian people was rendered totally defenceless before the State and the new class of powerful functionaries, acting on its behalf with the aura of its authority and immunity provided by the legal system. With this mutational change, all actions of the community even with regard to the most primordial and natural

functions of dispute resolution and maintaining order were deemed to contravene the law and, in some cases, even became penal offences. Similarly a person, conducting himself in accordance with the customs and tradition of his community could be charged for breaking an unknown law and become liable for penal action.

Our case is not to belittle the role of the new State and the laws in dealing with the near chaotic situation in some areas and in erasing some inhuman practices like sati, *which* had the so-called social sanctions. But these benign features cannot be accepted as justification for 'criminalising' the entire social system and ushering in an era of despotic rule in the name of law. The tribal areas were, however, spared this trauma, *albeit*, after ubiquitous revolts and a long struggle. Nevertheless the objective of extending State's suzerainty was not abandoned. In fact it was deemed to have been extended. The situation reconciled with tribals' rejection by declaring their areas as non-regulation areas even though it had no meaning for them. Thereafter, a cautious and subtle approach was adopted by authorising the Governor to extend general laws with suitable adaptation, if necessary, totally in his discretion.

The India Constitution also intends adaptation of the legal frame on the lines. However, the extension of the laws of the State and the Centre to Scheduled and Tribal Areas does not need a conscious decision by the Governor. It is automatic except in matters referred to in Para 3 of the Sixth Schedule. This provision of automatic has proved to be ominous. All the laws enacted during the long British rule flooded the tribal areas except the North East (N.E.) with the sudden obliteration of that dike, of earlier law on the dot on 26<sup>th</sup> November 1949. The adoption of the Constitution with an idea frame drawing from the experience all over the world including the UDHR was taken as more than sufficient for realization of its objectives. No question was raised as to how the laws enacted for consolidating the hold of an imperial power in perpetuity could be compatible with the spirit of Constitution dedicated to the values of equity, liberty, equality and brotherhood and establishment of a Socialist Democratic Republican Order. Consequently no systematic review of the Central and Provincial laws was made by the

President in terms of the provisions of Article 372. And no Governor deemed it necessary to have a second look at those laws in terms of his responsibility implicit in the bestowal of limitless powers for adaptation under Para 5 of the Fifth Schedule and Para 12 of the Sixth Schedule. That is not all. Virtually no Governor has used this power ever thereafter to adapt any Central or State law enacted in the last half century.

Thus we have an ambivalent situation. While the Constitution has reasonable provisions for individual-centred human rights, the legal frame has remained rather inadequate for their full realization, particularly for the ordinary people who are not even aware of the nature of laws governing them. Moreover, in the case of Scheduled Tribes they stood deprived of the protective shield of their traditional system of self-governance. It rendered them totally defenceless not only in the face of State and its powerful functionaries but even all sorts of intruders, traders, contractor, criminals and fortune seekers challenging the simple people in all matters feigning protection and support of law and the System. All human rights embedded in the identity of the community and its natural rights of self-governance and command over resources in the traditional territories ironically evaporated with the adoption of an ideal Constitution simply because the executive did not act.

#### **Critical Appraisal of State of Human Rights: Modern Sector Tribals' Participation**

The legal and institutional frame for the modern sector, which is basically individualistic, is near ideal in respect of human rights. It does not admit discrimination in any form. The provisions for positive discrimination for Scheduled Tribes have also been reasonably operationalised in terms of laws, rules, orders, and procedures. They have been suitably updated and amended wherever necessary in response to the demand of the articulate sections amongst the Scheduled Tribes. Thus, the political reservation in Parliament and State Assemblies was for ten years. It has been extended decennially for the last sixty years. The reservations in Panchayats and Municipalities for Scheduled Tribes are now a constitutional mandate under Articles 243D and 243T. The traditional right of self-governance of the

community has been given a formal frame under the Provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (to be referred hereafter as to the Extension Act). It is mandatory that not less than 50 percent of seats in Panchayats at any level shall be reserved for the Scheduled Tribes irrespective of the proportion of their population in the relevant areas and that the chairperson of all Panchayats in the Scheduled Area shall be a person belonging to a Scheduled Tribe. There is virtually no default in implementation of provisions concerning political reservations.

The scope of reservation in public employment for Scheduled Tribes has been expanded gradually from reservations in general services under the State to cover All India Services and posts in scientific, technical and academic institutions as well. The Constitution was amended for accelerated promotion in services to overcome the handicap because of late entry and other reasons and facilitate adequate representation at all levels. The representation of STs in A, B, C, and D, grades of services in Central Ministries as on 1.1.1999 was 3.39, 3.35, 6.07, and 7.00 percent respectively.<sup>1</sup> The scheme in respect of public employment in industrial and mining enterprises, located in Scheduled Areas by virtue of their rich resource endowment, has however been handled mechanically and for the sake of form missing the spirit of equity and justice.

### **Education**

The key to participation in the modern sector is education. It is a pity that right to education remained only a Directive Principle for more than fifty years. Nevertheless, substantial advances have been made in many areas particularly in the North-East. The performance is particularly dismal in many remote areas and also many communities such as *Bhils*, *Saharias*, and sub-groups amongst *Gonds*. The level of literacy amongst STs according to 1991 census was 29.6 as against their total population, which stands at 52.21 percent. Education has helped the Scheduled Tribes in moving up and joining the modern sector. However, it remains totally unrelated to the local socio-economic scene, which stands in the way of meaningful participation of the educated therein. The 'neither here nor there'

status of such people has led to the waning of the initial enthusiasm for education in many areas.

A number of notable measures have been taken by the State for promotion of education amongst Scheduled Tribes. At the top, there is reservation in admission in all educational institutions including technical and medical institutions. There are provisions for relaxation of minimum standards for admission. There are special arrangements for advance preparation like coaching. A number of institutions of higher learning including Universities, medical, engineering and agricultural colleges have been established in Scheduled Areas. The network of school education is quite wide spread with a number of pace-setting institutions at various levels like Model Higher Secondary Schools, Ashram Schools. They basically address to quality education and needs of remote and sparsely populated areas, where ordinary elementary schools may not be viable. In principle, medium of instruction of education for first two classes has to be the mother tongue, which may continue even at higher levels. There are a number of technical training institutions to enable the youth to participate in the vast informal as also the public sector.

#### **Critical Appraisal of State of Human Rights: Traditional Sector**

As we move to the traditional sector, the mainstay of the tribal people, the situation about human rights is simply dismal notwithstanding tremendous good will from the very beginning exemplified, for example in Nehru's Panchasheel of tribal policy and the ideal Constitutional frame. The executive failure has been largely because of inadequate appreciation of real issues involved, lack of rigour in micro group/situation-specific handling and lack of political will when it comes to taking vital decisions particularly in respect of command over resources and questioning the basic premises of the inherited colonial legal-administrative structure. The radical Extension Act, with community at the centre of the stage, has come as a new ray of hope.

The human rights are not amenable to be handled as generalities or rule of averages. This is reflected in the scheme of scheduling both of tribal communities and their habitats. The

Presidential Orders for scheduling communities broadly followed the pre-independence listing of tribals in the British provinces. A detailed exercise for areas of erstwhile Indian States, however, was not undertaken, which is crucial for identification of 'tribes or tribal communities or parts of or groups within tribes or tribal communities.' Some communities were left out from scheduling even though they were listed earlier as tribes and their areas were non-regulation areas, for example, the *Gonds*, and *Kols* in Sonbhadra and Mirzapur.

The Scheduling of areas under the Fifth Schedule also generally followed the British non-regulation frame. There were, however, vital omissions like the non-regulation areas of Mirzapur. The benevolent leadership of the State did not consider such special dispensations really necessary in independent India committed to build an egalitarian order. The scheduling of areas in the extensive tribal tract particularly in middle India comprising erstwhile Indian States was rather *ad hoc* without detailed exercise and considerations. No areas were scheduled in Kerala, Karnataka and Tamilnadu, which have some of the most vulnerable groups, as in Tripura and West Bengal. In Bastar, the largest tribal tract of the country only two tahsils of Dantewara and Narayanpur and two Zamindaries of Bhopalptnam and Kutru were scheduled leaving out the rest for no obvious reason, some of which like Konta and Bijapur were still more backward.

Even this exercise was rendered rather purposeless because of the failure on the part of Governors to review the general laws. Even the provisions regarding framing of regulations regarding peace and good governance remained largely unused except about land alienation and money lending. The administration of Scheduled Areas has not been perceived in a broad frame implicit in the Fifth Schedule. The reports of Governors to the President are lustreless account of departmental welfare schemes. The Scheduled Areas and Scheduled Tribes Commission (Chairman U.N. Dhebar), constituted in 1960 under Article 339 missed the real purport of the Fifth Schedule. It opined that 'a cut and dried plan of protection and development,' as recommended by them 'will find greater favour with the tribals than the vague provisos of



the Fifth Schedule.<sup>2</sup> The Commission was swayed by the immediate imagined concerns of development. They thought that proposals for Scheduling of additional areas by the States were prompted by the possibility of claiming additional funds. Accordingly any exercise for inclusion of new areas under the Fifth Schedule would divert attention from the main issues. According to them, the purpose of the Fifth Schedule could be reasonably served by general state legislations. The Commission, therefore, did not consider the proposals for Scheduling of additional areas in various States.

It was only in the seventies that crucial role of Fifth Schedule provisions was acknowledged in the new strategy of tribal development (popularly known as tribal sub-plan strategy). According to this strategy three distinct approaches were formulated: (i) area development with focus on tribal people in compact tribal tracts; (ii) community-cantered beneficiary approach for dispersed tribals; and, (iii) restoration of symbiotic relationship with the habitat approach for primitive tribes. The communities less than 10,000 strong, at pre-agricultural stage, with extremely low literacy, rendered non-viable because of socio-ecological reasons, were termed as primitive tribes. Some 75 communities have been identified as primitive tribes. All areas with more than 50% tribal concentration and a minimum population threshold of 10,000 were covered by the first approach and tribal sub-plans were prepared for them. Elimination of exploitation was accorded the highest priority in all cases followed by building the inner strength of the community. It was decided that all tribal majority areas should be brought under the Fifth Schedule. The first extensive rationalisation of Scheduled Areas was taken up in 1977-81. This process however, has remained incomplete even to this day.

This exercise also came to a naught because no action was taken either to adapt the laws or to frame necessary regulations for peace and good governance of the Scheduled Areas. The proposed amendment in the Constitution for according Constitutional status to Panchayat Raj institutions in 1989 brought to the fore the issues of dissonance in the tribal areas became of super-imposition of the formal legal structure on the

living tradition of the community, which was responsible for the continuing confrontation between the State and the tribal people. With a view to put an end to this confrontation, the Parliament excluded, *inter alia*, the Scheduled Areas from the purview of the provisions concerning Panchayats in Part IX of the Constitution. The Constitution (Seventy-third Amendment) Act, 1992 thus became the first law of Independent India, which was not extended later to the Scheduled Areas automatically. The provisions of Panchayats were extended to the Scheduled Areas with exception and modification as specified in the Extension Act, 1996.

The Extension Act *vide* Sections 4(b) and 4(d) has created space in the Constitution for the community at the village level in the form of Gram Sabha and also for its *competence* to manage all its affairs in accordance with its customs and tradition. This includes command over resources and dispute resolution, the two natural rights crucial for the identity and survival of a community. This provision, acknowledging the *competence* of Gram Sabha, is qualitatively different from the earlier provisions under Article 40 for Panchayats and even Article 243A for Gram Sabhas in general. They envisage *endowment* of such powers on them by the legislatures of the concerned State as may be deemed necessary. The Extension Act also specifically empowers the Gram Sabha directly in respect of vital matters like prevention of alienation of land, restoration of alienated land, control over money-lending, regulation of markets, enforcement of prohibition, control over institutions and functionaries. The Act confers ownership rights on the Gram Sabha over minor forest produce. Consultation with Gram Sabha before acquisition of land and rehabilitation of project-affected people as also grant of leases of minor minerals is mandatory under this Act.

#### **Implications for Human Rights**

Before we proceed further, we may review the implications of the process of scheduling of tribal communities and their habitats for their Constitutional and Human Rights which can be summarized as follows:

- (i) The left out, but eligible tribes like Gonds, Kharwar of Sonbhadra, UP, have been totally denied the safeguards envisaged for them by the Indian Constitution.

- (ii) Even those tribal communities which have been Scheduled, but whose habitats were not included in the Scheduled Areas, remained bereft of the protection of the Fifth Schedule. The implicit violation of human rights in extensive areas not scheduled, notwithstanding the clear commitment in the Parliament in 1976 to schedule the entire tribal sub-plan area, is continuing for more than a quarter century.
- (iii) Even in the Scheduled Areas, the total failure to adapt the legal frame in keeping with the intention of the Constitution for 46 years until 1996 and half-hearted measures even after a clear mandate in the Extension Act, the Scheduled Tribes remained stripped of the most basic of all human rights, recognition of their identity as a community and their vital natural rights of self-governance including command over resources and dispute resolution.
- (iv) The abrogation of human rights is total in respect of pre-agricultural tribal communities because of non-recognition in the general law of the resource-use at their stage of progression such as hunting and gathering, fishing, pastorals and even shifting cultivators (recognised only in Sixth Schedule areas).
- (v) The programmes of primitive tribal communities comprise largely routine beneficiary schemes. The vital issue of command over resources and loss of socio-ecological balance has been missed. Consequently many communities with the gradual denial of access to the natural resources in their traditional habitat are virtually vanishing like the Great Andamanese. The *Chenchus* in A.P. and many other groups, who are being currently forced from their habitats in the name of protection of wild life or environment, are destined to meet the same fate. Thus there is open denial of human rights to the most vulnerable groups simply because of the failure of the system to appreciate the nature of their crisis and to honour the spirit of the Fifth Schedule.
- (vi) The communities branded as criminal and now de-notified tribes had passed through the same traumatic process earlier. Their current state is despicable for they are still deemed to be criminals and hauled up by the police at the

slightest pretext. They do not have the benefit of even a formal ritualistic protection of the State.

- (vii) Many tribal communities or groups thereof and other groups are being currently forced into the mould of criminal tribe, *albeit*, without formally branding them as such. They are unwanted by the advanced communities, which have captured their resource base and are hunted by the police. The worst form of violation of human rights continues simply because the system does not acknowledge the very existence of the problem.

#### **Shifting Cultivators**

Shifting cultivators comprise about ten percent of Scheduled Tribes. Their human rights stand abrogated except in the North-East simply because shifting cultivation has been branded as a pernicious practice without realising that it is a stage in the progression of humankind. It represents the best use of natural resources at that stage of human advancement. Moreover, it is a way of life exemplified by the term *jhum*, swinging in a group, nearest to the ideal of 'from each according to his capacity and to each according to his needs.' In the tribal areas of the North-East, however, regulation of *jhum* and other forms of shifting cultivation is under the exclusive jurisdiction of Autonomous District Councils.

Most of the schemes for settling shifting cultivators as agriculturists on land all over the country including North-East have failed on account of non-appreciation, nay non-realisation of the nature of mutational stage jump from shifting cultivation to settled cultivation and problems associated with the same. The very right to life with dignity of shifting cultivators has been under sever attack because of the simple act of non-inclusion of their traditional system in the legal system, the misplaced concerns of environmentalists and emergence of a set of new vested interests who are moving into these areas and grabbing their lands, for example is Southern Orissa, under the cover of law and use of money power ostensibly in the service of environment and best use of natural resources for development.

### **Displace Communities and People**

Another blatant form of human rights violation relates to the use of rich natural resources of the tribal areas for a variety of public purposes in the wake of national development. Even though specific regulations with regard to command over resources were not framed and the incongruous law of land acquisition enacted by the British under the aura of *eminent domain* has remained in force, the intention of the Constitution implicit in special provisions for Scheduled Tribes and Scheduled Areas is clear. The command of tribal communities over their respective habitats shall be honoured. It was made explicit, *albeit* rather late, in the Extension Act, 1996. The Supreme Court in *Samatha* case<sup>3</sup> has further elaborated it. Moreover, the provisions in this regard are clear and elaborate in ILO Conventions 107 and 169. India broadly subscribes to the principles enunciated in Convention 169.

Notwithstanding the above provisions and commitment extensive tribal territories have been taken over by the State in India simply because their rights are not recorded. Moreover, individual holdings of tribal people are being summarily acquired under the provisions of the Land Acquisition Act with no concern for the abrogation of human rights because they are not legally enforceable. Some 21.3 million people have been affected in India by projects since 1951 out of whom about 8.54 million belong to Scheduled Tribes.<sup>4</sup> In some cases, the displaced have been assigned some lands but not as a matter of right. Moreover, these lands are mostly not of the same quality with scope for future accommodation as envisaged in Convention 107. The crucial issue is about resettlement of the displaced as communities in new habitats. In many cases, even formal commitments have not been honoured as in *Sardar Sarovar*.

The fact that the tribal people subsist not on agriculture alone, but on the entire habitat has been totally ignored in land acquisition proceedings. The result is that compensation etc. are exclusively related to the land formally recorded in the name of concerned person. This 'due process' under the law is in total disregard of the tribal tradition, the spirit of the Constitution, and specific provision in Convention 169 that land 'shall include the concept of territories, which covers entire environment of the areas which the people concerned occupy or otherwise use.'

Consequently displacement sanctified by 'due process of law' has resulted in disorganisation, destitution and slow demise of concerned communities.

The legal situation in this regard has changed significantly after the provision of consultation with Gram Sabhas before acquisition of land in the Extension Act. The general consensus about 'consultation' even amongst concerned governments is that it has to be construed as 'consent'. This has been reinforced by assertion of tribal communities in specific cases in many areas. Moreover, the consent of community has to be based upon concrete rehabilitation plans, which have to be prepared as per the provisions of Convention 107. Rules framed for consultation with Gram Sabha in this regard by Madhya Pradesh (M.P.) in 2000 reflect this spirit.

Nevertheless the ground reality is far from satisfactory. The Land Acquisition Act still remains to be amended and the concerned States also have to adapt their respective laws. The administration is still steeped in the colonial tradition. The political leaders in a hurry are conscious about the authority they enjoy as peoples' representatives in a democracy and yet cavalier in dealing with ordinary people and their institutions in the style of colonial rulers. They are prompted not infrequently by personal interest. The global market forces are keen to capture natural resources at any cost. In this frame of matters concerning land acquisition, there is subversion of democratic processes, blatant use of force and repression and even indulgence in outright criminal acts by officers responsible for protection of tribal interest. For example, the dissent of Gram Sabhas was transmuted into their consent in Nagarnar, Bastar, Chhattisgarh through fabrication of Gram Sabha proceedings, in a conspiracy by senior officials. No Constitutional authority could provide any relief even after appeals by the people. This case brings to fore the continued strangle hold on the people and their institutions enjoyed by the executive, which has been largely responsible in general for non-realisation of the potential of the Constitutional mandate to honour the human rights in the communitarian frame. It is crucial for the tribal people as also, for the entire country though to a lesser extent, which lives in its villages.

Nevertheless the provisions concerning the powers of the Gram Sabha are so clear and unequivocal that the people are asserting the same even in the face of worst repression. They are organising themselves as village republics. The resistance by the establishment, which may sometimes stoop to abysmal level in its behaviour, is bound to wane in not too distant a future.

#### **Dispersed Tribals**

About 30 percent of Scheduled Tribes are dispersed. They broadly comprise (i) migrants, migrant labourers and displaced persons, some of whom get settled in new areas, and (ii) original inhabitants whose territories have been inundated by outsiders as in large tracts of Tripura. There is a general central Act for protection of interstate migrant labourers. It is, however, hardly implemented. Bulk of the dispersed tribals is resourceless with concomitant loss of social status worse than even untouchables for examples the *Kols* on the M.P.-U.P. border. Forced labour and debt bondage are rampant. The general poverty alleviation programmes do not address these vital issues. Violation of human rights of all description is normal state of their existence.

#### **Compromise on Dignity**

The human dignity, the greatest endowment of tribal people, has been the worst casualty after independence. The successors of the Raj adopted, the role-style of 'white man's burden' without any qualms of conscience in the great 'mission of civilizing the world' within the Nation-State. The first stage of 'Mission Civilization' has to be unconditional submission by the people before the laws of the land. This act of submission, according to ruler's perception, by definition, would pave the way for their attaining a place of honour amongst civilized people. It was on the strength of this implicit premise that the exercise for adapting the laws of the land for the tribal areas was not considered worthwhile. The logic was that in any case these people have to move out of that frame and imbibe the new spirit of 'civilisation.' Accordingly, the community, along with all its communitarian values, was rendered redundant in the liberating individualistic modern frame of the national law. Moreover, the revolt against the State during the British days, which basically related to command over resources (*Darti*

*Bhagwan ne Banai, Hum Bhagwan ke Bete, Yah Sarkar Bich Mein Kahan Se Aai-Tana Bhagat*), was countered and insidiously sabotaged by recognition of individual rights over land as a dispensation of the State. The community had been ignored by the British on purpose notwithstanding the exclusion of these areas. The community even in tribal areas remained omitted from the legal frame after independence notwithstanding the spirit of Panchasheel and Fifth Schedule.

The result is that the virtual figment of imagination, known as *sarkar*, gradually acquired a visual form of a real *mai-bap sarkar*, with the appearance of a multitude of officials swearing by its omnipotent and omnipresent authority with total control over all the resources. They wield unimaginable authority over life and liberty, the very essence of human existence. The people can be hauled up on any pretext real or imaginary and penalised for breaking unknown laws. The tribal people thus got reduced to the status of solicitors for small favours in almost every sphere of their life including eking out a living from resources *in their own habitat*. And in this state of total deprivation, grants or doles in the name of development created unimaginable scenes of scramble unbecoming any people with honour. The saving grace is that before this virus has become pervasive, a new form of resistance has appeared from community's end with assertion of its identity and natural rights. The State conceded this claim in 1996 in the Extension Act.

#### **'Legalistic' Human Rights**

The set of 'legalistic' human rights in the UDHR comprise a broad spectrum including equality before law and equal protection of law (Article 6), protection against arbitrary arrest (Article 9), hearing before an *impartial* tribunal (Article 10) and presumption of innocence until proved guilty (Article 11). The Indian Constitution fully subscribes to this frame and the provisions in the relevant laws of our country are broadly unexceptionable barring a few like Prevention of Terrorism Act (POTA). That this frame is inadequate for the tribal people is implicit in the extra-ordinary powers vested in the Governor to adapt any law. While the UDHR and provisions of Indian Constitution are general, Convention 107 has a clear and



categorical provision with regard to the tribal tradition. Article 8 envisages that:

“To the extent consistent with the interests of the national community and with the national legal system:

- (a) The methods of social control practiced by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations.
- (b) When use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.”

Article 10 has a further provision for special safeguards against improper application of preventive detention, for taking due note of cultural development of the concerned community while imposing penalties and for giving preference to rehabilitation rather than imprisonment of the offenders. Convention 169 goes a step further and calls for unequivocal recognition of the right of the tribal communities to retain their own customs and institutions and for respecting the methods customarily practiced for dealing with various offences.

The failure on the part of the executive in the vital issue of legalistic human rights for the tribal the people has been total. The executive, notwithstanding full discretion vested in it, has not only not taken necessary steps on its own to honour the spirit of the Constitution, but has also ignored the provisions of the ILO Convention which basically reflects the intention of Indian Constitution. The implications of this non-action by the executive have been far-reaching and virtually catastrophic. The automatic extension of all laws to the Scheduled Areas, with the adoption of the Constitution and failure to adapt them with reference to spirit of Indian Constitution and specific human rights under UDHR read with ILO Conventions, have rendered the customs and tradition of the tribal people and their institutions *non-est*. Consequently a new genre of offences and even crimes have come into being without people realising the change. Moreover, no effort has been made to convey its message to the concerned people. The super-imposed legal frame, therefore, violates the universal premise about *prima facie* innocence of a person and the concomitant right for protection

for innocent acts without intention, like a child. The arrest of a tribal person for an alleged offence and crime under the penal law is generally effected following 'due processes' of unknown laws. There is no dialogue with the community to which the person is answerable according to his custom. Consequently such detentions cannot but be arbitrary. It is a clear violation of human rights.

In fact, all proceedings against the tribals are in courts of law, about whose procedures the people know virtually nothing. The provisions about assistance are only in name. The people, therefore, are totally defenceless and not in a position even to make simple submissions. The final verdict is passed by a presiding officer who has no inkling about the tribal traditions and custom and who, in most cases, would not care to go beyond the literal frame of the law. Moreover some basic premises of the legal frame, for example, documentary evidence being virtually conclusive in the face of mere oral evidence, are antipodal to the tribal values according to which word is conclusive and there is no value for the written word except in formal proceedings. Such proceedings, notwithstanding in accordance with due process, cannot be deemed to be impartial in terms of UDHR. Accordingly, all 'due processes' in terms of the present legal frame with no regard for the tribal social milieu comprise serious violation of human rights.

#### **The Tribal Areas**

The situation in the tribal areas of the North-East with compact uni-tribe territories is qualitatively different from that in the Scheduled Areas with substantial mixing of communities. The administrative units in the N.E. can comprise single tribal groups in terms of Para 1 (2) of the Sixth Schedule. In case there are different Scheduled Tribes in Autonomous District Council, the Governor can divide the area inhabited by them into autonomous Regions. The Autonomous Regional Council have the some powers as the Autonomous District Council. The District/Regional Councils under Para 4 of the Sixth Schedule have the power to regulate the constitution of village councils and courts and their powers. The traditional institutions at the village level, under Para 5, have been given the powers under

the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1898 for trying the suits, cases or offences, as the case may be.

It is an irony that even these radical formal provisions do not honour the spirit of UDHR read with ILO Convention. The Sixth Schedule basically 'envisaged replacement of the traditional institutions of self-governance, which had retained full autonomy in these tracts by virtue of non-regulation, or exclusion there of by a set of formal institutions.'<sup>5</sup> Moreover, in this case formal institutions, namely, Autonomous District / Regional Councils, have been endowed with the responsibility as also the authority to settle the parameters of governance in all those matters, which had been governed by the *parampara* of the people from time immemorial. What is crucial in this change is that the parameters of governance of the community in the specified matters can be settled by a body other than the traditional institutions of the people.' Thus what we see in the Sixth Schedule in the name of formal autonomy is the 'end of autonomy' in the real sense enjoyed by the traditional communities.

The substitution of traditional institutions by the formal structure of Autonomous District/Regional Councils in the Sixth Schedule Areas has led to rather confused situation. While the new institutions are weak, the traditional institutions continue to have their sway. The most significant but unintended consequence of the Sixth Schedule is that traditional institutions were spared the trauma experienced by the tribal people elsewhere with the inundation of their area by all sorts of laws. In the tribal areas of N.E. no law of the State or the Centre in vital matters covered by Para 3 of the Sixth Schedule could be extended to the District/Regional Council area until adopted by the Council.

In the absence of any action by these Councils, general laws were not extended. The authority of traditional institutions, particularly at the village level, remained unchallenged. They are as strong as ever with undisputed command over their resources and social control over all matters including trial of cases.

The obsession with formalisation amongst rulers in a legal State is natural. Every thing in this case, by definition, has to be formally defined. It is so even for acknowledging the simple fact of the very existence of a living entity like community or traditional institutions. But the moment a natural entity is formally defined, it loses its natural endowments. It can have only those attributes, which are formally assigned to it. The resolve of the founding fathers to recreate the hoary tradition of village republics with 'establishment' of Panchayats foundered on the rock of formalisation. The Panchayats established under Article 40 were creatures of law and handmaidens of their creator, the State. Such Panchayats, therefore, were incapable to imbibe the spontaneity of *traditional Panchayats* and reflect their inclusive organic integrity.

The *Nyaya Panchayats* specifically established to simulate the *panch parameshwari* tradition of open assemblies of people, guided by their collective wisdom and ordained tradition failed in that objective. They virtually became institutions of lowest denomination in the long judicial hierarchy. In the tribal areas, the simple people have failed to manage the formal institutions guided and operated by the written word. Even recognition of traditional Panchayats became a non-starter as in Bastar, because the real message could not reach the people and the mystique of written word, which comprises the rules for their functioning, could not be unravelled by the simple people. The officials remained supreme.

The Extension Act is a law with a difference. It is a serious attempt to imbibe the spirit of UDHR read with ILO Conventions about legal human rights in the tribal setting. This spirit is implicit in the special provisions of our Constitution and vision of the founding fathers. The community at the village level in the form of Gram Sabhas is *competent* to manage all its affairs in accordance with its customs and tradition. These provisions are necessarily subject to the condition that any action thereunder is in consonance with the basic value frame of Constitution. These provisions have merely created space in the legal system for the traditional institutions. Therefore, in areas like Santhal Parganas, Jharkhand where tradition is strong, the community has been able to assert in many *vital* matters concerning minor

minerals, forests and land even though relevant laws remain to be adapted. The concerned States have however, defaulted in this vital matter. The people continue to suffer simply because of the non-action of the concerned States. They are ignoring violation of human rights even after the clear and categorical provisions of the Extension Act.

#### **Right to Life with Dignity with Adequate Standard of Living**

For the tribal people living in their traditional habitat, the right to life with dignity is a natural endowment. Their way of life is directly related to the nature of the habitat, its resource endowment, level of technology and people's perception about quality and goals of life. The enjoyment of these human rights acquires a new dimension of externally imposed limitations as the tribal people and their habitat formally becomes a part of a larger system of the State. This formal legal frame may not necessarily be in consonance with the tradition and customs of the tribal people, the nature of their institutions and the value frame governing their life. We have already discussed the major conflict arising from the super-imposition of the basic premise of *eminent domain* on these areas, which is virtually deemed as a natural right of the State.

#### **Command over Resources**

The command over resources, on which a people subsist for their living, is the life-breath of the right to life with dignity. The edifice of dignity collapses with the appearance of the State on the scene with aura of *eminent domain*. The 'Mission Civilisation' is really an attempt to build a make-do structure of formal institutional support system for life with dignity on the debris of their natural rights. For example the tribal people were deprived of their natural rights over forest under this dispensation. A set of rights and concessions, however were worked out by the State at the time of reservation of forests to defuse their resistance. But in course of time even these rights and concessions became, in the perception of the administration, a dispensable burden as observed by Dhebar Commission in 1960. The situation at the moment is ambivalent. After accepting elimination of exploitation as a top priority item in the formal agenda of tribal development under tribal sub-plan strategy,

there was concerted effort to end the confrontation between the tribal people and the State on various issues relating to forests. The symbiotic relationship between the forests and tribal people was formally incorporated in the National Forest Policy, 1988. In the mean time, there was consensus about conceding ownership rights over minor forest produce (MFP) in favour of tribal communities. The MFP is the main stay of tribal economy in many areas. This decision changed the status of tribal people from mere wage labourers to owners of MFP. Madhya Pradesh was the first State to formalize this consensus in 1986. It is now a Constitutional mandate under Section 4 (m) (ii) of the Extension Act. This Act also acknowledges the *competence* of the community in the form of Gram Sabha to manage 'community resources'. The scope of 'community resources' has been made explicit in Madhya Pradesh Panchayat Raj & Gram Swaraj Adhiniyam, 1993 *vide* Section 129C (iii) as 'natural resources including land, water and forest ...' However, the relevant laws concerning forests remain to be suitably adapted even in M.P., not to speak of other States and the Union.

In the mean time, the legitimate concern about worsening environmental situation, ironically aided and abetted by global market forces, is leading to accentuation of confrontation between the State and the tribal people. The tribal fully realises that his well-being depends on the forest. But the fact that market forces are responsible for rapid depletion of forests is being purposefully ignored. A comprehensive frame worked out in 1990 to end this confrontation in pursuance of the recommendations of the Commissioner for Scheduled Castes and Scheduled Tribes has not been implemented. It envisaged, *inter alia*, a dialogue with the Gram Sabhas, resolution of all disputes including those relating to infirmities about process of reservation and an alternative means of livelihood being provided before the concerned person is evicted.

#### **Adequate Standard of Living**

The first crucial issue relating to 'adequate standard of living' is the nature of perception of concerned people about it. The tribal communities, at whatever stage of progression,

consider their state as ideal unless the natural harmony is disturbed for any reason whatsoever leading to distress. The protagonists of 'development at any cost' in their obsession about 'adequate standard of living' as per their own perception have totally missed this aspect which may imply even snatching away the people right of biological survival, not to speak of their dignity. For example, clear felling of forests including fruit bearing trees destroys the rich flora. It leads to forced change in the dietary profile of the tribals, in with fine balance with nature, evolved over centuries. It has resulted in vital deficiencies causing countless diseases. The traditional system is unable to meet the new challenge. Modern medical care is virtually non-existent. In any case, it is beyond their reach. Similarly it is hardly realized that wage employment is no substitute for loss of habitat and land for a tribal. Such bargains are forced on them without any qualms of conscience under the banner of 'due process' and people's development. The tragedies are superciliously termed as 'birth pangs' of change.

The inability of the system even to appreciate the challenge, which the people face during the transition between two different stages, has been responsible for ignoring people's side and their plight.

"The learned economists are familiar with the modern system....In their studies, all aspects of life are assessed mostly in terms of money.... No form of accounting is suitable for comparing of a thatched, but near a mango grove in an open field, and that of a hovel constructed of bricks and mortar on the side of a *nullah* (drain) away from the village."<sup>6</sup>

Consequently houses for tribals built with lavish investment, reported as great achievement in deluxe brochures, may be used by them for their cattle or may collapse, as they remain unoccupied. *Even ILO Conventions have missed this issue.* They have not cared to articulate the way the rights of tribal people in respect o Article 25 of UDHR have to be protected, that is, 'every one has the rights to a standard of living adequate for health and well-being of himself and of his family.' One cannot fail to observe the deterioration in health of tribals as one moves from remote areas to roadside village, where change is fast and exploitation rampant.

The two other major issues about the right to life with dignity are protection against land alienation and operations of money and market particularly money lending, which find specific mention in the Fifth Schedule. We will begin with land.

### **Communitarian Territorial Rights**

The Supreme Court of India while discussing the rights of tribal people on land in *Samatha* case (1997), clearly stated that 'land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living.' According to the Court, therefore, 'the Constitution intends that the land always shall remain with the tribals.' The first basic flaw in realization of this objective has been the ambivalence about what constitutes 'land' which has to be protected. According to the ILO Conventions 107 & 169, the State must recognise both collective and individual ownership over the land, which the people traditionally occupy. It must also honour the concept of territories covering the total environment of the areas, which the people occupy, or otherwise use. These provisions are in consonance with the spirit of Indian Constitution. However, in practice the rights of the tribal people in this perspective are being honoured only in the hilly tribal tracts in the North-East. In the rest of the country the lands not formally assigned to a person in a territory, which the tribal people traditionally occupy or otherwise use, is deemed to comprise government land. The position about 'community land' is also not very clear particularly because 'community' itself had no place in the legal frame before the Extension Act. Nevertheless, territorial concept of land and community ownership thereon persists in some area in the mainland and is also recognised in law in some pockets like the Munda area in Khunti, Jharkhand. The shifting cultivators also have the tradition of community command over specified territory. But their claim has no place in the legal frame. Accordingly individual rights over land, in terms of specific governmental assignment through *pattas*, have come to be accepted as a rule notwithstanding their dissonance with the customs and tradition and dogged resistance by the concerned people to accept the same.



In areas with living tradition of community's command over land comprising the relevant territorial unit, land alienation is not possible. Even when some outsiders come and occupy land, it can be only with the permission of the community. They cannot acquire any right thereon. They may, however, be accepted in due course by the community as virtual members, albeit, with a distinct identity. Such people enjoy their rights over the land as a part of the collectivity. Thus, question of protection of tribal lands is largely related to introduction of exotic concept of individual rights over land, alien to tribal tradition. The basic weakness is therefore, related to individual right over land which transforms collective ownership into personal property. The land becomes a virtual commodity in the market, which is amenable to transfer notwithstanding stringent laws against transfer. The laws for protection of tribal lands comprise a wide spectrum from soft to the most stringent as in the following:

1. The Chotanagpur Tenancy Act simply did not recognize transfer of tribal land in any form until 1950. Therefore, legal transfer of land was simply not possible.
2. The Santhal Parganas Tenancy Act, *vide* Section 20 (2) envisages that 'no right of an aboriginal raiyat in his holding ....shall be transferred in any manner to any one but to a *bona fide* cultivating aboriginal raiyat of the pargana or taluk or tappa in which the holding is situated.' This provision has been quite effective because no outsider can get a title to land in the concerned area.
3. The most common form of regulation of transfer of tribal land is transfer with prior permission of the designated authority, generally the Deputy Commissioner or Collector of the district. Such provisions have proved to be the weakest because the permission depends on the discretion individual officers, whose perceptions can widely vary. One weak person in a long succession of strong officers committed not to allow transfer of tribal land, may undo their effective attitude over a long period in no time and open the floodgates for legal transfers on flimsy grounds.

4. Large-scale transfer of tribal land has been under the cover of law in the wake of opening up of tribal areas in the name of development. Acquisition of land for all sorts of programmes/projects, ostensibly for public purpose, has been done under 'due process of law' in which ironically the State, charged with the responsibility for the protection of tribal people, stands on the other side. The Land Acquisition laws have not been amended even after enforcement of the Extension Act, which can provide only partial protection against what is virtually, forced displacement.
5. Substantial lands have also been lost by the tribal people under the cover of law in discharge of their debt and other contractual liabilities to a variety of institutions. We will discuss this in detail in the section on money lending.
6. The large-scale alienation of tribal lands has been managed by others by taking advantage of loopholes in the legal system, or by manipulation of laws, or by taking undue advantage of the customs and tradition of the people, or by sheer use of force and money-power. The most notable regulation to deal with this problem is the A.P. Scheduled Areas Land Transfer Regulation, 1959. According to Section 3 (1) (b) of this Regulation, 'Until the contrary is proved, any immovable property situated in the Agency tracts and in the possession of a person, who is not a member of Scheduled Tribe, shall be presumed to have been acquired by a person or his predecessor in possession through a transfer made to him by a member of a Scheduled Tribe.' Such lands can be restored to the transferor or his heirs.
7. A one-time provision on similar lines was made in 1981 in the M.P. Land Revenue Code 1959. All those persons who were in possession of land, which may have belonged to a member of Scheduled Tribe between 2.10.1959 (that is, the coming into force of the Land Revenue Code) and 18.9.1981 (that is, the date on which the amendment became effective), were obliged to file a return under Section 170B of the Code before the Sub-

Divisional Officer with full information about the way the land came into their possession. Should a person fail to file such a return, it is presumed that the possession of land has no legal authority and the same shall be returned to the original owner of that land.

8. With a view to undo the injustice implicit even in legal transfer of lands, which in many cases were executed taking advantage of the simplicity of tribal people, Regulation 1 of 1970 for Scheduled Areas of Andhra Pradesh declares that all transfers of immovable property, in the Agency Tracts in favour of a person who is not a member of a Scheduled Tribe, by any person, who may or may not be a member of a Scheduled Tribe, is absolutely null and void. Accordingly transfer of immovable property now can be only in favour of a Scheduled Tribe. This provision led to a lot of controversy in the State. A number of attempts were made from time to time to get this Regulation amended so much so that even all party consensus has been mobilised more than once in favour of change. But the reaction in the Scheduled Areas even to a mention to that effect has been so sharp that the proposal had to be dropped instantaneously. No other State has made a provision on similar lines.
9. The weakest aspect of all well-meaning provisions is that all formal processes for seeking protection or justice in cases where land has got alienated under the cover of law or otherwise, are totally beyond comprehension of the people. They have to be pursued in alien and distant institutions where he has hardly any friend to guide. In this situation, he is virtually a 'born loser.' To meet this situation, wrongful dispossession from or wrongful occupation or cultivation of any land belonging to a member of a Scheduled Tribe has been made a penal offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Moreover, wilful neglect of duty in this regard on the part of a public servant not belonging to a Scheduled Caste or a Scheduled Tribe, is also a penal offence.

Nevertheless, these measures have provided all relief only to handful persons particularly in areas of people's movements.

The Extension Act, 1996 makes a radical departure from dependence of tribal people for protection of their rights on processes in alien institutions. The community in the form of Gram Sabha now has the necessary power 'to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe.' In furtherance of this objective, a special provision has been made under Section 170-B (2-a) of M.P. Land Revenue Code, 1959 follows:

"(2-a) If a Gram Sabha in the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution finds that any person, other than a member of an aboriginal tribe, is in possession of any land of a *Bhumiswami* belonging to an aboriginal tribe, without any lawful authority, it shall restore the possession of such land to that person to whom it originally belonged and, if that person is dead, to his legal heirs:

Provided that if the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the Sub-Divisional Officer, who shall restore the possession of such land within three months from the date of receipt of the reference."

No other State has made a provision in relevant laws in this regard so far.

The most vexed issue in territorial rights relates to mineral resources. The only reference to tribals in the Mineral Concession Rules, 1960 envisages that 'the lessee shall, *in the matter* of employment, give preference to the tribal and to the persons who become displaced because of the taking up of mining operations.' In A.P., however, there is total prohibition under the adapted Mines and Minerals (Regulation and Development) Act, 1957 on grant of prospecting license or mining lease in the Scheduled Areas to a non-tribal person. According to the Extension Act, 1996, recommendation of Gram Sabha is now mandatory before grant of prospecting license or mining lease for minor minerals. The Committee of Select Members of Parliament and Experts (Bhuria Committee) in 1995 recommend 'community ownership over industry' in the Scheduled Areas 'with 50% shares in its favour by virtue of its allowing the

industry to use the local resources.<sup>7</sup> This proposition has been reinforced by the Supreme Court in *Samatha* case, in which it held that no lease can be given to a non-tribal person in the Scheduled Areas and that 'minerals could be exploited by the tribals themselves, either individually or through cooperative societies composed solely of the tribes with the financial assistance of the State or its instrumentalities.' Suitable frame, however, remains to be worked out.

### **Operations of Money and Market**

Insidious monetisation of simple tribal economy through obligatory money transactions in dealings with the State, traders, money-lenders has proved to be the Achilles' heel of tribal life because the mystique of money, market and associated agreements, verbal or written, are beyond his comprehension. The monetary transactions of all descriptions, therefore, are totally one-sided. The tribal has to accept whatever is told or asserted by the other side, not infrequently on the strength of tribal's own 'commitments' notwithstanding his ignorance even about their nature, his sense of honour, value for his word. Alienation of land, formal, informal or *benami*, and debt-bondage under conditions worse than slavery, therefore, became order of the day. Regulation of money and markets thus, becomes one of the highest priority programmes for the protection of tribal people without which right to life with dignity is unthinkable. However, the focus has been generally limited to money lending.

### **Money-lending**

Usury in general has been a cause of deep concern in India for a long time. The first law concerning the regulation of interest on loans to aboriginals in tribal areas was the Agency Tracts Interest and Land Transfer Act 1917. The maximum rate of interest under this Act is 24 percent per annum. This interest, however, cannot be compounded and the same cannot exceed the principal amount (principle of *dam dupat*). The Usurious Loans Act, a central law, was enacted in 1918. It was followed by a number of provincial acts on money lending. The Bihar Money-Lenders Act, 1938, for example, prohibits compound interest and makes *dam dupat* mandatory. The focus in all these legislations, however, has been on checking usury and ensuring

proper maintenance of records by moneylenders in which tribal as no interest. The 'Kangal' (pauper) Bank has been operating in many tribal areas including Bastar for decades. This 'Bank' charge interest at the rate of 375 percent per annum with no eyebrow raised.

The Banks and Cooperative Societies have been kept outside the purview of State legislations about money lending on the ground that their dealings are subject to the provisions of the relevant laws and they are accountable to designated authorities. The vital point concerning the terms of credit of this institution, however, has been missed all through because they are presumed to be fair. It has not been realized even to this day that the Banking System was established basically in response to the needs of trade and industry whose nature is intrinsically different from that of agriculture, which it was required to serve later under directions of government. In the case of trade and industry, growth is exponential. Therefore, charging compound interest with exponential growth potential can be a reasonable norm. But compounding is incongruous with the organic growth frame of agriculture. While State has not succeeded in controlling money-lenders, the burden of bank credit and even cooperative credit due to onerous terms became excruciating for farmers in general and tribals in particular. Accordingly, institutional credit itself became responsible for large-scale alienation of tribal lands. The case described as 'Final Disposal: An Unclaimed Corpse' illustrates this point.<sup>8</sup>

"Sitaram Kharwar, a tribal from Palamu in Jharkhand took a loan of Rs. 11,000 in from Land Development Bank in 1984. He paid back in all Rs. 13,400. An amount of Rs. 10,000 was also written off in 1989 as a part of *karzamafr*. Nevertheless Sitaram's liability continued to grow according to rules. An amount of Rs. 54,670 became due against him as on 19.1.89. Sitaram, at the ripe age of 70, was sent to civil jail first for 15 days and latter for four months. All pleadings of his sons about his ill health were ignored. The condition of ailing Sitaram during his second detention became serious. He was transferred to hospital where he died within a couple of days. His sons were not even informed. His corpse was disposed of as unclaimed."

Thus, the basic reasons of tribal indebtedness have remained unresolved notwithstanding ubiquitous legal

measures. Therefore, it becomes necessary to take *ad hoc* measures from time to time, when serious discontent comes to surface or otherwise, to provide some relief. For example, the debts of Scheduled Tribes were scaled down *vide* the Andhra Pradesh (Andhra Areas Scheduled Tribes) Debt Relief Regulation, 1960. The entire interest liability in respect of any loan was deemed to have been discharged. Similarly, all debts of scheduled debtors, who included the Scheduled Tribes, were liquidated in pursuance of 20-point programme in 1976. In this case, however, it was not realized that the simple tribal was not bounden by law to repay the loan. He was beholden by his word to the *sahukar* and by his sense of honour. The overall relief even after this drastic measure, therefore, was marginal. Similarly, in 1989 there was general write off of all 'overdues' of eligible farmers up to Rs. 10,000 which included all tribals. But a general impression had been created that all 'loans' *up* to that amount had been written off. The simple tribal in this case was confused about the difference amongst 'due', 'overdue' and 'loan.' The small 'dues' which remained unpaid, in some cases because repayment was not accepted even by the Banks when approached, became manifold in course of time resulting in total confusion and untold harassment to the people.

A radical approach was adapted in M.P. way back in 1979 for dealing with tribals' debt liability. Rules were framed for Resolution of Doubtful Debt Liability. A clear stipulation was made about accrual of liability in all types of institutional and governmental credit. These loans are generally thrust on unwilling people with high promises but little follow up. According to these Rules, no liability shall accrue to a tribal in respect of any advance given to him by way of loan or otherwise, so long as the intended benefit of the scheme for which the advance had been given, is not realized by the tribal. Some people have been benefited by these rules in areas where concerned officers were sensitive. In general, however, the intent of these radical rules for protection of tribal people against vicissitudes of development remained largely unappreciated and unimplemented.

The greatest weakness of the credit system for the simple tribal situation is that it ignores the organic nature of tribals' life

and caters to some specific needs, that too as perceived by the administration within its own frame of law and rules. Thus, if a person spends on food, without which no one can work, the advance is deemed to be a consumption loan, not production. But advances given to an entrepreneur, which covers wages of his labourers, is deemed to be production credit. Some *ad hoc* measures, however, have been taken from time to time to meet the social needs, but without much success. In these cases, the form tends to supersede the spirit. In sum, the present institutional credit system is incongruous with a tribal's way of life and his economy. *Failure of the system in this vital matter has resulted in violation of the tribals' right to life with dignity.*

Sitaram Kharwar and his ilk's are victims of the system with no *mala fides* on their part. The detention for non-payment of institutional credit, notwithstanding the law, which authorises its recovery, as arrears of land revenue cannot be justified on any count. Moreover molestation is a penal offence under Money-Lender Act. Credit of any kind- personal, institution or government, is a contractual liability. *Detention in civil jail for non-fulfilment of terms of contract is abrogation of the debtor's right to liberty and, accordingly a serious violation of human rights.*

### **Credit and Community**

All schemes concerning protection, relief and welfare of the tribal people, supported by State through formal institutions suffer from the basic flaw that they all ignore the living reality of the community. Credit is advanced to a person for whom security of immovable property is demanded. No serious attempt has been made by the Reserve Bank of India or the government to make this system consonant with the reality of tribal situation. For example, land as a security for loans results only in its alienation not because of some real default of the debtor but machinations of the System *vis-à-vis* the people right from the stage of writing an application to final payment as is brought out in Sitaram Case. In case the community is brought in the picture, not only the recovery would be fully assured, even proper utilization, albeit, as per the perception of the people, would be guaranteed besides doing away the leakages and burden of unnecessary overheads.



The irony is that even in the case of North East, where community is unequivocally effective and the traditional communitarian ownership over resources is strong, persistent efforts have been made by the Banking System for adoption of personal-rights frame in land-use with the objective of providing credit for agriculture. The Union and concerned State Governments have been acquiescing in this, if not enthusiastically supporting the same in the name of development. There is no realisation that once indebtedness begins in any form, land alienation is inevitable. Moreover, the very idea of expecting the traditional institutions to adapt themselves and change to meet the requirements of law and treating the law as an invariant, is unmitigated violation of the clear Constitutional mandate prefaced with an unequivocal clause 'notwithstanding anything in this Constitution' that it is the legal frame which has to be adapted with reference to the social and economic situation of the tribal people and not the other way round, under provisions of the Fifth and the Sixth Schedules.

The Extension Act makes a radical departure in respect of money-lending as well. 'The power to exercise control over money-lending to the Scheduled Tribes' in the Scheduled Areas now vests in the Gram Sabha, that is, the community at the village level. Accordingly, the tribal is not expected to approach the credit institutions hither to as a person, which have no inkling about their nature. Moreover, the term 'money-lending' in this case has been used as a general term. It, therefore, covers 'every one engaged in money-lending', be it, a money-lender, a cooperative, a bank, or the government itself. However, the amendment of relevant laws and framing of rules there under in various States remains to be done. Nevertheless the Gram Sabhas, in some areas, have started effective intervention, particularly in respect of doubtful liabilities and coercive processes initiated by banks and cooperatives.

### **Market**

The market, variously known as *hat*, *hatia*, *bazaar*, *chatti*, which is generally held weekly at a central place in a group of villages, virtually commands the entire exchange economy of the tribal people with the outside world. It is an integral part of

their social life in the relevant tract. These Centres have remained outside the purview of the laws relating to agricultural marketing. The local community has had no say in their management. The result is that they have become centres of exploitation in exchange, where the commodities may be bartered with scales heavily loaded against tribals, or the produce may be simply grabbed for a pittance from innocent girls on their way to the market by the *kochias*. Money-lenders of all descriptions descend on these centres for virtually forcible realisation of arbitrary dues. Games of chance like cockfights are popular. Sale of intoxicant, largely traditional brews is almost universal. There are no regulations on any count in these markets. The Extension Act, however, envisages that the Gram Sabha has 'the power to manage village markets by whatsoever name called.' This provision is open-ended and covers all activities referred to above.

#### **Forced Labour**

Article 23 abolished forced labour in all forms, which includes servitude. Besides specific laws being made by the States abolishing all known forms of forced labour such as *Sagari* in Rajasthan, *beth-begar* in Bastar, a comprehensive and stringent Central law was passed in 1976 abolishing bonded labour. Any contractual relationship, oral or written, traditional or ephemeral, which deprives the concerned person of due entitlement for his labour in any way, or which obliges him to work involuntarily until the terms of contract have been fulfilled, comes within the purview of 'bonded labour.' All such practices are penal offence under the Abolition of Bonded Labour Act punishable with imprisonment. A campaign for implementation of this Act yielded commendable results so long as the focus was on punishing the culprits for violation of human rights. It was particularly effective where bondage was rampant under coercive powers of erstwhile feudals, like three Jagirdars commanding the entire Kalarain Hills in Tamilnadu, or muslemen of contractors in stone quarries, brick-dins, sugarcane harvesters and such like. Some dent was made in debt bondage as well. However, the focus gradually shifted from *human-rights-violation-penalisation* to *release-rehabilitation-grant-*

*welfarism*. The real thrust of the law, therefore, was lost. Bondage in countless insidious forms not only continues but it has also accentuated, particularly in areas undergoing fast change after their being opened up. The earlier campaigns got transformed into formal programmes, which now tend to be mere rituals.

#### **Protection Against Intrusion and Undue Advantage of Tribal Customs and their Ignorance about Law**

In the milieu of Mission Civilisation, one of the most basic precondition for enjoyment of human rights relates to the taming of the confluence of unequals and ensuring hegemony in all matters of the concerned community. It has been virtually ignored so far except in the North-East. The inner line regulations, which prohibit entry of outsiders in the tribal areas, and exclusion of the jurisdiction of legal State over self-governing traditional system provided the frame within which the tribal people could develop according their own genius. The protection accorded to the tribal people has been reasonably effective in the Agency tracts of A.P., where the single line simple administration under the Agent established during the British period has remained in vogue. The Agent has extensive jurisdiction in all civil, revenue and criminal matters involving Scheduled Tribes. He is also vested with powers for summary punishment of officials of any government department and extern any non-tribal if he is satisfied that his presence in such area is likely to be detrimental to the interest of the tribals. In no other States, however, there are special provisions on similar lines. The result is that traditional tribal territories have been inundated by outsiders, in many cases reducing the tribal people to a minority. The de-scheduling of some such areas for example in Maharashtra stripped them even of notional protection. No action has been taken not only to check the influx, but no one even bothered about preventing entry of undesirable elements into these areas. That tribal areas should not be treated as *kala pani*, that is, punishment postings of officials, has remained a mere cliché with disastrous implications for the simple tribal. Officers have used their influence to acquire extensive lands.

Convention 107 calls for special measures for preventing other persons 'from taking advantage of their (tribals) customs

or of lack of understanding of the laws' to occupy tribal land (Article 17). *Enticing tribal girls for 'living together' and acquiring land in their name is a wide spread phenomenon in tribal areas.* The irony is that in the perception of the tribal girl marriage is virtually complete once the boy and the girl exchange solemn promises to be together for life. There is no obligatory formality for a marriage amongst many tribal people except community feast, which amongst Murias of Bastar can be given at any time before the marriage of couple's first son. But the same relationship in the perception of the non-tribal persons has no sanctity or even formal binding of 'marriage.' The girl can be deserted at will with no protection for her either from the community, which may have already ostracized her, or from the law because of no formal standing for her. The life for such girls is a veritable hell. This virus is rampant in the vicinity of new industrial centres in remote areas where the tribal is simply dazzled by the sudden change with no one to protect or even to counsel in a tragedy, which is private and personal. The State has singularly failed in its duty not to allow the tribal customs to be misused against them.

#### **Crucial Transition and Right to Work**

According to Article 23 of UNHR, 'everyone has the rights to work, to free choice of employment, to just and favourable conditions of work and to protection against employer.' This Article is ideally set in the scenario of industrial and post-industrial Western world. At the tribal end of the spectrum, the focus in ILO Conventions 107 and 169 is an effective command over resources in the concerned territory and an honourable alternative acceptable to the people, should that land be taken for some other purpose. As discussed in detail earlier, the State has failed in protecting this vital right of tribal people so far. The essence of entire gamut of human rights in respect of the tribal people is being put to test in the way they are enabled to negotiate the imminent structural transformation which the tiniest group amongst the tribal communities may face, some time or the other. The right to work in its real spirit can be the only reliable anchor for the tribal people in that tumultuous phase of change. Right to work is particularly crucial in the

context of the prevailing situation on 'land' front discussed in detail above. *It is not only a Constitutional but also moral obligation of the Indian State since the trauma, which the tribals are facing, is largely because of executive failure.*

With the announcement of New Economic Policy in 1991, it was realized that it may adversely affect employment in rural areas. A programme of Employment Assurance was started on 2<sup>nd</sup> October 1993, which covered all the tribal areas besides drought prone, flood-affected and hill areas.

The objective was to assure employment to all men and women in the designated areas. However, firm commitment was envisaged only for 100 days work in a year for at least two members in a family. Even this commitment has not been honoured by the Government even in Scheduled Areas notwithstanding the fact that by virtue of this programme having been agreed to between the Centre and the States, the financial sanction for the Scheme is automatic according to the First Proviso to Article 275 (1). Moreover, necessary funds for that purpose become a Charge on the Consolidated Fund of India. Thus, the continuing default in employment assurance by the Union and the States in respect of Scheduled Areas is not only violation of human right but also blatant violation of the Constitution itself.

#### **Participation in Government**

'Everyone has a rights to take part in the Government of his county, directly or through freely chosen representatives,' is the essence of modern democracy and condition precedent for honouring all other human rights in an essentially iniquitous world. The humankind is segmented and fractured, arranged in countless hierarchies, comprising crowds of competing persons out to 'achieve' at any cost. It enables the concerned nations to be genuinely convinced about imbibing the spirit of the basic premise that 'all human beings are born free and equal in dignity and rights.' Every legal State is, therefore, obliged to formulate 'due process' which would add flesh and blood to make that skeleton a living reality. As we have seen, India fully honours this right having established 'due processes' for people's representation in Parliament, at the national level down to

Panchayats at the village level. And yet, the dilemma arises in the tribal areas where 'living reality' of true democracy is so natural an endowment like the very life-breath that even its existence is not realised by the people there. This is what Khan Abdul Gaffar Khan, Jaipal Singh and Muhammed Sadulla were pleading for tribal area when the spirit of democracy was being given the frame of 'due processes' in the form of Indian Constitution.

The form superseded the spirit in the case of representative institutions notwithstanding the warning, the pleadings and profusion of good will on all sides. The 'due process' superseded the 'living reality' in the tribal areas. In the North East this was done ironically in association with the traditional institutions without their realising what it was all about. The Autonomous Councils and even the State with its formal authority, but with no channels of communication with the living system, have remained concerned largely with matters, which are inconsequential in people's perception. The traditional system remains strong and dissonant with the legal State, for example, in Nagaland in the North-East. *Creation of space for the traditional system in the formal legal frame remains a major issue without which the realisation of these crucial human rights for a real democracy will remain an enigma.*

The failure to evolve a synthesis between the formal and the living systems and deeming the formal representative democracy as the real democracy has played havoc in the Scheduled Areas. There has been no conflict between the formal and the real in practice in three situations, *viz.*, (i) in inaccessible areas where the system exists only in name with no manifestation of its authority in any form, (ii) where the traditional institutions are so strong that the presence of the formal authorities is inconsequential, and (iii) where members of the formal system are sensitive with appreciation for the value system of traditional institutions and prefer not to interfere merely for the sake of form. The formal participation of elected representatives in the democratic institutions did not really serve the purpose of directing or even influencing the governance at various levels. It was not possible for the people's representatives to understand the complexities of the modern system, appreciate their linkages

with the interests of the people, particularly in the long run and the dilemmas of their own dual conflicting roles as members of traditional communities and the formal institutions whose values are incongruous, if not outright contradictory.

In the beginning participation of simple representatives of simple communities in democratic institution was largely a ritual with not much significance for either side. But given an opportunity, the representatives did reflect people's perception. However, as the tentacles of formal system spread out, its powerful authoritarian presence gave rise to a variety of conflicts in which ultimately the formal system prevailed. It weakened the traditional institutions, which, in many areas, have virtually disappeared. A new class of articulate tribals, imbibing new values, is slowly emerging with far-reaching implications. It is this group, which tends to represent the tribal people but does not necessarily reflect their perception or even their interests. For example, this class has generally come to accept land as property and resents regulation of transfer, which depreciates its value in the market. This assertion on their part is against tribal tradition, national laws and ILO Conventions, which have provided some protection *albeit* inadequate during the crucial transition. *It is a truism to state that farther the representative institution from the real life, larger the dissonance between the precepts and concepts at the two end.*

Even though attempts had been from the very beginning to solve this riddle not only in the tribal areas under the Fifth and the Sixth Schedules but also in general areas of the country, for example, in the Directive Principles concerning Panchayats under Article 40, *the traditional institutions waned and the spirit of this basic Human Rights was not honoured notwithstanding the formal provisions.* As the confrontation between the people and the State continued to grow, meaningful participation is now being attempted under the provisions of the Extension Act. The community at the village level in the form of Gram Sabha is now central in the governance of these areas. The Gram Panchayat, the representative body, is answerable to the village assembly and has no powers of its own. Other representative institutions at higher levels, block and district, are supposed to play a supportive role to the Gram Sabhas.

Nevertheless, the concerned State laws remain to be suitably adapted. In the mean time, the traditional institutions themselves particularly in Jharkhand like *munda-manki*, *parka*, etc. have started asserting their natural rights by virtue of the competence of the community 'to safeguard and preserve traditions and custom of the people, their cultural identity...' enshrined in the Constitution. The Jharkhand Panchayat Raj Act 2001 envisages that the meetings of Gram Sabhas shall be presided over by a traditional leader of the community like *paraha*, *munch*, *pahan* or by a member of a Scheduled Tribe elected by the Assembly. Thus, while the traditional institutions have been honoured yet hereafter 'the traditional leader shall be their leaders because the community recognises him as a leader,' and no leader can claim his position due to recognition by the State. He will have to abide by the people's verdict.

It is this blend of the traditional and modern, of the energy of the young and wisdom of the elders in the grand frame of the assembly of people at the village level the best in the individualistic and communitarian human rights will blossom and create conditions to participative in the cultural life of the community, 'to enjoy the arts and share in scientific advancement and its benefits.'

### **Conclusion**

Indian can be proud of a virtually ideal Constitutional conceptual frame for realisation of the rights and freedoms of its citizens as persons, set forth in UDHR and also the natural rights of the community, the real nursery for development of human personality, specially of the Scheduled Tribes as envisaged in ILO Conventions and more. While the rights of Scheduled Tribes in the modern Sector have been reasonably operationalised, the position in the traditional sector is rather dismal largely because of inaction on the part of administration and also the political executive. The creation of space for the self-governing community and its traditions and customs in the Constitution in 1996 can become the foundation for realising the ideal. Some of the immediate tasks in this regard are briefly given below:

1. The message of the natural and constitutional rights of the citizens and also their duties to the community



should be conveyed to them in a simple form so as to enable the people, severally and collectively, to realise their potential behoving the dignity of man.

2. The Union must ensure that the basic features of the legal and institutional frame for the Scheduled Areas envisaged and protected specially in the Extension Act, 1996 are incorporated in all the laws of the Centre and the concerned States in their true spirit. In particular, all concerned, irrespective of their status in the State hierarchy, must honour the competence of the community in the form of Gram Sabha meticulously, by enabling it to manage all its affairs in accordance with its customs and tradition, albeit consistent with the Constitutional values and human rights. A set of guidelines, but not formal rules, should be prepared in this regard for due appreciation of the new context. A provision should be made for Paragana Sabhas at the group of village level, simulating, to the extent possible, the traditional system of resolution of issues remaining unresolved at the village level and other matter of wider interest.
3. Denigration of the participatory democratic process at the village and the group of village level should be deemed to be a serious penal offence. A tribunal at the national level should be established for dealing with matters therewith expeditiously.
4. All Bills, having any bearing on the special Constitutional safeguards of Scheduled Tribes, specially the matter covered in the Extension Act, should be specifically examined by the law department and certified before their introduction in the Parliament and the concerned State legislatures to the effect that the letter and spirit of the relevant Constitutional provisions are honoured therein. All Bills having a bearing on these matters should be referred to the Tribes Advisory Council in the State and the Ministry of Tribal Affairs at the Centre. The Ministry may suitably consult the National Commission for Scheduled Castes and Scheduled Tribes.

5. The spirit of collective command over resources in general and agricultural land in particular should be honoured wherever it still obtains and restored to the extent possible elsewhere, with the rights of individuals limited to use the same, by suitable amendments in the relevant laws.
6. The traditional rights of all pre-agricultural communities in general and the primitive tribes as also the shifting cultivators in particular, should be recognised by amending the relevant laws and framing fresh regulations under the Fifth Schedule. The programmes for their development should aim at restoring the lost balance as the highest priority.
7. In accordance with the recommendation of Bhuria Committee, a suitable frame should be worked out for setting up industries in Scheduled Areas with the community as a major stakeholder.
8. The provision of credit to the tribal people should in a holistic frame. The terms of loans advanced should be in consonance with the nature of their economy and clear legal provisions concerning *dam dupat* and prohibition of compounding. Molestation should be an offence in all cases concerning recovery of loans. A law may be enacted for protecting the Scheduled Tribes against doubtful debt liabilities adopting the frame of M.P. rules.
9. In view of the vital role of assured livelihood in the crucial transition, which the tribal people are obliged to negotiate, right to work implicit in the Constitutional safeguards should be unequivocally recognised and enforced in the Scheduled Areas.
10. The entire sub-plan area comprising micro-units up to the group of village level should be scheduled in terms of the commitment of the Union Government in the Parliament in 1976.
11. Administrative reorganisation of tribal areas should be taken up to begin with within each State so that compact

tribal tracts artificially divided amongst numerous administrative units are suitably brought together within the same administrative unit.

12. In keeping with the spirit as also specific provisions of the First Proviso to Article 275 (1) of the Constitution and Para 3 of the Fifth Schedule, annual review of administration of Scheduled Areas should be done by a high powered committee comprising representatives of Ministry of Home Affairs, Ministry of Tribal Affairs, Ministry of Finance and the Planning Commission and necessary financial assistance should be provided for raising the level of administrative to the rest of the State as a time bound programme.
13. A comprehensive regulation for peace and good governance in Scheduled Areas should be framed which, in particular, should provide specially for disciplining the public servants, checking the entry of undesirable elements into and their summary expulsion from Scheduled Area or any part there of, drawing upon the experience of A.P. Agency Regulations.
14. In keeping with the spirit of the Constitution that tribal affairs shall be attended to as a national task, cutting across party lines, the Chairman and members of the National Commission for Scheduled Castes and Scheduled Tribes should be appointed on the recommendation of a Committee comprising the Speaker of Lok Sabha, the Prime Minister and the leader of the Opposition.
15. The recommendation in specific matters inquired by the National Commission should be binding on the concerned government or other authority. In case of disagreement, the matter may be referred back to the National Commission for review. Any decision not to implement the final recommendation, after the review if any, must be taken only by the Cabinet and reported to the President or the Governor, as the may be, and placed before the Parliament and case the concerned State Legislature in due course.

**Notes:**

1. Report of the National Commission for Scheduled Castes and Scheduled Tribes, 1999-2000 & 2000-2001, p. 182.
2. Report of the Scheduled Areas and Scheduled Tribes Commission (New Delhi: Government of India, 1962) Para 8.29.
3. National Commission, *Op. Cit.*, note 1, p.125.
4. B.D. Sharma, *Tribal Affairs in India* (New Delhi: Sahyog Pustak Kuteer, 2001) p. 62.
5. Report of the Commissioner for Scheduled Castes and Scheduled Tribes (Twenty-ninth), 1987-89, Para 18.47.
6. B.D. Sharma, *Op. Cit.*, note 4, p. 361.
7. B.D. Sharma, *The Debt Trap* (New Delhi: Sahyog Pustak Kuteer, 2000) p. 45.

## ***Rights of Dalits: Law and Reality***

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G. Haragopal

**T**his paper deals with the rights of Dalits, focusing on their legal rights and the importance of these rights in not only improving the socio-political status and economic conditions of Dalits but also in transforming the overall Indian societal structure so as to ensure their dignity and self-respect. Unlike the universal rights, which are aimed at maintaining an 'equilibrium' within the society, the Dalit rights movement aims to create a new social order, which makes it unique. There is a difference between equilibrium-centric rights and transformative rights. Rights, as obtained in any society, are an accomplishment of the struggles of the previous generations. In contrast, Dalit rights are not only a result of their struggle but they also embody a transformative vision for the future. By conferring certain privileges and freedoms exclusively on Dalits, these transformative rights prevent other sections from fully realizing their own rights unless they respect and enable the Dalits' enjoyment of these rights. It is precisely for this reason that rights impose several duties on the socially advantaged 'others,' creating a situation where the Dalits have greater privileges while the others have greater responsibilities. These apparent discriminatory laws, however, are not really discriminatory, as they are intended to eliminate structured discrimination. This is the logic of 'negation of negation,' and the approach is inevitable if a highly stratified hierarchical social order is to be changed.

Now we turn to the question: Who is a Dalit? There has been an intense debate on this question, resulting in two important viewpoints: (1) that all the socially, politically and economically oppressed sections of the society are Dalits; (2) that Dalits consist of only those sections of Indian society that

suffered as "untouchables." Both the viewpoints are correct in their own ways. But, the untouchables suffer the worst form of discrimination at all levels. While the first viewpoint has the strength of focusing on the wider process of exploitation, it may not adequately represent and reflect the social discrimination to which the untouchables have been subjected. For this reason, the Indian Constitution provides a schedule for these castes and mandates that all the organs of the government treat the Dalits as a special social category and enforce their rights with greater care and commitment.

Dalits have been called by various names: Untouchables, Harijans, exterior Castes, Depressed Classes, Outcastes, Pariahs. In more ancient times, terms such as Mlecha, Chandala, Panchama, Nishada, Avarna, Antyaja, Atishudra, Paulkasa, etc., were used. These usages of terms through the times and in different parts of India indicate the spatial and temporal dimensions of the Dalit question.

It is a hard fact that the practice of untouchability is widely prevalent in various forms in almost all parts of India and has been so for several centuries throughout history. A brief account of the debates on the origin of untouchability is necessary to understand its historical beginnings in almost all parts of India. It is in fact unfortunate that there has been a paucity of historical and anthropological evidence facilitating valid and acceptable assessment of this question. Most of the writers who attempted to trace the origin of the problem have not had enough data, except circumstantial evidence. Their interpretation depended more on the current concerns of the scholars than the scientific evidence they command.

There are varied explanations and interpretations of the origins of the caste system and untouchability. One interpretation maintains, "[that] the untouchables are persons of a set of discrete low castes said to be excluded on account of their extreme collective impurity from their relations with the beings of the so-called higher castes." Another predominant view traces the origins of caste and untouchability to the Aryans and to their ways of relating to the people. It is believed according to one estimate that, although a set of human beings were already treated as *Chandalas* and stigmatized, it was only

in the period between 600 BC and 200 AD that untouchability appeared as such. There is a reference to the practice in Kautilya's Arthashastra and Manu's Manusmriti, in which its increased rigidity could be seen. J.H. Hutton, a leading anthropologist, held that "the origin of position of the exterior caste is partly racial, partly religious and partly a matter of social custom." He reiterated, "[that] the idea of caste untouchability originated in taboo."

The caste system survived, as it not only provided a hierarchical arrangement for the maintenance of social order through the perpetuation of political power, but it also ensured cheap, if not free, labour power for economic activity. It could be for these reasons that no political regime ever brought about meaningful or qualitative changes until the advent of the British rule. Reform or protest movements like Buddhism or the Bhakti movement were not able to touch the roots of the caste system, much less the "untouchability."

The first major and forceful response to untouchability came during the freedom movement, led by the Congress party under Gandhi, and separately by Babasaheb Ambedkar. The contribution of these two personalities to the removal of untouchability is historic, and influenced the social consciousness in a substantial way. Gandhi was an Indian political leader who could clearly understand the inhumanness and cruelty associated with untouchability. He protested against it, at the levels of belief and practice. He wrote extensively against untouchability and its ideological hegemony, and preferred to call members of this section as Harijans-the one loved by God, although the Dalit consciousness has reached a point today wherein untouchables are taking exception to being called "Harijans." While today the debate on and objection to this nomenclature is valid, it should not lead to an underestimation of Gandhi's contribution to the cause of the removal of untouchability. However, it is true that Gandhi did not pay exclusive attention to the Dalit cause, as his primary engagement was with the anti-colonial struggle, which was also equally important for the enlargement of freedom of the Dalits.

Babasaheb Ambedkar was the first to diagnose the counterproductive role of the caste system in general and

untouchability in particular, and to contrast them with the very notion of freedom and human rights. He thought and believed that the freedom of the Indian people is not complete unless the question of caste is fully addressed and tackled. He, in his very profound thesis on "Annihilation of the Caste," maintained that caste was very specific to the Indian reality, and if freedom in India were to have any substance, the whole caste structure had to be annihilated. Dr. Ambedkar traced untouchability to the distinction between tribesmen and broken men from alien tribes; the broken men subsequently came to be treated as untouchables. He held that there are two roots from which untouchability has sprung: a) contempt and hatred for the broken men, as for Buddhism by the Brahmins; and b) the continuation of beef eating by the broken men after it had been given up by the others. Notwithstanding recent controversies about beef eating, these forms of discrimination persist in every possible way, permeating the entire network of social relations and forms of living. This is precisely the reason why Dr. Ambedkar vehemently pleaded and worked for the cause of liberating the oppressed, particularly the Dalits, from the earlier forms of social bondage. He argued that in a highly graded society, there is no space for equality before the law, nor could there be equal protection by the law. He therefore said, "You must give a new doctrinal basis to your religion -a basis that will be in consonance with liberty, equality and fraternity, in short, with democracy." His influence on constitution making and the subsequent initiatives and debates received worldwide recognition.

#### **Dalit Rights in the Indian Constitution**

As aforementioned, the overall constitutional scheme envisages a proactive role for the State in enlarging and enforcing Dalit rights with a vision of transforming the social order. It is unusual that the State has been called upon to perform such a historical task, which, in many other societies, has been realized either through major socio-political movements or continuous collective social action. The immense faith in the capacity of the State to enact and enforce these rights makes the role of the State and the place of these rights very unique. The following discussion deals essentially with the range of rights incorporated



in the Constitution and the subsequent legislations on Dalit rights.

Part III of the Indian Constitution confers a wide range of rights to the citizen, which include: Article 14, Equality Before Law; Article 15, Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth; Article 16, Equality of Opportunity in matters of public employment; and Article 17, Abolition of untouchability. These articles, along with the other Articles starting from 14 to 35, are very important as they accept not only equality and freedom but also social justice as Constitutional values. All of these articles were conscious and sensitive to the conditions of Dalits, their history, and the socio-political responsibilities of the State to these sections of the society. A brief discussion on these rights follows.

Article 14 includes the right to equality before the law and equal protection of the law. This provides space for a definition wherein, while discrimination is considered undesirable, discriminatory laws are permissible to abolish the existing discrimination, provided they are based on some valid principle, which itself is not irrational or discriminatory. It says that differential treatment does not *per se* constitute a violation of Article 14, but only where there is no reasonable basis for the differentiation. For example, s.5.4 (4) of the Representation of People Act, 1951, confers a double advantage upon the members of the Scheduled Castes or Tribes to be returned to the General Seats; it cannot be held void for contravention of Article 14. Similarly, the Courts held in the cases of *Hira Lal v. D.S.A* (1984), *Sooai v. Union of India* (1986) and *Sukumar v. State of West Bengal* (1983) that Scheduled Castes and Tribes must be considered to constitute a separate class so that the legislative measures for their benefit are upheld as valid. As a part of the positive interpretation of Article 14, the Supreme Court widened the concept of fairness inherent in the guarantee of equality when it held that the Court would not only strike down a law on the ground of absence a reasonable classification, but would conversely uphold a law on the ground of 'protective discrimination.' In the case of *Indira v. Union of India* (1993), a Nine Judge Bench held that Article 14 enjoins the State to take into account de facto inequalities existent in the society and to

take affirmative action by either giving preference to the socially and economically disadvantaged persons or by inflicting handicaps on those more advantageously placed, in order to bring about real equality. It further added,

“Such affirmative action though apparently discriminatory, is calculated to produce equality on a broader basis of eliminating de facto inequalities and placing the weaker sections of the community on par with the more powerful sections of the society so that each member of the community may enjoy equal opportunity of using to the full of natural endowments.”

In 1992, in the case of *St. Stephen College v. University of Delhi*, the Court was categorical when it said, “To treat unequals differently according to their inequality is not only permitted but required.”

Article 15(1) deals with the prohibition of discrimination and enjoins that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them or subject any citizen to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and place of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. This shows varied forms through which discrimination is practiced. This Article confers responsibility and discretion on the judicial institutions for the enforcement of these rights. Under this Article, the State is entitled to do anything for the upliftment of the members of these castes and tribes, to make reservations for their admission to educational institutions and to impose such conditions as would make the reservations effective. It follows that the State may make reservations for admission to such institutions or for selection to government employment, say, by lowering the minimum qualifying marks or other conditions or by offering them two avenues for promotion (one for the reserved category) or by the reservation of a selection of posts for them.

Article 16 deals with equality of opportunity in matters of public employment and does oppose discrimination. However, it reiterates that nothing in this Article shall prevent Parliament from making any reservation, in regard to a class or classes of

employment or appointment to an office under the government in favour of the Scheduled Castes and Scheduled Tribes, which, in the opinion of the State, are not adequately represented in the service under the State. This Article also holds that the Scheduled Castes and Tribes are entitled to be treated as Backward Classes and accordingly, any reservation or relaxation of service conditions for promotion or appointment cannot be challenged as discriminatory even though it relates to 'selection posts.' It has been re-emphasised that preferential treatment to these sections is indeed necessary to make effective the equality of opportunity for all citizens, which is provided by Article 16 (1).

Article 17 deals with prohibition of the practice of "untouchability" in any form. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law. However, the word "untouchability" has not been fully defined. In *Devarajaiah v. Padmanna*, a single judge of the Mysore High Court in 1961 held that "untouchability" refers to the social disabilities historically imposed on certain classes of people by reason of their birth into certain castes.

Article 32(1) deals with the constitutional remedies, which include the right to move the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights. It also empowers the Supreme Court to issue directions or orders or writs for the enforcement of any rights conferred by Part III. This is, perhaps, the most extensively used provision in the constitution, especially in public interest litigation -an innovation in the Constitutional working of the system.

Since the Constitution did not elaborate on "untouchability" or the enforcement mechanism, it was after five years of the adoption of the Constitution that the Parliament passed the Untouchability (Offences) Act in 1955, which has been renamed as the Protection of Civil Rights Act in 1976; there was a formulation of rules in 1977. Almost two decades later, in 1989, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was passed and the relating rules were passed in 1995. The following part deals with these Acts to explore the process of enlargement of Dalit rights over a period of time.

### **Civil Rights Protection Act**

The Untouchability (Offences) Act was passed in 1955 and amended in 1976 when it was renamed as Protection of Civil Rights Act. The Protection of Civil Rights Rules were formulated in 1977. As stated earlier, this constitutes a part of a continuing effort to ensure that the aims of Article 17 are fully realised. The Acts reflect not only the rights that are conferred but the range of violations arising out of untouchability, calling for a redefinition of Civil Rights, which in this case means any right accruing to a person by reason of the abolition of "untouchability." From the enumeration of places and practices, one can see the continued prevalence of untouchability in both the public and private lives of the people. For instance, the Act says 'hotel' includes a refreshment room, a boarding house, a lodging house, a coffee house and a cafe. The "place" includes a house, building and other structures and premises as well as a tent, vehicle and vessel. Further, "places of public entertainment" includes any place to which the public are admitted and in which entertainment is provided or held. It was further elaborated that entertainment includes any exhibition, performance, game, sport and any other form of amusement. Then the Act focuses on places of public worship, which means a place used as a place of public religious worship or for the performance of any religious service. This also includes all lands and subsidiary shrines and even a privately owned place of worship that is, in fact, allowed by the owner to be used as a place of public worship. The Act pays attention to the commercial establishments, which include a "shop" (According to the Act, the term "Shop" means any premises where goods are sold either wholesale or by retail or both). This also includes any place from where goods are sold by a hawker or vendor or from a mobile van or cart, a laundry and hair cutting salon, or any other place where services are rendered to customers.

If one critically looks at the "other places" of violation of Dalit human dignity, the definition includes bathing in or use the waters of a sacred tank, well, spring or water-course (river or lake or bathing at any ghat of such tank, water course, river or lake). There are also practices where dalits are denied use of utensils, articles in public restaurant, hotels, *dharmashala*, *sarai*

or *musafirkhana*. The Act also takes note of the absence of freedom for Dalits to practice professions or carry on any occupation, trade or business or employment in any job. It is equally striking that this heinous practice has spread even to places like burial or cremation grounds, sanitary conveniences, roads or passages and places of charitable trusts maintained out of state funds. There is also the problem of construction, acquisition, or occupation of any residential premises in any locality. The iron grip of untouchability does not exclude even hospitals, educational institutions or hostels. The Act fully recognises the practice of refusal of admissions to these places and provides for legal rights to enable them to cross these social hurdles.

A descriptive account of the places (included in the Act) is largely intended to bring into focus the all-pervasive nature of 'untouchability.' These violations are inherent in the deep-rooted prejudices of various sections of the Hindu Society and extend to three very vital domains viz., the homes and houses, religious places, and commercial establishments. It is generally stated and believed that God creates all human beings, but in the case of Dalits the puzzle remains that the place of worship of the "creator" is not accessible. More surprising is the position of commercial establishments, where goods are exchanged for profit. This economic impulse is blunted by these practices although it means a loss of income. The Act aims at fighting these practices and prejudices so that the Dalits enjoy the 'rights' conferred on them by the Constitution as any other citizens of the country.

In order to enforce the provisions of the Act, punishment for preventing entry into a place of public worship and the other related practices, or causing disability with regard to access to shops, public restaurants, hotels or places of public entertainment, use of utensils kept in public restaurants, practice of any profession, carrying on of any occupations, trade or business, or use of a river, stream spring, well, tank, water tap, or any watering place, bathing ghat, burial or cremation ground, any sanitary convenience, any road or passage, any place used for a charitable or public purpose, use of access to public conveyance, residential premises, *Dharmasalas*, hospitals, hostels and educational institutions is provided. The prescribed

punishment is imprisonment from one to six months, with a fine between one hundred to five hundred rupees.

In these offences, like preventing persons from exercising any right accruing to them by reason of abolition of untouchability under Article 17 of the Constitution, or molesting, injuring, annoying, obstructing the exercise of any of these rights, or the other offences such as using either written words, or by signs or visible representations, inciting or encouraging any person or class of persons to practice untouchability, insulting or attempting to insult on the ground of "untouchability" a member of a scheduled caste, the quantum of imprisonment is between one month to six months is prescribed.

The Act also broke new ground when it recognised unlawful compulsory labour as a part of the practice of untouchability. It states that whoever compels any person on the ground of "untouchability" to do any scavenging or sweeping or to remove the umbilical cord or to do any other job of a similar nature shall be deemed to have enforced a disability arising out of "untouchability." In these cases, unlike the other offences, the punishment is between three months and six months and the fine is between one hundred rupees and five hundred rupees. The Act also provides for cancellation or suspension of licenses when a person is convicted of an offence under S.6 if he is holding any license under any law for the time being in force in respect of any profession, trade, calling or employment in relation to which the offence is committed. It also states that the court trying the offence may, without prejudice to any other penalty to which such person may be liable under that section, direct that the license stands cancelled or be suspended. In the case of religious places, where the manager or trustee of a place or public worship or any educational institution or hostel which is in receipt of a grant of land or money from the government is convicted, the government may direct the suspension or resumption of the whole or any part of such grant.

The process of punishment extends to companies too. If the person committing an offence under this Act is a company, every person who at the time the offence was committed was in charge of or responsible to the company for the conduct of the

business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. This Act also gives the power to the State Government to impose a collective fine. The Act says, "If, after an inquiry in the prescribed manner, the State Government is satisfied that the inhabitants of an area are concerned in or abet the commission of any offence punishable under this Act, or harbour such persons, or fail to render assistance in their power to discover or apprehend the offender or offenders, or suppress material evidence of the commission of such offence, the State Government may, by notification in the Official Gazette, impose a collective fine on such inhabitants and apportion such fine amongst the inhabitants who are liable collectively to pay it. Such apportionment shall be made according to the State Government's judgement of the respective means of such inhabitants, and in making any such apportionment the State Government may assign a portion of such fine to a Hindu undivided family to be payable by it. It also prescribes the procedure to be followed such that the notification shall be proclaimed in the area by beat of drum or in all other possible manner.

The Act also prescribes an enhanced penalty to those who have already been convicted of any offence under this Act. The second offence is punishable with imprisonment for a term between six months and one year and also with a fine between two hundred rupees and five hundred rupees. For the third offence, or any offence subsequent to the third offence, the punishment includes imprisonment of two years and also a fine between five hundred rupees and one thousand rupees.

The Act also was vociferous when it stated,

"Notwithstanding anything contained in the Code of Criminal Procedure, every offence punishable under this Act shall be cognisable and every... such offence, except where it is punishable with imprisonment for a term exceeding three months, may be tried summarily by a Judicial Magistrate of the first class or in a metropolitan area by a Metropolitan Magistrate in accordance with the procedure specified in the said code."

The Act also reflects its concern and commitment when it states that it is the duty of the State Government to ensure that

rights accruing from the abolition of untouchability are made available to and are availed of by the persons subjected to any disability arising out of "untouchability." It held that such measures include the provision of adequate facilities, including legal aid, to the persons subjected to any disability to enable them to avail themselves of such rights; the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of provisions of this Act; the setting up of special courts for the trial of offences under this Act; the setting up of committees at such appropriate levels as the State Government may think fit to assist the State Government in formulating or implementing such measures; provision for periodic survey of the working of the provisions of this Act with a view to suggesting measures for its better implementation the identification of the areas where persons are under any disability arising out of "untouchability" and adoption of such measures as would ensure the removal of such disabilities from such areas. It also prescribes that the Central Government shall, every year, place on the Table of each House of Parliament a report on the measures taken by itself and by the State Governments in pursuance of the provisions of this section.

The Protection of Civil Rights Rules, 1977, did attempt to strengthen the procedure so as to expedite the process of justice. The State Government is required to appoint an officer not below the rank of a Sub-Divisional Magistrate for the purpose of making an inquiry. It directs that the officer "shall issue a public notice specifying the date, time, and the purpose of such inquiry and calling upon all the residents of the area in respect of which the inquiry is to be held to furnish such information and materials, including documents in their possession, as may be relevant for the purpose of the enquiry." It is also made clear that it should be in the local language or languages of the area and such other places as the inquiry officer deems fit and at least in one daily newspaper circulating in the area and proclaimed in the area by the beat of a drum or in such other manner as the Inquiry Officer may think best in the circumstances to bring the contents of the public notice to the notice of the inhabitants of the area.



**The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**

Two and half decades after the Civil Rights Act had been passed and enforced, there arose the need for the enactment of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989; five years later, the rules were formulated. This is a sad reflection on the State and society in India. The very nomenclature 'Prevention of Atrocities' is indicative of the deteriorating quality of rights that are guaranteed to the Dalits.

It is obvious from the tone and the tenor of the 1989 Act that the earlier legal measures had not had the anticipated effect. To the contrary, it appears that the situation had deteriorated. There can be varied explanations for this change in the overall context. One plausible explanation could be that the attitudes of certain sections of the upper strata of society did not qualitatively change but seem to have hardened. It could be equally true that the consciousness of the members of the Scheduled Castes had heightened on account of the expectations that legal measures coupled with the constitutional guarantees had raised, and due to organized Dalit movements. It is widely noticed that the commission of offences aggravated into atrocities. This called for additional legal measures by way of providing special courts for the trial of such offences and also for the relief and rehabilitation of the victims of such offences. The 1989 Act not only listed out the atrocities punishable but also raised the severity of punishment.

The atrocities include:

- (i) Forcing a member of the scheduled caste or the scheduled tribes to drink or eat any inedible or obnoxious substance;
- (ii) Dumping excretion waste matter, carcasses, in his premises or neighbourhood;
- (iii) Forcible removal of clothes from the person or parading him naked or with a painted face violative of the dignity of the person;
- (iv) Wrongfully occupying or cultivating any land owned by or allotted to a member of these communities;
- (v) Wrongful dispossession of land or premises;

- (vi) Compelling or enticing a member to beg or forced or bonded labour;
- (vii) Forcing or intimidating a member not to vote or to vote for a particular candidate;
- (viii) Instituting false, malicious, vexatious suit or criminal or other legal proceedings against a member of these communities;
- (ix) Giving false and frivolous information to any public servant, thereby causing injury to the member;
- (x) Intentionally insulting or intimidating or humiliating a member of the community;
- (xi) Assaulting or using force on a Scheduled Caste or Scheduled Tribe woman to dishonour or outrage her modesty;
- (xii) Using positions of power for exploiting her sexuality;
- (xiii) Corrupting or fouling the waters of any spring or reservoir used by the members of a Scheduled or Caste Scheduled Tribe;
- (xiv) Denying a member customary right to a place of public passage or resort; and
- (xv) Forcing or causing a member to leave his house and village.

Given the nature of these offences, they have been made punishable with imprisonment between six months and five years with fine. The Act also provides for adequate provisions for procedural justice. Therefore, it prescribes that if anybody who is not a member of these communities fabricates or gives false evidence in any case leading to a conviction for a capital offence, he shall be punished with imprisonment for life; and if an innocent member is convicted and executed as a consequence of forged evidence, the person shall be punished with death. The growing severity of punishment is indicative of the growing concern for the Dalit rights and the belief that deterrence can contain the atrocities.

The Act is categorical when it states that if any person causes any evidence of the commission of an offence to disappear with the intention of screening the offence from the legal punishment, he shall be awarded the same punishment that is provided for that offence in the law. It also says that a public

servant committing any offence under this section shall be punished with imprisonment for one year. It is further fortified with a provision for the punishment of the neglect of duties required to be performed by him with imprisonment for a term of six months to one year.

The Act also provides for an enhanced punishment of one year for those who commit the same offence more than once. The Special Court is further empowered to order the forfeiture of the movable and immovable property belonging to a repeat offender. The properties can be attached during the period of trial, and where the trial ends in a conviction, the property shall be liable to forfeiture. The Act further provides for punishment by the special courts of those who render any financial assistance to a person accused of abetting.

There is a provision for the conferment of powers normally exercisable by a police officer to any officer of the State Government. This includes the powers of arrest, investigation and prosecution of persons before any special court. It also requires all the officers to assist the concerned officers in execution of the legal provisions. The special courts can remove a person from an area or a place if the Court is satisfied that the person is likely to commit an offence. In case that person fails to remove himself as directed or enters the area, violating the order, he could be arrested and removed in police custody to such place as the court specifies.

#### **Special Courts:**

The Act in Chapter IV Section 14 provides for a speedy trial for which purpose the State Governments may specify the Court of Sessions to be the special court for each district to try the offences, with the concurrence of the Chief Justice of the High Court. It also specifies that the Special Court, being a court of original jurisdiction, has all the powers under section 10 of the Criminal Procedure Code to take cognisance of the offences. For every Special Court, the State Government shall appoint an advocate with not less than seven years of experience or a special public prosecutor to conduct the cases.

The Act enjoins the State Governments to take all the measures to ensure the effective implementation of this Act.

These measures could include the provision of adequate facilities, including legal aid to the persons subjected to atrocities to enable them to avail the justice. This section also provides for a provision for travel and maintenance expenses for witnesses, including the victims of atrocities, during investigation and trial of offences. The other measures include: a provision for the economic and social rehabilitation of the victims of atrocities, the appointment of officers for initiation or exercising supervision over prosecutions, the setting up of committees to assist the government in the formulation or implementation of such measures. It further requires that a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of it.

The Act also empowers the Central Government to make rules for carrying out the purpose of the Act. In pursuance of this objective, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, were made.

The rules emphasise that as a part of precautionary and preventive measures the State Governments are required to initiate a variety of measures that include identifying the areas which are vulnerable to the commission of atrocities and ordering the District Magistrate and Superintendent of Police to review the law and order situation. They can not only cancel the arms licenses of all persons and have them deposited in the government armoury, but also seize all illegal firearms with a view to ensuring the safety of person and property. They can even provide arms licenses to the members of the Scheduled Castes and Scheduled Tribes if they deem it necessary. The rules also provide for the constitution of powerful State, district and division level committees to assist the government and for the establishment of vigilance and monitoring committees to ensure the effective implementation of the provisions of the Act.

The rules also provide for the setting up of awareness centres and the organization of workshops in the identified areas to educate the Scheduled Castes and Scheduled Tribes about their rights and the legal protections available to them. They also encourage Non-Governmental Organizations (NGOs) and provide financial assistance for establishing and maintaining the awareness centres.

The rules require the State Government to prepare a panel of competent and committed advocates to conduct cases in special courts. They also empower the State Government to identify the public prosecutors whose work is found to be unsatisfactory. The District Magistrates are empowered to engage a senior advocate if the victims so desire. The rules also provide for the periodic review of the progress so as to ensure that the entire machinery is alert and vigilant. For this purpose, the District Magistrates and Director of Prosecution are to review the performance of the special public prosecutor. In addition, they are also required to review the position of cases registered under the Act and submit a monthly report of the investigation and prosecution of each case.

The rules also direct the office-in-charge Police station to assist the victims in filling out the formal complaint by reducing their oral statements into a written form and giving the a copy of that statement to the informant. In the event of any non-response of police personnel, the higher officers, such as the Deputy Superintendent of Police, are to take care of this procedure. The rule provides for a spot inspection by the senior police officers on receiving the complaint. The District Magistrate, the Sub-Divisional Magistrate, or the Superintendent of Police is required to draw a list of victims, their family members and dependents who are entitled to relief, prepare a report of the extent of the atrocity, loss and damage to the property of victims and provide immediate relief to the victims. The rules also direct for an intensive police patrolling of the affected area and initiate all the measures to provide protection to the witnesses and other sympathizers of the victim. It also includes the appointment of an investigating officer not below the rank of Deputy Superintendent of Police with a mandate that he completes the investigation within thirty days and submits the report. The Home Secretary and the Social Welfare Secretary and Deputy Superintendent of Police are required to review the progress of the investigation at the end of every quarter.

Another important provision is the setting up of the Scheduled Castes and the Scheduled Tribes protection cells at the State Headquarters under the charge of an Inspector General

of Police. The cells are charged with the responsibility of conducting surveys of identified areas, recommending to the State Government the deployment of special police forces, and finding out the possible causes leading to an offence. They are to monitor the overall measures taken in restoring a feeling of security amongst the members of these communities. The rules also make it the responsibility of the government to appoint a nodal officer of the rank of Secretary to Government to coordinate the working of the district administration and ensure the relief and rehabilitation of the victims. The rules also provide detailed guidelines and measures to be taken by the district administration.

The rules emphasise the specific responsibility of the State Government to make the necessary provisions in its annual budget to provide relief and rehabilitation facilities to the victims of atrocities. The State Government is also required to prepare a model contingency plan for implementing the provisions of the Act. As a part of this responsibility, the State Government is to specify the role and responsibility of rural/urban local bodies and non-governmental organizations. The contingency plan should include schemes to provide immediate relief in cash or kind, allotment of agricultural land and house-sites, schemes for employment in the government or in government undertakings to at least one member of the victim family, and the provision of housing for them. The plan should also grant pension to widows, provide, mandatory compensation, and strengthen the socio-economic conditions of the victims including health care, supply of essential commodities, electrification, adequate drinking water facilities, burial/cremation and link roads to their residence.

The rules also envisage the constitution of state-level and district level-vigilance and monitoring committees. In fact, at the State-level the committee is to be headed by no less a person than the Chief Minister. It also comprises of the Home Minister, Finance Minister, and Welfare Minister. In addition, all the elected members of Parliament and the State Legislative Assembly and Legislative Council from the States belonging to the Scheduled Caste and Scheduled Tribe are also members. Added to these public representatives, the Chief Secretary, the

Home Secretary, the Director General of Police, the Director of the National Commission for the Scheduled Castes and the Scheduled Tribes are also made members. The Secretary-in-Charge of Welfare and Development of the Scheduled Castes and Scheduled Tribes would act as Convenor.

This high power vigilance and monitoring committee is required to meet twice a year to review the implementation of the provisions of the Act, relief and rehabilitation and the overall working of the machinery that is in-charge of the enforcement of these rights.

The district level vigilance and monitoring committee comprises of the elected members of the Parliament and State Legislative Assembly and Legislative Council, Superintendent of Police, three group "A" officers belonging to the Scheduled Castes and Scheduled Tribes and three members of non-governmental organizations. The District Magistrate and the District Social Welfare Officer shall be chairman and member-secretary respectively. The committee, which is mandated to meet once in three months, is required to carryout similar functions to those of the State Committee.

To enforce Rule 12(4), regarding relief and rehabilitation, norms for the quantum of relief are prescribed. The offences such as forcing to drink or eat inedible or obnoxious substances, causing injury or insult, wrongful occupation of land, beggary or forced labour, filing false, malicious or vexatious legal proceedings, providing false and frivolous information, a insult, intimidation and humiliation, the amount of fine has been fixed at Rs.25,000 or more .

It also prescribes that Rs. 50,000 be awarded for outraging the modesty of a woman or sexual exploitation. For denial of customary rights or fouling of water, the amount fixed is Rs. 1,00,000 or full cost of the restoration of normal facility. In those cases where disability, mental and physical, is caused, the relief of Rs. 1,00,000 or more is prescribed depending upon the severity of the disability. For instance if the incapacitation is 100%, the amount is Rs. 1,00,000; if it is an earning member it is Rs. 2,00,000. The same is prescribed in the case of murder or death of the non-earning and earning member of the family, respectively.

The rules are so thorough that their concern for the rights of the Dalits is very wide, deep and intense. This was perhaps the result of the experience over a period of time, particularly the decades of seventies and eighties, when the nature of atrocities, both in the extent and magnitude, intensified.

**Contemporary Scenario of Dalit Rights:**

Since independence, it is obvious from the above account that a variety of initiatives have been undertaken by the State for the socio-economic development of the Scheduled Castes and Scheduled Tribes. They include an array of constitutional commitments and the enactment of a number of special legislations, reservations in public employment and elected representative bodies, planned development programs, budgetary allocations and its general according of high priority in all the governmental activities. The series of land reform legislations, the land allotment rules, the myriad developmental programs, and known as poverty alleviation programs, and the scheme of reservation not only in public service but also in various other fields all constitute positive measures intended to secure livelihood opportunities and enhance the well being of these sections of the community.

Notwithstanding such legal endeavours during the last five decades, the enjoyment of rights by the Dalits has not yet been qualitatively altered. There is definitely some relief but in five decades, things ought to have changed much faster. In this part, a brief review of four important papers on Dalit rights are presented to provide the reader an overview of the existing and unfolding situation. This emerging picture can act as a backdrop for future efforts to promote and protect Dalit rights.

S.R. Sankaran, a deeply committed and concerned civil servant, and a vigilant participant in the formulation and implementation of programs meant for improving, if not altering, the conditions of Dalits, writes, "The welfare and development of the members of the Scheduled Castes and Scheduled Tribes should be viewed at not merely in terms of material needs but equally or even more so in relation to non-material needs such as the right to live with freedom, human dignity and self respect." He adds, "It is well known to any keen



observer that throughout the whole of rural India Scheduled Castes' habitations are even today usually segregated, mostly on the outskirts of the village. All of them suffered and continue to suffer from varying degrees of unfreedom and denial of human dignity. The injustices suffered relate to property, wages and other resources on one hand and the person on the other." He further observes, "The Scheduled Caste families in many villages have been in permissive position of house sites or homesteads with constant threats of eviction by the land owners or even the state." He laments, "The victims of custodial violence or illegal detention are mostly from the poor scheduled castes and scheduled tribes with little financial or political power to back them." Sankaran emphasises the fact that "Despite various measures to improve the socio-economic conditions of the Scheduled Caste and Scheduled Tribes, they remain vulnerable. They are denied a number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have in several brutal incidents been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons. Others do not take the assertion for rights by the dalits kindly. Occupation and cultivation of even the government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests."

In matters of reservation, Sankaran observes that, "In the case of Scheduled Castes, their representation, in overall terms, has reached the level indicated by the proportion to the total population. However, it is noted that there is shortfall in Group "A" and Group "B" posts in respect of which the percentage of Scheduled Castes is only 10.25 and 12.06 percent respectively. Though only a small proportion of Scheduled Castes and Scheduled Tribes have been able to secure employment in government and other public organizations, those who have been able to secure employment have been able to cross the line of economic freedom and of self-respect to a significant extent." He also observes, "With the onset of liberalization and the shrinking size of the State and Public Sector the job opportunities that are likely to emerge in future in the public domain are

unlikely to be large. The issue of reservations has to be viewed at as one of equitable sharing not just in public appointments but in all the emerging opportunities and resources."

Sankaran observes, "That the welfare and development of Scheduled Castes and Scheduled Tribes since Independence has been rooted in the Constitution, which has been based on the values of equality, human dignity and social justice and the laws and policy prescriptions emanating from the constitutional mandates." However, he adds, "In actual practice, there has been a disjunction between these values and the hierarchical and gender values which continue to govern the society." With regard to the recent developments he stresses, "In a country where the distribution of income, resources and political power are uneven among classes and groups, with the Scheduled Castes and Schedule Tribes being at the bottom of the socio-economic ladder, public policy cannot be left merely to the market signals." He adds, "The hollowness of market orientation in a poverty dominated economy is obvious, with the poor being virtually out of the market."

Sankaran suggests a series of measures for enhancing the quality of Dalit rights that include land restructuring, wage intervention, price intervention, employment generation, generable equitable shares in emerging opportunities and well targeted socio-economic programs backed by the effective implementation of special laws in their favour not just 'safety nets' or 'human face.'

The suggestion relating to land is specifically focussed when he observes that, "The material poverty of these sections of the people can be seen to arise primarily from their state of landlessness and their social position is inescapably bound up with their conditions as a predominantly landless people working on the land of others. It is land that is at the centre of poverty, parasitism, exploitation, misery and iniquitous relationships and to the rural poor ownership of land denotes enhanced social status and equality means equality in the ownership of the land, endowing them with self-respect, self confidence and a sense of equality."

P.S. Krishnan, another key player in the enlargement of the scope and content of Dalit rights observes, "Untouchability

in its classic expressed forms known all over India, continues to exist in many parts of India. The Act and the machinery are not able to reach out to most of the victims in the villages or to alter the situation there significantly." He adds, "Many new forms of 'untouchability' have appeared in rural as well as urban areas in many parts of the country. With this has arisen a variety of discriminatory practices such as no seating, separate seating, separate glasses, usually old, dirty and cracked or chipped."

Krishnan further observes, "The Dalits have been the providers of labour that has continued this day." He adds, "In order to force the Dalits to remain permanently tied down as helots providing agricultural and other labour, members of these castes were denied the right to owning land or cultivating it on their own account." Added to this, as the Dalit consciousness is growing, Krishnan points out, "It becomes necessary for the dominant classes drawn from different upper castes in different parts of the country to force new instruments of control. This is how atrocities made their presence in the sixties, and concurrently as the resistance of the Dalits has grown, also the frequency and brutal ferocity of atrocities has grown apace."

A sample of the following incidents enumerated by Krishnan epitomises the crisis and gravity of dalit rights:

- In Kilavenmani in Tamil Nadu, 42 Dalits, mostly women, children and elders, were killed in 1968.
- In 1977 in Belchi in Bihar, 11 Dalits were killed.
- In 1978 in Chainpur, Gaya, two Dalits were killed.
- In 1979 in Bodhgaya, Bihar, two Dalits were killed and one injured.
- In 1980 in Pipra in Bihar, 14 Dalits were killed.
- In 1983 in Vijayanagar of Rajasthan, three dalit families were attacked and two Dalit women were gang raped.
- In 1984 in Bichgaon of Rajasthan, seven Dalits including two women were Massacred.
- In 1986 in Golana of Gujarat, four Dalits were killed and 20 injured.
- In 1988 in Nonki-Nagawa in Bihar, 19 Dalit Persons were killed.

Dalits are facing atrocities even for the assertion of their self-respect and dignity. A case in point is the Sundur incident in the state of Andhra Pradesh where in 1991 eight Dalit youths were massacred for just asking to be treated as equals. This is a point for the future. It is noticed that, "Whenever punishments as per the Act have been inflicted and proven offenders sentenced to imprisonment, there has been a salutary effect in the villages. It is further pointed out, "Delay or want of quick trials through exclusive special courts and mobile special courts results in the State unintentionally promoting acquittals, leaving enough time for complainants and witnesses to be reduced to silence."

Krishnan makes several suggestions for ensuring an effective enforcement of Dalit rights. Some of them include: serious implementation of the elaborate guidelines of the Government of India; serious implementation of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989; meaningful economic development and economic liberation of Dalits to bring an end to the present explosive juxtaposition of Dalit agricultural labour castes and land owners belonging to dominant upper middle castes and to enhance their ability to resist "Untouchability"-based discrimination; a peaceful, consistent and persistent, democratic mass movement, which will let no case of atrocity anywhere in the country go unnoticed by the nation.

Sukhadeo Thorat, a leading scholar on the question of Dalit rights, traces these violations to the Indian socio-economic structure and points out the following causes in the economic sphere accounting for the violation of rights:

- a) it fixes the occupation of each caste by birth and its hereditary continuation;
- b) the unequal distribution of economic rights relate to ownership of property, trade, employment, wages, education etc, among the caste groups;
- c) a hierarchy of occupational order based on the social stigma of high and low;
- d) a recognition of slavery as a phenomenon of the social infrastructure; and

- e) a harsh system of social, religious and economic penalties to enforce the caste-based economic social order.

Thorat observes that, "Such a system leaves no scope for individual choice and inclination in matters of occupation. The Hindu social order does not recognise equal need, equal work or equal ability as a basis of reward for labour in the distribution of the good things of life to those who are reckoned as the highest must get the best and those who are classed as lowest (Untouchable) must accept the least and the worst." This is what leads to the tremendous and unending spiral of violence. The following are certain stunning facts relating to violation of Dalit rights.

- a) at the all-India level, the number of registered cases of civil rights violations against the former untouchables were, on an average, between 1993 and 1997, about 1672 annually;
- b) the average number of cases registered annually was 480 during the 1950's, 903 during the 1960's, 3240 during the 1970's and 3875 during 1980's;
- c) on average, 30,000 cases of general crimes and atrocities committed against the former untouchables were registered annually between 1981-97;
- d) during '81-'86 and '95-'97 (9 years) a total of 2,69,000 cases of crimes and atrocities were committed against the former untouchables;
- e) the break-up of the atrocities for the year 1997 shows 504 cases of murder, 3462 of grievous hurt, 384 of arson, 1002 cases of rape and 12,149 cases of other offences;
- f) the data also shows that between 1981-97 as an average annually about 2343 were hurt, 847 were subjected to arson, 754 women were raped and 12,000 were subjected to other offences.

Thorat is categorical and unambiguous when he, based on the above data, maintains that, "With 513 murders every year we cannot say that the formerly untouchable persons enjoy any right to life. With 847 cases of arson annually, we cannot say that they have the right to safe and secure life. With about 750

cases of rape annually we cannot say that the scheduled caste women have the assurance of a safe, secure and dignified life. And with 3000 cases of civil rights violations annually we cannot say that the scheduled castes enjoy liberty and equality in civic and political sphere."

Gopal Guru, a scholar activist, in an attempt to conceptualise the whole experience and relating the discourse on Human Rights to the Dalits, emphasises the need to "broaden the definition of human rights through the inclusion of the Dalit rights to acquire space in public discourse". He argues "Human Rights are denied to Dalits because of their group character" and adds that the resistance to the violation of Human Rights by one single Dalit has always been endangering the life and limb of the entire Dalit community." The "'package deal violence' sparking from the individual act of crossing the traditional boundaries has in the recent times led to the mass violence against the Dalits... thus the magnitude of the violation of the human rights particularly in the caste-ridden or ethnically divided societies begins with the violence unleashed against an individual but it logically leads the violence against the groups." The Dalit Perspective on the Human Rights of Dalits is distinct because of its group character as against the legalistic individualistic approach taken by Indian State towards the Human Rights of Dalits.

#### **Concluding Remarks**

Dalit rights in India has undergone ups and downs. There has been a considerable legal effort to ensure their rights. Periodically from the year 1955, there have been attempts to either amend, or enact or enlarge the ambit of law in '76, '77, '89, '95. The law did take note of the changing context and provided for more rigorous measures. The changing nature of the law itself offers ample evidence to the serious violations of their rights. In 1955, while the Act referred to untouchability offences, in 1976 it was amended as the Civil Rights Protection Act and in 1989 it became the Prevention of Atrocities Act. Despite several serious measures, there has been an unending violation of rights indicating that constitutional guarantees to rights are a necessary condition but not a sufficient one. This is

more than evident in the past five decades of experience. The men and women who occupy political administrative and judicial positions will need to have a world-view rooted in the values of dignity and self-respect of every human being and believe that equality between human beings is not only desirable but it is possible.

The political parties, the political movements, the new social movements, the NGOs, professional associations, Trade Unions and Students and Youth Organizations, should incorporate Dalit rights into their agendas and continuously strive for them. The upper strata of the society should realise that in a society where one-fifth of its population does not enjoy dignity and freedom, the democracy is not safe and society is not secure. The substance of freedom depends, in the ultimate, on the quality of life and social relationships of those who are at the rock bottom of the society. It is this understanding that should guide our future efforts, not only in the protection and promotion but also in the enlargement of the scope and content of Dalit rights.

**Notes:**

1. The Untouchability (Offences) Act, 1955
2. The Protection of Civil Rights Act, 1976.
3. The Protection of Civil Rights Rules, 1977
4. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989
5. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995.
6. S.R. Sankaran, "Welfare of Scheduled Castes and Scheduled Tribes in Independent India-An Overview of State Policies and Programmes," *Journal of Rural Development*, Vol.19(4), 2000.
7. P.S. Krishnan, "Untouchability And Atrocities," *Social Action*, Vol.43, Oct-Dec, 1993.
8. Sukhadeo Thorat, "Human Rights of Ex-untouchables in India: Violations and Rights Enforcement," *Indian Journal of Human Rights*, Vol. 4, Nos.1&2, 2000.
9. Gopal Guru, "Human Rights and the Dalits-An Inquiry into the Human Rights Discourse in India," *Indian Journal of Human Rights*, Jan-Jun, 1997.
10. Also see *Indian Journal of Human Rights* Special Issue *Human Rights: Dalits*, Vol. 4, Nos.1&2, 2000.

## ***Rights of the Disabled***

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**D**isability is a relative term because different cultures define their norms of disability differently. The title "disability" conceals behind it a loosely connected heterogeneous group of many disabilities. For instance, being a woman, low caste, poor and ethnic minority are some commonly perceived disabilities and across the cultures, persons having physical or intellectual challenges are also considered disabled, though are rarely counted amongst those requiring protection against discrimination for equal enjoyment of rights and citizenship. Social values, norms and attitudes are not static and are liable to change, depending on a wide range of factors and forces that operate at macro and micro level. Consequently, the formal notion of disability undergoes revision to accommodate the change. Article 15 of the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth. The National Commission to Review the Working of the Constitution (2001) suggested to extend the prohibited heads of discrimination to include ethnic or social origin, colour, age, language, political or other opinions including property and birth. However, disabilities on account of physical and intellectual challenges have not been included in the recommended list of prohibited heads of discrimination.

This essay attempts to discuss the human rights of those persons with disabilities who, temporarily or permanently, experience physical, intellectual or psychological impairment of varying degrees. Most often, their lives are handicapped by social, cultural and attitudinal barriers which hamper their full participation and enjoyment of equal rights and opportunities. Persons with disabilities have been viewed, as abnormal, deserving pity and care, not as holders of rights, equal in dignity and freedom.



### **Medical Definition**

There are a number of definitions in use to describe persons with disabilities and most of them reflect an understanding that disability is an individual pathology - a condition grounded in the physiological, biological and intellectual impairment of an individual. For example, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, while defining disability in Section 2(t) stipulates that "person with disability means a person suffering from not less than forty percent of any disability as certified by a medical authority." The disabilities that have been listed in Section 2 include blindness, low vision, hearing impairment, locomotor disability/cerebral palsy, mental retardation, mental illness and persons cured of leprosy. The World Health Organization describes disability "as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being". Thus disability tends to be couched within a medical model, identifying people with disabilities as ill, different from their non-disabled peers and in need of care. Because the emphasis is on the medical needs of persons with disabilities, there is a corresponding neglect of their wider social needs. This has resulted in their severe isolation.

### **Social Definition**

Disability is a highly varied and complex condition with a range of implications for social identity and behavior. Therefore, several efforts to define disability in a manner that reflects the social dimension of disability have been made in order to establish that disability largely depends upon the context and is a consequence of discrimination, prejudice and exclusion. In the UN Standard Rules on the Equalization of Opportunities for Persons With Disabilities, 1993, disability summarizes a large number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment but a distinction has been made between disability and handicap "meaning handicap is the loss or limitation of opportunities to take part in the life of the community on an equal level with others." It

describes the encounter between an individual and the environment which occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens. The purpose of the term handicap is to emphasize the shortcomings in the environment and in many organized structures of society. The definition of disability adopted by the British Council also takes into account the conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner that is different from others. By this definition, "Disability is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities". Therefore, like racism or sexism, disability is described as a consequence of discrimination and disregard to the unique circumstances of certain sections of the society.

#### **Human Rights Definition**

There is a growing realization to elaborate a definition of disability which is in conformity with human rights values and the principle that "all human beings are born free and equal in rights and dignity". In the heart of human rights mission lies the respect for variation in human cultures and the recognition that people are different on several considerations such as gender, race and disability. Nevertheless, concerning their rights and dignity all people are same but it does not imply that all people should be treated in the same or similar way. The ethical principle of justice implies that people with different needs are treated differently but the difference of treatment must not be decided on arbitrary norms. The formal equality discourse actually builds up on the idea of the Greek philosopher, Aristotle, who said that, "things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their un-alikeness."

In the introduction to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993, the principle of 'equal rights' is described as implying "that the needs of each and every individual are of equal importance, that

those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunities for participation." A coherent programme of "equality of opportunity" entails tackling deep-rooted social attitudes to disability. Besides that, equality entitles each person to equal membership in society. This calls for critical reorientation of perspective, which has important implications for the way in which law and policy in relation to disability are developed, as well as for its substantive content. "In essence, the human rights perspective on disability means viewing people as subjects and not as objects. It entails moving away from perceiving the disabled as problems towards viewing them as holders of rights. Importantly, it means locating problems outside the individual and addressing the manner in which various economic, social, cultural and political processes accommodate the difference of ability."

#### **Causes of Disability**

It is the inherent compulsion of a welfare model to treat the manifested symptoms of a problem rather than treating the problem itself. The analysis of the causes of disability from a welfare standpoint tends to emphasize disease, hereditary and birth defects over the systemic and environmental factors. Thus the focus of preventive programmes has been more on eradicating diseases such as measles, leprosy, polio, goiter, rubella etc. There are powerful reasons to prevent the occurrence of disability so that people can live healthier lives free from disease and its life long implications. However, recognition of more fundamental causes that perpetuate and exacerbate disability is critical in planning any strategies to overcome the consequences of disability. Article 40 of the World Programme of Action (WPA) concerning disabled persons lists out a comprehensive range of causes of disability which take into consideration factors like wars, civil conflicts, poverty and overcrowding and unhygienic living conditions, constraints of resources, geographical distance, physical and social barriers, industrial, agricultural, and transportation-related accidents, natural disasters, stress and psycho-social problems as factors

causing disablement. Certainly, the diagnostic parameter in WPA go beyond the medical aspects of disability and locates its causes outside the medical realm.

### **Wars and Disability**

Human civilization right from its inception has engaged itself in wars to advance various interests. Some nations use wars as a strategy to resolve conflict and problems of inequity. Whatever may be the reason for an armed conflict the disaster it creates is immeasurable. In the West, war has been the single largest factor responsible for causing permanent disablement not only to combatants in the battlefield but also to civilians who are forced to bear the hazards of lethal, chemical and nuclear weapons. It has been estimated that 25 percent of the world's population is suffering from the consequences of war and civil conflicts. In the nineties alone, more than four million people lost their lives, and about thirty five million people became refugees or were internally displaced as a result of violent conflicts and forced to live in conditions that contribute to disease, malnutrition and early death. Based on the figures from a study carried out in 206 communities, including Afghanistan and Cambodia, landmine triggered disability rate among the survivors is about 0.9 percent. About 6 percent of households in Afghanistan are affected by landmine accidents alone. Surveys of four countries in 1995 found that between 12 and 60 percent of landmine victims had to sell assets to meet their medical bills. In the war torn countries physical and psychiatric disabilities have not only been on account of war injuries but more because of diminishing resources and growing demand on already scarce resources available to the communities.

### **Crime and Disability**

Violent crimes underline shortcomings in the social, political and economic arrangements. Such crimes not only leave people with a sense of insecurity and fear but it also deprives them of their life and liberty. During 1999, the percentage share of the violent crimes reported in India was 13.5 percent of the total 2,38,081 reported cases under IPC. Many children and women are abducted to be used in prostitution, slavery and beggary. The risk of emotional, mental and physical disabilities

increase manifold. In the mid nineties, the government of Saudi Arabia repatriated more than 500 maimed Indian children who were used for begging. The case of female domestic workers with amputated fingertips, nose and earlobes also surfaced during the same time. They too were smuggled into Arab countries by powerful mafia gangs operating in various parts of India, Philippines and other developing countries. There are hardly any studies that have analyzed the nexus between disability and crime though at every nook and corner one can't escape the sight of maimed, blinded and mentally ill persons begging and wandering. Unfortunately, even the law enforcement agencies themselves commit acts of torture and inhuman treatment particularly to persons in detention. Custodial crimes, which include death, rape and disability, have drawn attention of public, media, legislature and human rights organizations. Bhagalpur blinding case is the illustration of this menace. "Freedom from torture and from inhuman or degrading treatment provides a shield of immunity. These rights protect both the physical and mental integrity of the person. It is no accident that the very highest level of due process protection is reserved in most legal systems for loss of the right to liberty. More generally access to a court in order to vindicate rights is an important safeguard in any society."

#### **Poverty and Disability**

There is a high correlation between disability and poverty but there are very few studies undertaken to investigate how poverty and disability influence each other and with their combination create new forms of barriers. In general, people with disabilities are estimated to make up 15 to 20 percent of the poor in developing countries. Inequitable economic and social policies have contributed to ever swelling population of people living in extreme poverty. Poor families often do not have sufficient income to meet their basic needs. Inadequate shelter, unhygienic living conditions, lack of sanitation and clean drinking water combined with poor access to health facilities breed disability. People with disabilities are also very vulnerable to poverty, if they are not already poor, since disability often results in loss of income and demands additional expenditure.

The extra costs directly related to the disability include such things as medical treatment, purchase and maintenance of special devices, cost on traveling to access rehabilitation and medical facilities. A survey of people with disabilities in India found that the direct cost of treatment and equipment varied from three days' to two years' income, with a mean of two months. For instance, the average cost of an orthopedic surgery is approximately Rupees 10,000 which is twice the annual income of two adult wage workers. The average cost of one visit to the hospital for treatment is Rupees 10 equivalent to a female agricultural laborers daily wage and almost half that of a male daily wager.

#### **Malnutrition and Disability**

While malnutrition indicates poverty, lack of nutritional security is indicative of inequity and political apathy. Malnutrition in its various forms is a cause of disability as well as a contributory factor in other ailments that increase susceptibility to disabling conditions. It is estimated that currently 515 million Asians are chronically undernourished, accounting for about two thirds of the world's hungry people. Common micronutrient deficiencies that affect disability include:

- Vitamin A deficiency - blindness
- Vitamin B complex deficiency - beri-beri (inflammation or degeneration of the nerves, digestive system and heart), pellagra (central nervous system and gastrointestinal disorders, skin inflammation) and anaemia
- Vitamin D deficiency - rickets (soft and deformed bones)
- Iodine deficiency - slow growth, learning difficulties, intellectual disabilities, goitre
- Iron deficiency - anaemia, which impedes learning and activity, and is a cause of maternal mortality
- Calcium deficiency - osteoporosis (fragile bones)

At the present rate, by the year 2010, there could still be some 680 million chronically undernourished people whose disabilities are likely to have roots in micronutrient deficiencies. Those most vulnerable to inadequate diets will be girl children, women and older persons. Due to the lack of food and nutrition security for the poor, about 30 percent of all infants born in India

are born weighing less than 2,500 grams, which is the WHO cut-off level to determine low birth weight with a lower chance of survival and high risk of disability.

“Recent scientific advances in the field of immunology and cell biology show that the role of nutrition, as a major determinant of health, is much wider and more pervasive than was earlier believed. Thus, it is now known that good nutrition is essential not only for the achievement of optimal physical growth and development, but also to ensure ‘mental well being, the ability to withstand the inevitable process of ageing with minimal disability and functional impairment.” Article 12 of ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This right is obviously violated when the necessary measures are not taken to prevent undernourishment or malnutrition and when proper medical care is not provided.

#### **Structural Adjustment Programmes**

The 1978 WHO Declaration of Alma-Ata advocated a comprehensive and strong participatory approach to the achievement of the global strategy for “Health for all by the Year 2000”. However, since the 1990s, the World Bank has assumed a leading role in formulating the health care policies and programmes of developing countries. One of the most significant impact of this has been a sharp cutback in public expenditure, which resulted in a steep fall in central grants to the disease control programs of Government of India in the early nineties. In this entire period, the outlays for curative services stagnated and in some states even declined. Some of these cutbacks had to be restored which was necessitated by the outbreak of several epidemics resulting in a large number of deaths. The plague outbreak in Surat and malaria in western Rajasthan in 1994 attributed to restoration of about 34 percent budget in the communicable disease control programs.

The negative experiences of SAP on health policies opened up a major debate regarding the health and nutritional consequences of SAP. Subsequently, the World Bank revised its earlier philosophy of blanket privatization of the health sector to promoting State’s capacity to protect social welfare, a more

utilitarian approach which employs a consequentialist calculation and comparison of policies to determine which reform will achieve the most results for the least inputs. Tools like DALY developed by the WHO also reflect the same utilitarian approach as it is used to gauge cost-effectiveness of interventions. This approach carries the risk of neglecting needs of certain sections on grounds of costliness. Therefore, any criteria which undervalues investment in securing right to life and health is inadequate and undesirable. The Committee on Economic, Social and Cultural Rights in General Comment No 5, makes an analysis of disability as a human rights issue. What is striking about the Committee's approach to the right to health in the context of disability is the direct link it establishes between the achievement of health and other rights, its emphasis on non-discrimination, which can be highly relevant in the context of selective treatment for people with disabilities.

#### **Occupational Hazards**

Around 90 percent of the workforce in India is in the unorganized sector, which is characterized by low levels of technological inputs in production, low standards of safety and inhuman conditions of work. To maximize profits, production is often located wherever costs are lowest, regulations loose and workers least likely to organize for better working conditions and fairer wages. This often results in high rates of accidents, poisoning from toxins, loss of hearing and vision, and health deterioration. Occupation-related health problems of workers employed in stone quarrying, leather industry, glasswork, weaving, diamond cutting, hand embroidery, etc.; children employed in the carpet, cracker and match industry, have not received appropriate and sustained attention, as occupation health has not been perceived important enough both by the corporates and those responsible to regulate work standards. Even in the western countries, permanent disablement as a result of industrial and highway accidents outnumbers war casualties, for example, 44,000 people lost their limbs in industrial accidents while 17,000 American soldiers became disabled in the Vietnam war.



Similarly, poor farmers and peasants are very vulnerable to disability as they work for long hours exposed to sunlight, dust and smoke. Wheat harvesting and amputations, paddy sowing and muscular diseases, coconut picking and spinal cord injuries are some common hazards associated with agricultural activities. The efforts to improve the design of agricultural implements have been quite successful in preventing disabilities however parallel improvements in the primary health system have not been achieved as it lacks the capacity to deal with agricultural accidents which occur at the village level. Occupation casualties and disabilities to a great extent can be brought down provided the industrial and occupation standards are in conformity with Article 7 of the International Covenant on Economic, Social and Cultural Rights which calls for the creation of just and fair conditions of work.

#### **Traffic Hazards**

Unplanned cities with narrow roads and rapid growth in vehicles have been responsible in increasing the number of road accidents in India. If current trends in increasing vehicles and inadequate roads and disregard to traffic regulations persist, the road accident may become the leading cause of death and disability. As per the Central Bureau of Health Intelligence Report of 1997-98, the number of deaths due to road accidents was 69,800 and railroad accident deaths were approximately 15,000. An expert in the field, Dr. Leslie G. Norman of London, estimates that for every road accident death there are 30-40 light injuries and 10-15 serious injuries which may lead to disability. Improvements in vehicle design and medical facilities, as well as stronger enforcement of traffic regulations concerning the compulsory use of seat belts (car use) and helmets (motorcycle use), and restrictions on alcohol consumption and other intoxicants need to be treated more seriously than it has been. "It is estimated that by 2020, road traffic accidents will be ranked as the third leading cause of disability in the Asian and the Pacific region. Quadriplegia, paraplegia, brain damage and behavioural disorders are some disabilities common among survivors of such accidents.

The purpose of analyzing a few selected causes of disability is to bring in focus factors beyond the biological and intellectual make up of an individual. It is a fact that disability would always remain one of the characteristics of the whole human society, but the causes may undergo change. In conclusion the treatment of disability does not lie in the prevention of medical factors but it calls for reorientation of diagnostic tools and intervention or prevention beyond the narrow medical concerns.

#### **Disability Estimates**

It is estimated that there are about 600 million people in the world who have disability of one form or another. Over 2/3rds of them live in developing countries with high density of their population in Sub-Saharan Africa and in South and South-East Asia. There is wide variation in the estimated disability rates reported by the developed and developing countries. The variation depends, to a large extent, on the definitions of disability used, which either expand or limit the disability groups covered in the survey. For example, the New Zealand's 1997 household survey yielded the average of 19.1 percent. In contrast, the 1991 National Sample Survey of India, covering four disabilities (visual, hearing, speech and locomotor), yielded a prevalence rate of 1.9 percent. In the same year, a separate sample survey brought forth 3 percent average of population with delayed mental development in the age group of 0 to 14 years. This brought the average population of persons with disabilities in India, China and Pakistan close to 5 percent in comparison to 19.1 percent in New Zealand and 18 percent in Australia.

In a country like India, underreporting is also due to the stigma attached to disability and the tendency to conceal it. Mild to moderate disabilities are not perceived as disabling by the rural Indians, and hence are not reported. There are other problems which contribute to poor reporting such as inadequately designed questionnaire and training imparted to enumerators. The census exercise for data collection in a highly populous country like India has many challenges. Therefore, a detailed sample survey may be a better option as the conduct of a sample survey not only lowers substantially the cost of data collection,

but it also means that a much smaller number of enumerators can be better trained and supervised. This is of particular importance in view of the sensitivity required to address the many facets of adequate disability data collection.

**The Disability Statistics at a Glance for India as per the National Sample Survey Organization**

Type of Disability	1981*	%	1991**	%	2000***	%
1	2	3	4	5	6	7
Locomotor	54.27	39.7	80.44	49.2	101.00	49.2
Visual	34.74	25.4	36.26	22.2	45.6	22.2
Hearing	30.19	22.1	29.4	17.8	36.6	17.8
Speech	17.54	12.8	17.68	10.8	22.2	10.8
<b>Total</b>	<b>136.74</b>	<b>100.00</b>	<b>163.62</b>	<b>100</b>	<b>205.4</b>	<b>100.0</b>
Disabled (with more than one of the four disabilities mentioned above).		14.54		12.36		12.4

Source: \* NSS 36th round;  
 \*\* NSS 47th round;  
 \*\*\* Estimated on the basis of average 2% of the population being disabled (other than mentally disabled, and inter-disability break-up is assumed at 1991 levels).

### Evolution of Disability Policy in India

#### Colonial Period

The Government had little regard for the well being of members of the annexed territories. In the absence of necessary social arrangements the problems of destitution, beggary, crime, and delinquency grew out of proportion. The theory of karma and fate further compounded the situation as disabilities were regarded as an outcome of one's sins and evil deeds of past lives. The indifference of the state and emergence of antiquated values defined new norms of disabilities causing stigmatization and

acute isolation. The crumbling of the old order and in the absence of new healthy substitutes, family became the primary social institution as an alternative to public arrangements for dealing with problems of disability.

The institutions, which the Imperial Government established for the care of the destitutes, beggars, and particularly the mentally ill persons offered asylum-like environment. Such an arrangement was enough to further alienate persons with disabilities. Asylum-like character of the new institutions unleashed in its wake the process of dehumanization of the PWDs. The Indian Lunacy Act of 1912 was established for the mentally retarded and mentally ill people. The Act allowed that any wandering or destitute person deemed of unsound mind could be relegated to an asylum by a magistrate, as could a convict who had become violent in prison.

### **Charity**

The next phase of change came about with the introduction of special schools by Christian missionaries. The first school for hearing impaired persons was established in 1884 by the Roman Catholic missionaries at Mumbai. Likewise, Miss Annie Sharp started the first school for the blind in 1887 at Amritsar, Punjab. The school functioned in the premises belonging to the Church of England Missionary Society. Though sporadic yet a more rational approach to the education and rehabilitation of persons with disabilities once again surfaced on the socio-cultural map of India. Inspired by the missionaries, many philanthropic Indians too came forward to ameliorate the lot of neglected and destitute people including those with disabilities. The freedom struggle and parallel movements for social reforms led to conditions conducive to the multiplication of voluntary sector. As a result, nearly 'hundred special residential schools and training centres for PWDs came into existence which the post-independence State either took over or registered them under The Societies Registration Act, 1860.

### **Independent India**

The Governments of independent India like their colonial predecessors have a tendency to use the mechanism of charitable

voluntary organizations for the delivery of basic services such as education, rehabilitation, training and employment for PWDs. During the first three Five-Year Plans (1951-66) the sole support to the disabled comprised grants-in-aid to NGOs and the establishment of national training institutes to prepare qualified cadre of professionals to work for institutions for the disabled. The Government also established the Central Social Welfare Board to assist voluntary agencies in organizing welfare programmes for the women, children and PWDs. The report of the Steering Committee on Social Welfare for the Tenth Five Year Plan records its deep concern over diminishing response of traditional voluntary organizations and the accompanying support which was available for the welfare of many people with disabilities. In their view, "this has shifted the major responsibility on the State to provide welfare services." The Planning Commission recommends an urgent need to "again activate both the community and the voluntary sector as well as the corporate sector to contribute to the well being of the deprived classes." These trends indicate that while education, training and rehabilitation of PWDs are seen important but for the provision and delivery of these basic services for the disadvantaged and the disabled, the State continues to depend on the NGO mechanism. Moreover, the question of granting rights to PWDs is regarded as a welfare issue requiring short-term alleviation of the problem using voluntary organizations.

#### **Characteristics of NGOs**

Majority of the voluntary organizations working in the area of disability are dominated by able-bodied, philanthropic individuals and professionals, leaving little room for participation of persons with disabilities in the planning or execution of their programmes. These charitable organizations view people as problems who are unfit to carry out the day-to-day affairs of their lives. Such an approach characterizes the medical model which presupposes the inability of people to take charge of their own situation. There are over 3,000 service-delivery NGOs in India of this kind. However in the last ten years, some of these NGOs have reoriented their understanding of disability and have assumed an active role in furthering the

rights, either by independently taking up campaigns for social mobilization, or by forging alliance with self-help organizations of the disabled.

### **Self - Help Movement**

The self-help organizations, though relatively small in number, are motivated by a rights-based development orientation and have played an effective role in reshaping public opinion and their contribution in the law and policy discourse have been noteworthy. Obviously, the self-help movement is spearheaded by persons with disabilities themselves. The solidarity of national disability organizations with their international partners have gained them unanticipated strength and visibility. The disability movement is an emerging agent of social transformation as it has challenged the society to be more tolerant to diversity and differences. Participation of persons with disabilities in the planning of policies, laws and programmes has been mandated in several jurisdictions. Any endeavour that seeks to promote the concept of development and human rights will necessarily take into account the perceptions of people themselves, as their real participation in the process of development alone can propel the process of change. This is not to suggest that mere involvement of people in the design and delivery of policies is an end in itself. In fact, it is a means for greater participation in economic, social, cultural and political processes. The support to the self-help organizations of the disabled and their parents for advocacy campaigns and for people-to-people empowerment does not come so easily since the Indian society accords greater importance to welfare-oriented services. In fact, the contributions of self-help organizations have gone unrecognized as the disability sector is highly dominated by service-providing NGOs managed by non-disabled persons. As a result, the reach of self-help organizations of the blind, hearing impaired, locomotor impaired and even of parents' associations of intellectually challenged persons is limited to urban areas. Due to the limitations of resources the attention of self-help movement has been more focused at social, cultural and economic rights and not so much on civil and political rights.

## The Constitution

### Disability: A State Subject

The Constitution of India is premised on the human rights values which recognize that all persons are born free and equal in rights and dignity. The Preamble, the Directive Principles of State Policy and the Fundamental Rights enshrined in the Constitution stand testimony to the commitment of the State to its people. These provisions envisage a very positive role for the State towards its vulnerable citizens. As per Entry 9 in the List 11 of Schedule 7 of the Constitution, the subject of 'Relief to the Disabled and Unemployable' is the responsibility of the state governments. Despite the constitutional mandate most of the state governments have neither introduced any law nor has introduced the State Policy on disability so far. Some schemes have been introduced to provide scholarships, pensions, assistive devices, braille books, out of turn houses etc. But, their impact has been insignificant perhaps due to inadequacies in the scheme of schemes.

**Article 41:** This Article enjoins that, "The State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement " These provisions, to a certain extent, reflect the traditional values of Indian culture which accords great importance to organized response by the State towards its disadvantaged and vulnerable members.

**Article 15:** Article 15 of the Constitution enjoins that, "no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public".

The public facilities mentioned in this Article are designed on an assumption that all people can walk, see, hear, and can use hands but may be discriminated on other grounds as

mentioned in the list of prohibited heads of discrimination in this Article. The framers of the Constitution failed to take cognizance of discrimination which occurs on grounds of physical or intellectual disability. Recognizing that people are handicapped not so much due to their disabilities as they are on account of environmental barriers. In order to create barrier free facilities for persons with disabilities Section 44 of the Disabilities Act 1995, enjoins the establishments in the transport sector to adapt rail compartments, buses, vessels and aircrafts in such a way as to permit easy access to PWDs. Section 45 calls for installation of auditory signals at intersections for the blind, curb cuts to be replaced with gentle slopes for wheel chair mobility, engravings on zebra crossing, railway platform etc for the safety of blind and low vision persons. Section 46 provides for ramps in public buildings, hospitals and schools, braille symbols and auditory signals in the elevators etc. However, precious little has been done by the governments to translate these provisions into reality, so much so, that even necessary amendments in the light of the Disabilities Act have not been carried out in building bye-laws, fabrication standards for buses, rail coaches, vessels etc. As a result, barriers for equal participation in the mainstream systems and processes continue to persist.

Javed Abidi filed a Civil Writ petition bearing No 812 of 2001 against Union of India & Ors before the High Court of Delhi. He was aggrieved on the removal of temporary wooden ramps from the Red Fort, Qutub Minar, Humayan's Tomb, Jantar Mantar and other similar monuments of historic importance. These ramps were fabricated and fixed by the Ministry of Social Justice and Empowerment and Archaeological Survey of India during the visit of Mr. Stephen Hawkins, the renowned physicist (Wheelchair User), who wanted to see these monuments. After his visit the Archaeological Survey of India decided to remove these ramps. Abidi filed the case seeking justice in accordance with Section 46 of the Disability Act, 1995, which mandates ramps in public places for wheelchair access. The petitioner urged the Court for directing the respondent to not to remove the wooden ramps and to erect permanent ramps ensuring barrier free access to persons with disabilities. *Mahesh Sharma and Shivani Gupta v. Ministry of Railways* (2000) was a



complaint case before the Chief Commissioner for Persons with Disabilities. Complainants were aggrieved on account of barriers to access trains and related facilities such as railway stations, waiting rooms and toilets. The relief was sought according to Section 44 of the Disabilities Act, 1995. The Chief Commissioner recommended Ministry of Railways to evolve a long-term plan with short and medium term objectives for making railway stations, rail coaches and other facilities accessible for wheelchair users and for persons with other types of disabilities. In pursuance of the recommendations, Ministry of Railways drew up a plan with a modest budget for

- Making ramps at the major railway stations at 155 locations in the first phase.
- The Railways also decided to convert 20-proto-type Guard-cum-sleeper coaches with wider doorways and modified toilets to permit direct access by wheelchair.
- For New Delhi, Hazarat Nizamudin and old Delhi railway stations, the respondent set aside a sum of Rs. 33.42 lakhs for providing ramps, accessible waiting rooms, accessible toilets, accessible parking space etc.

**Article 16:** This Article guarantees that “no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”

The silence of the Constitution regarding discrimination in employment on grounds of physical or sensory disability should not have caused exclusion of persons with disabilities in matters of employment and appointment to any public office; as most people with disabilities possess the capacity to productively contribute and be self-reliant provided the conditions of work are just and fair. However, people on grounds of disability have encountered rampant discrimination due to inadequate safeguards in the law. The medical fitness criteria for entry and retention of government service outrightly discriminates people on grounds of disabilities. A petition was filed under Article 32 in the Hon’ble Supreme Court of India by one *Narendra Kumar Chandla v. State of Haryana & Ors.* (AIR 1995, SC 519). Chandla was aggrieved on account of being

reduced in rank on acquiring disability during service. The Supreme Court, however, at that stage refused to entertain the petition under Article 32. The Petitioner therefore approached Punjab & Haryana High Court, who dismissed his petition. Chandla again filed a Special Leave petition in the Supreme Court. Though the Supreme Court by its Order appointed him as L.D.C. (clerk), which was lower in rank but protected his salary in the pay scale of Rs.1400-2300. However, he was deprived of his right to promotion to the next higher grade forever. No doubt, to a great degree the Supreme Court removed the injustice and protected his livelihood but it did not lay down the law prohibiting discrimination in the matter of career enhancement on acquiring disability during service. In order to prevent discrimination on grounds of disability extra legal safeguards have now been provided, for example, Section 47 of Persons with Disabilities Act, 1995 lays down that "No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefit. Provided further that if it is not possible to adjust the employee against any post, he may be kept on a super-numerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. No promotion shall be denied to a person merely on ground of his disability."

Medical fitness criteria for entry in the government service and in the public sector undertakings is so provided that it outright denies opportunity of entry in the service on grounds of disability even if the post in question is the one already identified for PWDs and the candidate in question has already qualified the selection criteria. In the case of *Nandakumar Narayanarao Ghodmare v. State of Maharashtra and Ors.* ((1995) 6 SCC 720), a physically handicapped candidate was rejected because of colour blindness. When it was pointed out to the Court that only 5 posts out of 35 posts required perfect vision, the Supreme Court directed the Government to consider the case of the appellant and to appoint him to any of the posts of the Agricultural Class II Service post, other than the posts which required perfect vision. But unfortunately, the medical fitness

standards laid down by most governments and public sector undertakings still are unfair and are in violation of law.

### **Review Mechanism**

The opportunities, which the process of revision of a Constitution can provide, are rare. Rights, guarantees and provisions of non-discrimination and equality before law can be visibly entrenched by an explicit reference to persons with disabilities during such endeavours. For instance, recent constitutional changes in the United Kingdom in a Bill of Rights and the process of devolution of some powers to regional governments provided an opportunity to entrench human rights provisions for persons with disabilities. On similar occasions, the disability movement and the government departments dealing with the subject of disabilities could not add a disability dimension as the emphasis has been more on having special laws and special schemes. Furthermore, the absence of a formal mechanism to undertake disability masking of legal and policy instruments could be the reason behind missing valuable opportunities of including a disability dimension in the constitutional amendments and in the new laws. Constitutional guarantees and rights are important but effective laws not only can bridge the gaps but can also bolster constitutional guarantees. To promote and protect rights of persons with disabilities, the Government of India in the last 20 years has put in place a fairly sound legal framework comprising 4 exclusive pieces of legislation covering various aspects of the lives of PWDs. The four Acts which are applicable to the whole of India barring the state of Jammu and Kashmir include:

- 1) The Mental Health Act of India, 1987.
- 2) The Rehabilitation Council of India Act, 1993.
- 3) The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
- 4) The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

### **The Mental Health Act of India, 1987**

There is a general agreement that among persons with disabilities, those with intellectual and psychological

impediments are most vulnerable and are discriminated both outside and within the families. To afford protection to the rights of this section, the Government of India repealed the outdated and inadequate Indian Lunacy Act, 1912 and the Lunacy Act, 1977 and enacted the Mental Health Act of 1987. Conditions conducive to protect autonomy, freedom and dignity of the mentally ill persons should have been created since the Act lays down a comparatively rational criteria for admission in psychiatric hospitals and psychiatric nursing homes, and for the custody of his person, his property and its management. Due to poor implementation and weak enforcement mechanism the intended changes have not come about. Persons with mental illness are still being subjected to prohibited forms of treatment without their consent. Until 1995 many of them were consigned to jails and those living in mental health institutions were no better as the conditions both in prisons and in mental institutions are far below the stipulated standards. "In *the Chandan Kumar Banik v. State of West Bengal* ((1995) Supp. 4, SCC 505), the Supreme Court went into the inhuman conditions of the mentally ill patients in a Mental Hospital at Mankundu in the District of Hooghli. The Supreme Court deprecated and discontinued the practice of tying up with the iron chain of patients who were unruly or not physically controllable and ordered drug treatment for these patients. The administration of the Hospital was also removed from the Sub-Divisional Officer and replaced by a competent doctor with requisite administrative ability and powers. The Supreme Court gave directions to remove other deficiencies in the care to ensure that the patients now detained in the Mental Hospital would receive appropriate attention in all respects in a humane manner."

Due to deep-rooted prejudice and insufficient understanding of the Mental Health Act the menace of committing people to jail did not stop for many years after the Mental Health Act became the law. *Sheela Barse v. Union of India & Anr.* ((1993) 4 SCC 204) was a case of detention of non-criminal mentally ill persons in the jails of West Bengal. Their appalling condition were noted by the Supreme Court, which observed:

- 1) That admission of non-criminal mentally ill persons to jails is illegal and unconstitutional.

- 2) The court directed that the function of getting mentally ill persons examined should vest with Judicial Magistrates and who upon the advise of mental health psychiatrists should assign the mentally ill person to the nearest place of treatment and care.

Mentally ill and mentally retarded persons also face discrimination on account of derogatory provisions in other laws such as "The Hindu Marriage Act of 1955, Section 5(1) and Section 4 of the Special Marriage Act of 1954 which treats that a marriage is not legal either if one party experiences "mental suffering" and is thereby unfit for marriage or procreation, or if a party is subject to insanity or epilepsy. Often these provisions in the law have worked not only against mentally ill persons who are often temporarily affected but have been a cause of double disadvantage to married women since it deprives them even of maintenance. Similarly, the Hindu Adoption and Maintenance Act of 1956 Section 7 prohibits a person from adopting a child unless the adopter is of majority age and of sound mind. Section 9 of this Act states that parents and guardians of children alone can give children into adoption, a mentally ill parent does not have to renounce his/her child; but a mentally ill adoptive parent is not allowed to adopt." Similarly the Indian Contract Act of 1872 absolved any person of unsound mind from contractual liability though all people with mental retardation and mental illness are not uneducable and unemployable.

#### **RCI Act**

The Rehabilitation Council of India was set up by the Government of India in 1986 initially as a society to regulate and standardize training policies and programmes in the field of rehabilitation of persons with disabilities. The need of minimum standards was felt urgent as majority of persons engaged in education, vocational training and counseling of PWDs were not professionally qualified. Poor academic and training standards adversely affect the chance of disabled in the world of work. Therefore, an Act of Parliament in 1993 enhanced the status of the Council to a statutory body with an aim:

- 1) To regulate the training policies and programmes in the field of rehabilitation of people with disabilities.

- 2) To standardize training courses for professionals dealing with people with disabilities.
- 3) To prescribe minimum standards of education and training of various categories of professionals dealing with people with disabilities
- 4) To regulate these standards in all training institutions uniformly throughout the country.
- 5) To recognize institutions/organizations/universities offering Certificate, Diploma, undergraduate and postgraduate degrees in the field of rehabilitation of persons with disabilities.
- 6) To promote research in rehabilitation and special education (Added as per amendments in the RCI Act).
- 7) To maintain Central Rehabilitation Register for registration of professionals.

*Sixteen categories* of professionals and para-professionals are covered under the RCI Act. The Council has so far, developed and standardized 85 different courses, which are offered by 203 academic institutions. The Council has accorded importance to both pre-service and in-service training, as inclusion of disability-perspective is vital to the integration of persons with disabilities in all facets of community life. In the Central Rehabilitation Register, about 21,000 professionals have been registered so far. The Manpower Development Report prepared by the RCI estimated that in the 9th plan period 3,63,000 trained persons would be needed. But the total output has not exceeded above 25,000. To accelerate the human resource development the distance education mode is now being explored.

#### **The National Trust Act**

The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act was passed in 1999 and became operational in 2001. This Act provides for the constitution of a national body for the welfare of persons covered under this Act. The main objectives of the Act are: -

- To enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong.
- To strengthen facilities to provide support to PWDs to live within their own families.

- To extend support to registered organizations to provide need based services during the period of crisis in the family of PWDs.
- To deal with problems of PWDs who do not have a family support.
- To promote measures for the care and protection of PWDs in the event of death of their parent or guardian.
- To evolve procedures for the appointment of guardians and trustees for PWDs requiring such protection.

The Act mandates the creation of Local Level Committees comprising District Magistrate or the District Commissioner along with one representative from a registered organization and one person with disability. The Local Level Committee is vested with the authority to decide upon the applications of legal guardianship received from parents, relatives or registered organizations duly authorized by the natural guardians of persons. The Committee is required to maintain inventory and annual accounts of the property and assets, claims and liabilities submitted by the legal guardians to it. The Local Level Committee can remove a guardian so appointed for negligence or for misappropriating the property of the person with disability.

Activities	Numbers	States	Union Territories
Formal awareness programmes	100	24	4
Local level committees formed	347	25	4
Organizations registered	277	25	1
State level master trainers trained	43	25	
District level master trainers trained		11	

### **Disabilities Act, 1995**

To give effect to India's commitment to the Proclamation on the Full Participation and Equality of Opportunity for the Persons with Disabilities 1993, in the Asian and Pacific Region the Parliament of India in accordance with the Constitution enacted a very comprehensive piece of legislation known as The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Act spells out the responsibilities of the various organs of the State and provides policy guidelines in the area of education, employment, manpower development, housing, social security and for research and training. It aims to promote creation of barrier free environment for persons with disabilities. The Act also lays down specific provisions for the development of specific services and programmes for equalizing the opportunity for the enjoyment of right to education, work, housing, mobility, communication and public assistance in case of severe disability and unemployment. For the translation of intended aims Central Coordination Committee and State Coordination Committees have been envisaged in a multi-sectoral mode with representation to persons with disabilities, members of Parliament, professional bodies and eminent citizens. To counteract problems of discrimination, prejudice, neglect and non-compliance to mandated responsibilities the institution of Chief Commissioner in the Center and Commissioner for persons with disabilities in the states have been provided. These quasi-judicial bodies are vested with the powers of a civil court. This mechanism has been quite effective in redressing individual grievances on account of deprivation of rights, facilities and guarantees. The wide-ranging provisions of this Act are compiled under 14 different chapters. The chapter on Prevention and Early Detection of Disabilities chapter 4, Education chapter 5, Employment chapter 6, Affirmative Action chapter 7, Non Discrimination chapter 8, Research and Manpower Development chapter 9, Institution for Persons with Severe Disabilities chapter 11 contain substantial provisions of the Act.

During the last decade the preoccupation of the Government and NGOs in the enactment of special legislations on the one hand has afforded a sound legal framework for the



promotion and protection of rights of PWDs but on the other many new laws lacking disability perspective have created new barriers. ICT laws, policies and broadcasting acts are a classic example of this trend. In the absence of a formal mechanism for the disability masking of new laws, policies and programmes, disability insensitive norms and standards would continue to create inequalities and barriers to their participation in economic, social, cultural and political processes. Disability is not so much about enjoyment of special rights and entitlements as it is about equal and effective enjoyment of whole range of rights and citizenship.

Despite having a sound legal framework and a plethora of programmes, schemes, rules, regulations etc., corresponding improvements in the circumstances of persons with disabilities are not visible. The rate of illiteracy, unemployment and poverty among persons with disabilities is alarming. The transport, buildings and information systems are designed on same old standards though the law demands creation of barrier-free facilities. The state governments, local authorities and panchayats have taken little care in fulfilling their obligations under various laws so much so that funds committed by Central Government through a number of schemes have remained grossly underutilized. The recruitment rules and service regulations still have discriminatory provisions. Some improvements could be achieved with court interventions. Fifty Five percent of the complaint cases before the Chief Commissioner for PWDs relate to service matters. Similarly, the barriers to education are deep rooted. Many institutions, despite mandatory provision of 3% reservation of seats in educational institutions, denied admission to students on grounds of their disability. Hon'ble Supreme Court of India in the Rekha Tyagi versus All India Institute of Medical Sciences and others gave a clear verdict to the academic institutions to not only allow admission to disabled students but also to extend reservation according to Section 39 of Disabilities Act, 1995. In the name of social security schemes, governments pay Rupees 100 to 200 per month to the unemployed persons with disabilities. There are hardly any short-stay or long-stay homes for disabled people in crisis or in situation of destitution. Maiming and blinding of

children for begging has gone unchecked. Similarly, intellectually challenged women and young girls are subjected to abuse of various kinds. The initiatives taken by the Government of India during the ninth plan have been noteworthy but the indifference of the state governments is a real challenge. The improvements in the ground reality without the involvement of grassroots organizations are difficult to come by. Therefore, the effort should be on activating state and local authorities.

### **International Norms and Standards on Disability**

#### **Declarations**

In the 1970s, the evolution in thinking of disability issues at the United Nations manifested itself in a number of UN initiatives, which embraced the growing international concept of human rights of persons with disabilities and equalization of opportunities for them. For instance, in Resolution 2856 (XXVI) of 20 December 1971, the General Assembly proclaimed the Declaration on the Rights of Mentally Retarded Persons. According to the declaration "the mentally retarded person should enjoy the same rights as other human beings, including the right to proper medical care, economic security, the right to training and rehabilitation, and the right to live with his own family or with foster parents. Furthermore, the Assembly declared that there should be proper legal safeguards to protect the mentally retarded person against every form of abuse if it should become necessary to restrict or deny his or her rights".

In 1975, the General Assembly of the UN adopted the Declaration on the Rights of Disabled Persons, which proclaimed that "disabled persons have the same civil and political rights as other human beings." The Declaration states, " Disabled persons should receive equal treatment and services, which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration". This Declaration is a comprehensive instrument with a clear focus on the rights of persons with disabilities. These Declarations have not been used enthusiastically by the disability movement in furthering their agenda perhaps due to non-binding character and inadequacies

of content. For instance, Article 7 (Right to work) of the Declaration on the Rights of Disabled Persons imposes a limitation in the enjoyment of right by PWDs by mentioning “according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation.”

### **Equality**

The world community observed 1981 as the International Year of the Disabled Persons. Its central theme was - “Full participation and equality”. It set the trend of human rights in the disability arena, as the State was held responsible to guarantee enjoyment of full citizenship and fundamental rights by persons with disabilities. Subsequently, the UN General Assembly adopted the World Programme of Action (1982), the most comprehensive global strategy which placed ‘equalization of opportunities’ as a central theme and as its guiding principle for the achievement of full participation of persons with disabilities in all aspects of social and economic life. To give recognition to economic, social and cultural rights of PWDs the period 1983 -1993 was observed as the UN Decade of Disabled Persons. The Decade intensified debate on equal opportunities and non-discrimination. Recognition of the inherent equality of all human beings as well as the entitlement of each individual to all human rights forms the core of human rights law. In international human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavorable treatment by introducing anti-discrimination laws), but goes much beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

### **Material Equality**

Commonly, the notion of equality manifests in two distinct ways: legal equality and material equality. Material equality encompasses both formal equality and economic, social and cultural equality. In the material equality perspective, society is obliged to modify those differences that deny or impair the right of each individual to be an equal member of society. "Policy research demonstrates that building codes, principles of barrier-free design, adapted curricula, targeted policy and funding commitments are useful mechanisms to reduce discrimination and increase equal participation" (Marcia, 2002). The UN Standard Rules on the Equalization of Opportunities for People with Disabilities, 1993 is an instrument based on the principle of material equality. The principle of 'equal rights' in the Standard Rules is described as implying "that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunities for participation."

### **Standard Rules**

The UN Standard Rules imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities. States are required under the Rules to remove obstacles to equal participation and to actively involve disability NGOs as partners in this process. In the first operative paragraph of resolution (2000/51), the Human Rights Commission recognizes the UN Standard Rules as an evaluative instrument to be used to assess the degree of compliance with human rights standards concerning disabled people. The Commission further recognizes that any violation of the fundamental principle of equality or any discrimination or other negative differential treatment of persons with disabilities inconsistent with the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities is an infringement of the human rights of persons with disabilities. (Para. 1)

### **Human Rights and Disability**

There has been an increasing international recognition that disability is a human rights issue. There is also recognition that disability and disability-related exclusion and marginalization is a concern for the UN human rights bodies. In August 1984, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur, Mr. Leandro Despouy, to conduct a comprehensive study on the relationship between human rights and disability. In his report (1993), Mr. Despouy made it clear that disability is a human rights concern, with which the UN monitoring bodies should be involved.

### **ICESCR**

The Committee on Economic, Social and Cultural Rights under International Covenant on Economic Social and Cultural Rights (ICESCR) in 1994 assumed the responsibility for disability rights by issuing a General Comment No 5, in which the Committee makes an analysis of disability as a human rights issue. The General Comment states: "The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in Article 2 of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities".

To illustrate the relevance of various provisions of ICESCR, a few articles can be examined. For instance:

**Article 6** stipulates that, "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts." Thus, when there's a denial of job opportunity on the ground of disability, the aforesaid article is clearly infringed.

**Article 7** refers to the "right of everyone to the enjoyment of just and favourable conditions of work which ensures

adequate remuneration". The just and favourable conditions of work have been interpreted and translated into the domestic labour standards by several governments. The concept of reasonable accommodation and barrier-free work environment is in fact premised on the notion set out in Article 7 of the Covenant. Reasonable accommodation can be defined as "providing or modifying devices, services, or facilities, or changing practices or procedures in order to afford participation on equal terms". Examples of "reasonable accommodation" include installment of a wheelchair ramp and elevators for people with mobility impairments, the introduction of part time work schedules for workers with severe conditions, availability of readers for visual impairments, and sign translation for people with hearing impairments.

**Article 11** recognizes that everyone has the "right to an adequate standard of living for himself and his family, including adequate food, clothing and housing". Available statistics show that world over this article is violated grossly in the case of persons with disabilities. High correlation between disability and poverty, and disproportionate number of disabled children in orphanages, visible presence of maimed, blinded and mentally ill persons amongst beggars are some examples.

**Article 15** recognizes the "right of everyone to take part in cultural life". This right is as relevant for PWDs as it could be for any other group. Connectivity and accessibility of places of cultural activities is thus critical for the effective integration of the PWDs in societies cultural life.

#### **ICCPR**

The Quinn and Degener study on the use of human rights instruments in the context of International Covenant on Civil and Political Rights, suggests that out of 114 States party reports reviewed, 76 (67%) made some reference to disability. Other than addressing social welfare measures and equality laws, States party reports tend to refer to disabled persons in connection with civil commitment and the compulsory treatment of mentally ill or intellectually impaired persons. The States parties with reference to disabled persons do not extensively cover treatment of disabled defendants and prisoners, voting rights,

marriage and divorce laws, and immigration laws and bioethics issues. With the exception of the initial report of the Czech and the second periodic report of Ireland, which frankly acknowledge that State prisons are unable to accommodate disabled prisoners. Denmark reports that the state has established a training programme for police officers on how to deal with disabled prisoners. UK reports that a common standard of conduct has been laid down for all the staff working in prisons, which also refers to disabled inmates. These trends reflect greater respect for civil and political rights of PWDs in a much broader context.

The various civil and political rights contained in the ICCPR can be classified under four broad categories: a) rights that refer to human existence b) liberty rights c) associational rights and d) political rights. All rights enshrined in this Covenant are of equal importance to PWDs. For instance, Article 14 and 15 recognize important rights in the context of criminal proceedings such as the right to a free hearing, including “to have a free assistance of an interpreter if he cannot understand or speak the language used in court.” (Theresia, 2002). Freedom from slavery and servitude (Article 8) is an important right for disabled persons both within the special and the mainstream institutions. In many countries children and women are abducted, maimed and disabled to be used for beggary and as domestic and bonded labour. Violations of this nature are clearly covered by this Article. General Comment No 8 stresses that Article 9, paragraph 1 (the right to liberty and security of person): is applicable to all deprived of liberty, whether in criminal cases or in other cases such as, mental illness, vagrancy, drug addiction, immigration control etc. Article 25 of the aforesaid Covenant “establishes the right of everyone to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at periodic elections by universal suffrage; and to have access, on general terms of equality, to public service in his country”. The norms laid down in the International Standards are predominantly protective in nature and do not exclude any individual or class of individuals. In General Comment No 8, the Committee on Human Rights establishes that physical disability can never be a legitimate

ground for restricting the right to vote. Neither may any intellectual disability be considered a reason for denying a person the right to vote or to hold office. The Comment further states that persons assisting disabled voters must be neutral, their only task being to preserve the independence of the voter. The Comment highlights the importance of participation in the political process by persons with disabilities who constitute a sizeable minority but have been an insignificant political constituency due to unfavorable circumstances. From the approach adopted by the Treaty Monitoring body, it is evident that people may be different from a physical and intellectual standpoint but so far as their civil and political rights are concerned, all people are the same.

#### **CRC**

There's yet another important international instrument viz. Convention on Rights of the Child which establishes the rights of a disabled child to effective access and reception of education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development (Article 23). In fact, this is the only instrument, which has comprehensive and exclusive provisions regarding rights of the disabled children although Article 2 of this Convention prohibits any discrimination in respect of the enjoyment of Convention rights on the ground of disability. In paragraph 2 of Article 23, States parties are encouraged and required to ensure assistance to children with disabilities who are eligible and who apply for such services. The Committee on the Rights of the Child has identified four general principles that should guide the implementation of all Convention rights: a) non-discrimination b) best interests of the child c) right to survival and development d) right to be heard and to participate. "The Committee on the Rights of the Child considers the self representation and full participation of children with disabilities as central to the fulfillment of their rights under the Convention. Article 12 may thus be viewed as the Convention's backbone. It encourages States parties to give a



face to the invisible and a voice to the unheard, thereby enabling children with disabilities to enjoy a full and decent life in accordance with Article 23. Furthermore, the Committee has expressed its determination to do all it can to encourage governments to prioritize the rights of children with disabilities, and in line with Article 12 to ensure that disabled children participate in devising solutions to their problems." (Kilkelly, 2002) The CRC is unique in explicitly addressing the issue of disability, and it therefore has a great potential in advancing the rights of children with disabilities.

#### **Torture Convention**

The Convention (The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is of particular relevance to millions of people with disabilities who are subjected to inhuman and degrading treatment in the institutions meant for their care and development. The imbalance of power is the root cause of such violations which happen due to poor supervision and arbitrary standards in the special institutions for PWDs. Mental health institutions, homes for severely and multiply disabled are the breeding grounds of such unlawful practices. Torture has aroused profound concern in all quarters. Article 5 of the overarching Universal Declaration on Human Rights and Article 7 of ICCPR prevent inhuman and degrading treatment including medical treatment without the consent of the individual in question. The fact that the Convention only covers torture committed by or with the consent of public officials may be thought to limit its significance in the context of disability. Since increasingly, countries in the developing world and some in the developed are routing services through private voluntary organizations it becomes all the more necessary for the States to regulate standards and working of these institutions to check instances of abuse as States parties are under an obligation to prevent torture (Article 2). Persons with disabilities who are institutionalized rarely take recourse to legal remedies. It is mainly due to their total dependence for survival on these institutions and State sponsored care providers. In this respect, the disability related discrimination is an outcome of inadequate regulations and

indifference to the problems faced by the disabled. Article 4 of the Convention requires each State party to ensure that all acts of torture and criminal offences are covered under the domestic law and their record is maintained category wise. Reports should, therefore, provide detailed information on criminal laws that prohibit torture. Emphasis should be placed on their applicability to persons with disabilities.

#### **CEDAW**

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is a human rights treaty with the focus on women in general and marginalized and vulnerable women in particular. Recognizing that disability combined with gender stereotype cause multiple disadvantages, the Treaty Monitoring Body under this Convention adopted General Recommendation No 18, which urges State parties to include information on women with disabilities in their periodic reports with respect to their exercise of several rights contained in the Convention. This makes it amply clear that all provisions contained in this Convention are very much applicable to women with disabilities as they are for other women. The purpose of adopting a General Comment is to assist State parties in fulfilling their reporting obligations. The attention of the State parties through a General Comment is drawn to the insufficiencies and to the neglected areas. The Treaty Monitoring Body not only analyses the shortcomings in the report but also provides useful suggestions to stimulate appropriate response from the State parties. Most importantly, the General Comments offer authoritative interpretation of the Covenant and its application in domestic law.

#### **Asian and Pacific Decade**

The Governments of the ESCAP region, proclaimed, the Asian and Pacific Decade of Disabled Persons, 1993-2002, by resolution 48/3 of 23 April 1992, at Beijing. The resolution was intended to strengthen regional cooperation in resolving issues affecting the achievement of the goals of the World Programme of Action concerning Disabled Persons, especially those concerning the full participation and equality of persons with disabilities. The Meeting held at Bangkok in June 1995 examined

the progress made since the introduction of the Decade and adopted 73 targets and 78 recommendations concerning the implementation of the Agenda for Action, including the gender dimensions of implementation. Of the 12 policy areas under the Agenda for Action, ESCAP has focused its efforts on areas that were not covered by the mandates of other United Nations instruments and bodies. The policy areas include national coordination, legislation, information (in particular, disability statistics), accessibility, assistive devices and self-help organizations of disabled persons. A comparative advantage of the ESCAP disability programme was the development of active inter-divisional collaboration, including the ESCAP Human Settlements Section, in the promotion of non-handicapping environments; the Rural Development Section, in poverty alleviation among rural disabled persons; the General Transport, Coordination and Communications Section and the Tourism Unit, in the promotion of accessible public transport and the promotion of barrier-free tourism. However, despite the achievements of the Decade, persons with disabilities remain the single largest sector of those least-served and most discriminated against in almost all States in the region. Much remains to be done to ensure the full participation and equality of status for persons with disabilities. Therefore, the countries in the region have decided to launch a follow up decade 2002-2012, with an aim to create barrier-free rights based society. It is hoped that the extension of the Asian and Pacific Decade of Disabled Persons for another 10 years will complete the achievement of the Decade goal of full participation and equality of people with disabilities.

#### **Disability Convention**

The UN General Assembly in its Resolution 56/168, 2001 recognizes that Governments, UN bodies and NGOs have not been successful in promoting full and effective participation and opportunities for persons with disabilities in economic, social, cultural and political life. Expressing deep concern "about the disadvantages faced by 600 million disabled around the world" the General Assembly passed a resolution to establish an Ad-hoc Committee to consider proposal for a comprehensive and

integral international Convention taking into account the recommendations of the Commission for Human Rights and the Commission for Social Development.

While arguing for the Disability Convention, the Asia and Pacific Forum of National Institutions for Human Rights emphasizes that “a coherent and integrated human rights approach to disability cannot be developed under the present treaty system” and an exclusive Convention would give “status, authority and visibility” to disability in the human rights area which cannot be achieved through the process of reform of existing instruments and monitoring mechanisms. Adding a new treaty would also complement existing international standards for the rights of the disadvantaged. Favoring thematic treaty on disability rights Gerard Quinn states “It would make much more sense to encapsulate the relevant human rights standards in a single legal instrument. It would clarify State parties obligations and it would give disability NGOs a clear target - one that is dedicated to disability rights in a holistic sense. This, in turn, could potentially enable international law to accelerate positive developments within states.”

A human rights and social justice approach enables the use of various categories of rights and also recognizes how rights have to be a concern in thinking about approaches to disability and social policy that enhance, rather than diminish, the status of those with disabilities. In conclusion, international and domestic laws are a reliable vehicle that can aid transformation in material conditions and mental attitudes towards disabilities.

The contemporary international law recognizes that all States have a duty under article 56 of the charter of the United Nations to ensure respect for and to observe human rights, including the incorporation of human rights standards in their national legislation. It is believed that more than 40 Governments across the globe have enacted anti discrimination legislations and some 17 Governments including 4 in the Pacific region are working actively for the adoption of such laws. While the means chosen to promote full realization of the human rights of persons with disabilities will differ from one country to another, there is no country in which a major policy or programme effort is not

required. The obligation of State Parties to the international human rights instruments to give effect to their obligations clearly requires Governments to do much more than social welfare. The Constitution of India empowers the government to take measures necessary to honour India's commitment to any international treaty or agreement. In the last 10 years government has adopted special laws, policies and schemes which are briefly analyzed here.

## ***The Gujarat Intervention***

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Dipankar P. Gupta.

**A**t times, when human rights are violated, particularly on a large scale, the National Human Rights Commission has in the past examined the situation and issued directions for the authorities in order to alleviate sufferings and secure rehabilitation. This had happened following the super-cyclone in Orissa in 1999 and the Gujarat earthquake in 2001. With regard to the Godhra and post-Godhra scene, however, there was a fundamental difference. Here, death and destruction had resulted from the inhumanity of human beings towards other human beings and the large scale violation of human rights. The Commission considered, therefore, that the response required here was of a qualitatively different kind.

The Commission took *suo moto* action on 1<sup>st</sup> March 2002. The proceedings stated:

“The Commission would like to observe that the tragic events that have occurred have serious implications for the country as a whole, affecting both its sense of self-esteem and the esteem in which it is held in the comity of nations. Grave questions arise of fidelity to the Constitution and to treaty obligations. There are obvious implications in respect of the protection of civil and political rights, as well as of economic, social and cultural rights in the State of Gujarat as also the country more widely; there are implications for trade, investment, tourism and employment. Not without reason have both the President and the Prime Minister of the country expressed their deep anguish at what has occurred, describing the events as a matter of national shame. But most of all, the recent events have resulted in the violation of the Fundamental Rights to life, liberty, equality and the dignity of citizens of India as guaranteed in the Constitution. And that, above all, is the reason for the continuing concern of the Commission.”

Notice was accordingly issued to the Chief Secretary and Director General of Police, Gujarat, asking for their replies indicating the measures being taken and in contemplation to prevent any further escalation of the situation.

The State Government responded by what was described as a preliminary report on 11th March 2002. Disappointed at the perfunctory nature of the report, the Commission decided that a team led by the Chairperson of the Commission would visit Gujarat to assess the situation for themselves. This was done from 19th to 22nd March 2002.

A report of the findings was prepared, but the Commission decided to keep the report in a sealed cover for maintaining confidentiality. Given the sensitivity of the allegations contained in it, the Commission wanted to give the State Government a full opportunity to comment thereon, and a copy of the confidential report was sent to the State Government requesting its response/comments.

Although more detailed responses were later received from the State Government, which the Commission considered and dealt with in detail, there was no response to the contents of the confidential report even by the end of May 2002. Under the circumstances, the Commission in its proceedings dated 31st May 2002, decided to release the confidential report in totality.

The situation in Gujarat gave the Commission an opportunity to lay down the parameters of its intervention in situations such as this, where there had been a large scale violation of human rights coupled with dereliction of duty on the part of the authorities concerned to deal with the same appropriately.

The Protection of Human Rights Act, 1993, empowers the Commission, amongst other things, to *inquire*, if necessary, into complaints of violation of human rights or abetment thereof, and, more significantly, negligence in the prevention of such violation by a public servant. The term "human rights" is defined by the Act to mean the right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants. The relevant portion of the International Covenant referred to states:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

In the light of these legal provisions, the Commission formulated several very important principles having far reaching implications in dealing not only with the current situation but similar situations in future, should the same recur. They also delineated the facets of the powers of the Commission. These are:

- (a) It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all those who constitute it. It was also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence;
- (b) The State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction;
- (c) The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights; and
- (d) In such a situation of widespread breakdown of public order, the doctrine of *res ipsa loquitur*, or, in other words, “the situation speaks for itself,” would come into play. Under this principle, there would be an adverse inference against the State Government regarding dereliction of duty which, unless rebutted by the State Government, would render it accountable for the situation. The burden was therefore on the State Government to rebut this presumption.

In this legal background the Commission formulated and structured its actions, directions and recommendations.

Dealing with the responses of the State Government the Commission held as follows:

- (a) While there can be no doubt whatsoever about the gravity of the Godhra tragedy, that itself should have demanded a higher degree of responsiveness from the State Government to control the likely fall-out;



- (b) As to the “local factors and players,” in respect of whom the Commission had sought specific information, the response of the State Government was found to be evasive and lacking in transparency;
- (c) The pattern of arrests was found to be clearly discriminatory. In this context, the Commission noted that the Special Representative of the Commission, Shri Nampoothiri has observed in a report that “almost 90% of those arrested even in heinous offences like murder, arson, etc., have managed to get bailed out almost as soon as they were arrested.”
- (d) Victims of the atrocities were experiencing great difficulty in having FIRs recorded, in naming those whom they had identified, and in securing copies of their FIRs. Further – for far too long – politically connected persons, named by the victims of the crimes committed, remained at large defying arrest;
- (e) In the opinion of the Commission, there had been a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the State. The Commission stated:

“The pervasive sense of insecurity extended to all segments of society, including to two Judges of the High Court of Gujarat, one sitting and the other retired who were compelled to leave their own homes because of the vitiated atmosphere. There could be no clearer evidence of the failure to control the situation.

“It therefore remains fundamentally important, in such circumstances, that those who are responsible for the promotion of communal harmony and the maintenance of law and order – whether in the political or administrative leadership – should discharge their duties in the present and future in accordance with the Constitution and the relevant statutory provisions, or be answerable for such acts of omission or commission that result in the violation of the law and the rights to life, liberty, equality and dignity of their fellow human beings.”

The Commission, on 1<sup>st</sup> April, 2002 and on 31<sup>st</sup> May, 2002, proceeded to make comprehensive sets of recommendations. These recommendations, amongst others, directed,

- (a) that critical cases, such as the Godhra incident itself (which was then being investigated by the GRP), the Chamanpura (Gulberga Society) incident, the Naroda Patiya incident, the Best Bakery case in Vadodra and the Sardarpura case in Mehsana District, should be entrusted to the CBI;
- (b) that Police Desks be set up in the Relief Camps to receive complaints, record FIRs and forward them to Police Stations; and,
- (c) that provocative statements made by persons to the electronic or print media should be examined and acted upon and the burden of proof shifted to such persons to explain or contradict their statements.

The Commission also directed that given the wide variation in the performance of public servants in the discharge of their statutory responsibilities, action should be initiated to identify and proceed against those who have failed to act appropriately to control the violence in its incipient stages, or to prevent its escalation thereafter. By the same token, officers who have performed their duties well should be commended.

Moreover, several important and detailed recommendations were made for relief and rehabilitation, for management of the camps and for reforms in the Police Force on which recommendations of the National Police Commission and of the Commission itself had been pending despite repeated efforts to have them acted upon.

The series of strong, impartial and prompt action taken by the Commission helped to improve the situation in the State of Gujarat. It was later observed, thankfully, that there was no communal flare-up following the attack on Akshardham, the precise mischief which the perpetrators of the attack intended. It is hoped that the Gujarat experience would have taught State administrations and particularly police forces all over the country to be in a state of preparedness to deal with communal flare-ups, should they occur, and be sensitive to the sufferings of human beings, irrespective of their caste, creed or religion.

## ***Some Important Orders of the NHRC on Gujarat***

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

Name of the complainant : Suo motu

Case No. : 1150/6/2001-2002

Date : 1 April 2002

**CORAM**

Justice Shri J.S. Verma, Chairperson

Justice Smt. Sujata V. Manohar, Member

Shri Virendra Dayal, Member

**Proceedings**

1. These Proceedings on the situation in Gujarat are being recorded in continuation of earlier Proceedings of the Commission dated 1 and 6 March 2002. They also follow upon a visit of the Chairperson of the Commission to Gujarat between 19-22 March 2002, during which mission he was accompanied by the Secretary-General of the Commission, Shri P.C. Sen, the Special Rapporteur of the Commission, Shri Chaman Lal, and his Private Secretary, Shri Y.S. Murthy. During the course of that mission, the team visited Ahmedabad, Vadodara and Godhra and held intensive discussions, inter alia, with the Chief Minister, Chief Secretary and senior officers of the State, eminent citizens, including retired Chief Justices and Judges of High Courts, former civil servants, leaders of political parties, representatives of NGOs and the business community, numerous private citizens and, most importantly, those who were the victims of the recent acts of violence.

2. In his meeting with the Chief Secretary and senior officers of the State Government, the Chairperson explained the purpose and timing of his visit. He indicated that he had not visited the State earlier in order not to divert the attention of the State authorities from the tasks in which they were engaged. However, the visit could not be further delayed as normalcy had not been restored in the State despite the passage of three weeks since the tragic events in Godhra. It was the concern of the Commission to see an end to the violence that was occurring and a restoration of normalcy. The Chairperson added that it was the role of the Commission to serve as a facilitator to improve the quality of governance, as a proper respect for human rights depended on such governance. This duty had been performed by the Commission in earlier instances too, notably after the Orissa cyclone and the

Gujarat earthquake. As then, it was now the responsibility of the Commission to ensure that the violation of human rights ceased, that further violations were prevented and that those who were victims were expeditiously rehabilitated and their dignity restored.

3. The Commission would like to emphasize that the present Proceedings contain the *Preliminary Comments* of the Commission on the situation in Gujarat. Likewise, the *Recommendations* that it contains are of an immediate character and constitute the minimum that needs to be said at this stage.

4. This is because the report of the team that visited Gujarat is being sent under separate cover, confidentially, both to the Central and State Governments, and it would be appropriate to wait for their response to it before commenting in greater length on the situation or setting out comprehensive recommendations.

5. Further, while the team was able to meet with a considerable range of persons concerned with the situation in Gujarat who were desirous of meeting with it, the numbers of such persons was vast and it was not possible for the team, within the constraints of the time available and the circumstances prevailing on the ground, to meet individually with all of those who sought to interact with it. The team therefore encouraged those who wished to meet with it to do so, if possible, in groups and also to submit their views and concerns in writing. Numerous and voluminous written representations have thus been received by the Commission, both from groups and from individuals, during the visit of the team to Gujarat and subsequently. These have been and are being carefully examined. They have been of great value to the Commission in the recording of the Preliminary Comments and Recommendations contained in these Proceedings and their further analysis and study will contribute immensely to subsequent Proceedings of the Commission.

6. On 28 March 2002, the Commission also received a response from the Government of Gujarat to a notice that it had sent on 1 March 2000; it was entitled "Report on the incidents in Gujarat after the burning of the Sabarmati Express Train on 27th February 2002," and came with three Annexures A, B and C, providing details respectively on the "Law and Order Measures" taken by the State Government; the "Rescue, Relief and Rehabilitation Measures;" and a "Response to Press Clippings" that had been sent by the Commission to the State Government for comment. The Report of the State Government, hereinafter referred to as 'the Report,' has been carefully examined and taken into account in drafting the present Proceedings.

7. The Commission would like to emphasize that these Proceedings must therefore be seen as part of a continuing process to examine and address the human rights situation prevailing in Gujarat beginning with the Godhra tragedy and continuing with the violence that ensued subsequently. In this respect, the Proceedings in this case bear some similarity to the manner in

which the Commission kept the situation under review, monitoring and commenting on it as the need arose, following both the super-cyclone in Orissa in 1999 and the earthquake in Gujarat in 2001.

8. There is, however, a fundamental difference as well. The earlier instances arose from catastrophic natural disasters which subsequently required a monitoring of the performance of the State to ensure that the rights of all, particularly those of the most vulnerable, were respected. In the present instance, however, the death and destruction sadly resulted from the inhumanity of human beings towards other human beings, and the large-scale violation of human rights. This therefore requires a response from the Commission of a qualitatively different kind.

9. The Commission would like to observe that the tragic events that have occurred have serious implications for the country as a whole, affecting both its sense of self-esteem and the esteem in which it is held in the comity of nations. Grave questions arise of fidelity to the Constitution and to treaty obligations. There are obvious implications in respect of the protection of civil and political rights, as well as of economic, social and cultural rights in the State of Gujarat as also the country more widely; there are implications for trade, investment, tourism and employment. Not without reason have both the President and the Prime Minister of the country expressed their deep anguish at what has occurred, describing the events as a matter of national shame. But most of all, the recent events have resulted in the violation of the Fundamental Rights to life, liberty, equality and the dignity of citizens of India as guaranteed in the Constitution. And that, above all, is the reason for the continuing concern of the Commission.

10. It would now be appropriate and useful to recall the background to the involvement of the Commission in this matter.

11. The Commission took suo motu action on the situation in Gujarat on 1 March 2002 on the basis of media reports, both print and electronic. In addition, it had also received a request by e-mail, asking it to intervene.

12. In its Proceedings of that date, the Commission inter alia observed that the news items reported on a communal flare-up and, more disturbingly, suggested inaction by the police force and the highest functionaries in the State to deal with the situation. The Commission added:

“In view of the urgency of the matter, it would not be appropriate for this Commission to stay its hand till the veracity of these reports has been established; and it is necessary to proceed immediately assuming them to be *prima facie* correct. The situation therefore demands that the Commission take note of these facts and steps-in to prevent any negligence in the protection of human rights of the people of the State of Gujarat irrespective of their religion.”

13. Notice was accordingly issued on 1 March 2002 to the Chief Secretary and Director General of Police, Gujarat, asking “for their reply within three days indicating the measures being taken and in contemplation to prevent any further escalation of the situation in the State of Gujarat which is resulting in continued violation of human rights of the people.”

14. Meeting again on 6 March 2002, the Commission noted, inter alia, that it had requested its Secretary General, on 4 March 2002, to send a copy of its 1 March notice to its Special Representative in Gujarat, Shri Nampoothiri, for his information. The latter was also asked to send a report to the Commission on the situation, involving in that exercise other members of the Group constituted by the Commission to monitor the rehabilitation work in that State after the recent earthquake in Kutch.

15. In its Proceedings of 6 March 2002, the Commission further noted that

“a large number of media reports have appeared which are distressing and appear to suggest that the needful has not yet been done completely by the Administration. There are also media reports attributing certain statements to the Police Commissioner and even the Chief Minister which, if true, raise serious questions relating to discrimination and other aspects of governance affecting human rights.”

16. Instead of a detailed reply from the State Government to its notice of 1 March 2002, the Commission observed that it had received a request dated 4 March 2002, seeking a further 15 days to report as most of the State machinery is busy with the law and order situation, and it would take time to collect the information and compile the report.

17. The Commission's Proceedings of 6 March 2002 accordingly stated “May be, preparation of a comprehensive report requires some more time, but, at least, a preliminary report indicating the action so far taken and that in contemplation should have been sent together with an assurance of the State Government of strict implementation of the rule of law.”

The Commission recorded its disappointment that even this had not been done by the Government of Gujarat in a matter of such urgency and significance. It added that it “expects from the Government of Gujarat a comprehensive response at the earliest.”

18. A ‘Preliminary Report’ dated 8 March 2002 was received by the Commission from the Government of Gujarat on 11 March 2002. However, it was perfunctory in character. In the meantime, the Commission had received a fairly detailed report on the situation from its Special Group in Gujarat, comprising its Special Representative, Shri P.G.J. Nampoothri, former Director General of Police, Gujarat, Smt. Annie Prasad, IAS (Retd) and Shri Gagan Sethi, Director, Jan Vikas. With violence continuing, it was in such circumstances that the Commission decided that the Chairperson should lead a team of the Commission on a mission to Gujarat between 19-22 March 2002. And it was pursuant to this that the detailed Report of the State of Gujarat was received on 28 March 2002, in response to the Commission's notice of 1 March 2002 and the discussions held with the team.

19. There follow below certain Preliminary Comments and Recommendations of the Commission on the situation in Gujarat. As indicated above, these will be followed, as required, by other Proceedings, containing Comments and Recommendations, which will take into account the response

that will be received from the Central and State Governments to the mission-report of the Commission's team, a further reading and analysis of the voluminous material that has been, and is being, submitted to the Commission, and the situation as it develops on the ground.

**Preliminary Comments:**

20. (i) The Statute of the Commission, as contained in the Protection of Human Rights Act, 1993, requires the Commission under the provisions of Section 12, to perform all or any of the following functions, namely:-

- “(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of
  - (i) Violation of human rights or abetment thereof; or
  - (ii) Negligence in the prevention of such violation, by a public servant;
- ...
- (b) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- ...
- (c) study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- ...
- (d) such other functions as it may consider necessary for the promotion of human rights.”

The term 'human rights' is defined to mean the right 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 (*Section 2(1)(d)*), and the International Covenants are defined as the "International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December 1966" (*Section 2(1)(f)*).

(ii) It is therefore in the light of this Statute that the Commission must examine whether violations of human rights were committed, or were abetted, or resulted from negligence in the prevention of such violation. It must also examine whether the acts that occurred infringed the rights guaranteed by the Constitution or those that were embodied in the two great International Covenants cited above.

(iii) The Commission would like to observe at this stage that it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.

(iv) The first question that arises therefore is whether the State has discharged its responsibilities appropriately in accordance with the above. It has been stated in the Report of the State Government that the attack on kar sevaks in Godhra occurred in the absence of "specific information about the return of kar sevaks from Ayodhya" (p. 12 of the Report). It is also asserted that while there were intelligence inputs pertaining to the movement of kar sevaks to Ayodhya between 10-15 March 2002, there were no such in-puts concerning their return either from the State Intelligence Branch or the Central Intelligence Agencies (p. 5) and that the "only message" about the return of kar sevaks, provided by the Uttar Pradesh police, was received in Gujarat on 28 February 2002 i.e., after the tragic incident of 27 February 2002 and even that did not relate to a possible attack on the Sabarmati Express.

(v) The Commission is deeply concerned to be informed of this. It would appear to constitute an extraordinary lack of appreciation of the potential dangers of the situation, both by the Central and State intelligence agencies. This is the more so given the history of communal violence in Gujarat. The Report of the State Government itself states:

"The State of Gujarat has a long history of communal riots. Major riots have been occurring periodically in the State since 1969. Two Commissions of Inquiry viz., the Jagmohan Reddy Commission of Inquiry, 1969, and the Dave Commission of Inquiry, 1985, were constituted to go into the widespread communal violence that erupted in the State from time to time. Subsequently, major communal incidents all over the State have taken place in 1990 and in 1992-93 following the Babri Masjid episode. In fact, between 1970 and 2002, Gujarat has witnessed 443 major communal incidents. Even minor altercations, over trivial matters like kite flying have led to communal violence." (p. 127).

The Report adds that the Godhra incident occurred at a time when the environment was already surcharged due to developments in Ayodhya and related events (also p. 127).

Indeed, it has been reported to the Commission that, in intelligence parlance, several places of the State have been classified as communally sensitive or hyper-sensitive and that, in many cities of the State, including Ahmedabad, Vadodara and Godhra, members of both the majority and minority communities are constantly in a state of preparedness to face the perceived danger of communal violence. In such circumstances, the police are reported to be normally well prepared to handle such dangers and it is reported to be standard practice to alert police stations down the line when sensitive situations are likely to develop.

(vi) Given the above, the Commission is constrained to observe that a serious failure of intelligence and action by the State Government marked the events leading to the Godhra tragedy and the subsequent deaths and destruction that occurred. On the face of it, in the light of the history of communal violence in Gujarat, recalled in the Report of the State Government itself, the question must arise whether the principle of 'res ipsa loquitur' ('the



affair speaking for itself') should not apply in this case in assessing the degree of State responsibility in the failure to protect the life, liberty, equality and dignity of the people of Gujarat. The Commission accordingly requests the response of the Central and State Governments on this matter, it being the primary and inescapable responsibility of the State to protect such rights and to be responsible for the acts not only of its own agents, but also for the acts of non-State players within its jurisdiction and any inaction that may cause or facilitate the violation of human rights. Unless rebutted by the State Government, the adverse inference arising against it would render it accountable. The burden is therefore now on the State Government to rebut this presumption.

(vii) An ancillary question that arises is whether there was adequate anticipation in regard to the measures to be taken, and whether these measures were indeed taken, to ensure that the tragic events in Godhra would not occur and would not lead to serious repercussions elsewhere. The Commission has noted that many instances are recorded in the Report of prompt and courageous action by District Collectors, Commissioners and Superintendents of Police and other officers to control the violence and to deal with its consequences through appropriate preventive measures and, thereafter, through rescue, relief and rehabilitation measures. The Commission cannot but note, however, that the Report itself reveals that while some communally-prone districts succeeded in controlling the violence, other districts - sometimes less prone to such violence - succumbed to it. In the same vein, the Report further indicates that while the factors underlining the danger of communal violence spreading were common to all districts, and that, "in the wake of the call for the 'Gujarat Bandh' and the possible fall-out of the Godhra incident, the State Government took all possible precautions" (p. 128), some districts withstood the dangers far more firmly than did others. Such a development clearly points to local factors and players overwhelming the district officers in certain instances, but not in others. Given the widespread reports and allegations of groups of well-organized persons, armed with mobile telephones and addresses, singling out certain homes and properties for death and destruction in certain districts - sometimes within view of police stations and personnel - the further question arises as to what the factors were, and who the players were in the situations that went out of control. The Commission requests the comments of the State Government on these matters.

(viii) The Commission has noted that while the Report states that the Godhra incident was "premeditated" (p. 5), the Report does not clarify as to who precisely was responsible for this incident. Considering its gruesome nature and catastrophic consequences, the team of the Commission that visited Godhra on 22 March 2002 was concerned to note from the comments of the Special IGP, CID Crime that while two cases had been registered, they were being investigated by an SDPO of the Western Railway and that no major progress had been made until then. In the light of fact that numerous allegations have been made both in the media and to the team of the

Commission to the effect that FIRs in various instances were being distorted or poorly recorded, and that senior political personalities were seeking to 'influence' the working of police stations by their presence within them, the Commission is constrained to observe that there is a widespread lack of faith in the integrity of the investigating process and the ability of those conducting investigations. The Commission notes, for instance, that in Ahmedabad, in most cases, looting was "reported in well-to-do localities by relatively rich people" (p. 130). Yet the Report does not identify who these persons were. The conclusion cannot but be drawn that there is need for greater transparency and integrity to investigate the instances of death and destruction appropriately and to instil confidence in the public mind.

(ix) The Report takes the view that "the major incidents of violence were contained within the first 72 hours." It asserts, however, that "on account of widespread reporting both in the visual as well as the electronic media, incidents of violence on a large-scale started occurring in Ahmedabad, Baroda cities and some towns of Panchmahals, Sabarkantha, Mehsana, etc" in spite of "all possible precautions having been taken" (p. 128-129). The Report also adds that various comments attributed to the Chief Minister and Commissioner of Police, Ahmedabad, among others, were torn out of context by the media, or entirely without foundation.

(x) As indicated earlier in these Proceedings, the Commission considers it would be naïve for it to subscribe to the view that the situation was brought under control within the first 72 hours. Violence continues in Gujarat as of the time of writing these Proceedings. There was a pervasive sense of insecurity prevailing in the State at the time of the team's visit to Gujarat. This was most acute among the victims of the successive tragedies, but it extended to all segments of society, including to two Judges of the High Court of Gujarat, one sitting and the other retired who were compelled to leave their own homes because of the vitiated atmosphere. There could be no clearer evidence of the failure to control the situation.

(xi) The Commission has, however, taken note of the views of the State Government in respect of the media. The Commission firmly believes that it is essential to uphold the Right to Freedom of Speech and Expression articulated in Article 19(1)(a) of the Constitution, which finds comparable provision in Article 19 of the Universal Declaration of Human Rights, 1948 and Article 19 of the International Covenant on Civil and Political Rights, 1966. It is therefore clearly in favour of a courageous and investigative role for the media. At the same time, the Commission is of the view that there is need for all concerned to reflect further on possible guidelines that the media should adopt, on a 'self-policing' basis, to govern its conduct in volatile situations, including those of inter-communal violence, with a view to ensuring that passions are not inflamed and further violence perpetrated. It has to be noted that the right under Article 19(1)(a) is subject to reasonable restrictions under Article 19(2) of the Constitution.

(xii) The Commission has noted the contents of the Report on two matters that raised serious questions of discriminatory treatment and led to

most adverse comment both within the country and abroad. The first related to the announcement of Rs. 2 lakhs as compensation to the next-of-kin of those who perished in the attack on the Sabarmati Express, and of Rs. 1 lakh for those who died in the subsequent violence. The second related to the application of POTO to the first incident, but not to those involved in the subsequent violence. On the question of compensation, the Commission has noted from the Report that Rs. 1 lakh will be paid in all instances, "thus establishing parity." It has also noted that, according to the Report, this decision was taken on 9 March 2002, after a letter was received by the Chief Minister, "on behalf of the kar sevaks," saying "that they would welcome the financial help of Rs. 1 lakh instead of Rs. 2 lakhs to the bereaved families of Godhra massacre" (see p. 115). This decision, in the view of the Commission, should have been taken on the initiative of the Government itself, as the issue raised impinged seriously on the provisions of the Constitution contained in Articles 14 and 15, dealing respectively with equality before the law and equal protection of the laws within the territory of India, and the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. The Commission has also noted the contents of the Report which state that "No guidelines were given by the Home Department regarding the type of cases in which POTO should or should not be used" and that, subsequent to the initial decision to apply POTO in respect of individual cases in Godhra, the Government received legal advice to defer "the applicability of POTO till the investigation is completed" (pp. 66-67). The Commission intends to monitor this matter further, POTO having since been enacted as a law.

(xiii) The Commission has taken good note of the "Rescue, Relief and Rehabilitation Measures" undertaken by the State Government. In many instances, strenuous efforts have been made by Collectors and other district officers, often acting on their own initiative. The Commission was informed, however, during the course of its visit, that many of the largest camps, including Shah-e-Alam in Ahmedabad, had not received visits at a high political or administrative level till the visit of the Chairperson of this Commission. This was viewed by the inmates as being indicative of a deeper malaise, that was discriminatory in origin and character. Unfortunately, too, numerous complaints were received by the team of the Commission regarding the lack of facilities in the camps. The Commission has noted the range of activities and measures taken by the State Government to pursue the relief and rehabilitation of those who have suffered. It appreciates the positive steps that have been taken and commends those officials and NGOs that have worked to ameliorate the suffering of the victims. The Commission, however, considers it essential to monitor the on-going implementation of the decisions taken since a great deal still needs to be done. The Commission has already indicated to the Chief Minister that a follow-up mission will be made on behalf of the Commission at an appropriate time and it appreciates the response of the Chief Minister that such a visit will be welcome and that every effort will be made to restore complete normalcy expeditiously.

(xiv) In the light of the above, the Commission is duty bound to continue to follow developments in Gujarat consequent to the tragic incidents that occurred in Godhra and elsewhere. Under its Statute, it is required to monitor the compliance of the State with the rule of law and its human rights obligations. This will be a continuing duty of the Commission which must be fulfilled, Parliament having established the Commission with the objective of ensuring the “better protection” of human rights in the country, expecting thereby that the efforts of the Commission would be additional to those of existing agencies and institutions. In this task, the Commission will continue to count on receiving the cooperation of the Government of Gujarat, a cooperation of which the Chief Minister has stated that it can be assured.

#### RECOMMENDATIONS

21. The Commission now wishes to make a first set of Recommendations for the immediate consideration of the Central and State Governments. As indicated earlier, once a response has been received from these Governments on the report of the visit of the Commission’s team to Gujarat, and a full analysis made of the numerous representations received by the Commission, additional Proceedings will be recorded by the Commission on the situation in Gujarat, offering further Comments and Recommendations.

##### I. Law & Order

(i) In view of the widespread allegations that FIRs have been poorly or wrongly recorded and that investigations are being ‘influenced’ by extraneous considerations or players, the Commission is of the view that the integrity of the process has to be restored. It therefore recommends the entrusting of certain critical cases to the CBI. These include the cases relating to the

- Godhra incident, which is at present being investigated by the GRP;
- Chamanpura (Gulbarga Society) incident;
- Naroda Patiya incident;
- Best Bakery case in Vadodara; and the
- Sadarpura case in Mehsana district.

(ii) The Commission recommends that Special Courts should try these cases on a day-to-day basis, the Judges being handpicked by the Chief Justice of the High Court of Gujarat. Special Prosecutors should be appointed as needed. Procedures should be adopted for the conduct of the proceedings in such a manner that the traumatized condition of many of the victims, particularly women and children, is not aggravated and they are protected from further trauma or threat. A particular effort should be made to depute sensitive officers, particularly officers who are women, to assist in the handling of such cases.

(iii) Special Cells should be constituted under the concerned District Magistrates to follow the progress of the investigation of cases not entrusted to the CBI; these should be monitored by the Additional Director-General (Crime).

(iv) Specific time-frames should be fixed for the thorough and expeditious completion of investigations.

(v) Police desks should be set-up in the relief camps to receive complaints, record FIRs and forward them to Police Stations having jurisdiction.

(vi) Material collected by NGOs such as Citizen's Initiative, PUCL and others should also be used.

(vii) Provocative statements made by persons to the electronic or print media should be examined and acted upon, and the burden of proof shifted to such persons to explain or contradict their statements.

(viii) Given the wide variation in the performance of public servants in the discharge of their statutory responsibilities, action should be initiated to identify and proceed against those who have failed to act appropriately to control the violence in its incipient stages, or to prevent its escalation thereafter. By the same token, officers who have performed their duties well, should be commended.

## **II. Camps**

(i) Visits to camps by senior political leaders and officers should be organized in a systematic way in order to restore confidence among those who have been victimized. NGOs should be involved in the process and the management and running of the camps should be marked by transparency and accountability

(ii) Senior officers of the rank of Secretary and above should be given specific responsibility in respect of groups of camps.

(iii) Special facilities/camps should be set-up for the processing of insurance and compensation claims. The Chief Minister of the State had requested the Commission to issue an appropriate request to insurance companies for the expeditious settlement of claims of those who had suffered in the riots. The Commission will readily do so and recommends that the State Government send to it the necessary details at an early date in order to facilitate such supportive action.

(iv) Inmates should not be asked to leave the camps until appropriate relief and rehabilitation measures are in place for them and they feel assured, on security grounds, that they can indeed leave the camps.

## **III. Rehabilitation**

(i) The Commission recommends that places of worship that have been destroyed be repaired expeditiously. Assistance should be provided, as appropriate, inter alia by the State.

(ii) Adequate compensation should be provided to those who have suffered. This will require an augmentation of the funds allocated thus far, through cooperative arrangements involving both the State and Central Governments. Efforts should be made to involve HUDCO, HFDC and international financial and other agencies and programmes in this process.

(iii) The private sector, including the pharmaceutical industry, should also be requested to participate in the relief and rehabilitation process and proper coordinating arrangements established.

(iv) The role of NGOs should be encouraged and be an intrinsic part of the overall effort to restore normalcy, as was the case in the coordinated effort after the earthquake. The Gujarat Disaster Management Authority, which was also deeply engaged in the post-earthquake measures, should be requested to assist in the present circumstances as well.

(v) Special efforts will need to be made to identify and assist destitute women and orphans, and those subjected to rape. The Women and Child Development Department, Government of India and concerned international agencies/programmes should be requested to help. Particular care will need to be taken to mobilize psychiatric and counselling services to help the traumatized victims. Special efforts will need to be made to identify and depute competent personnel for this purpose.

(vi) The media should be requested to cooperate fully in this endeavour, including radio, which is often under-utilized in such circumstances.

#### **IV. Police Reform**

(i) The Commission would like to draw attention to the deeper question of Police Reform, on which recommendations of the National Police Commission and of the National Human Rights Commission have been pending despite repeated efforts to have them acted upon. The Commission is of the view that recent events in Gujarat and, indeed, in other States of the country, underline the need to proceed without delay to implement the reforms that have already been recommended in order to preserve the integrity of the investigating process and to insulate it from extraneous influences.

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

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

**(Virendra Dayal)**  
Member

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

Name of the complainant : Suo motu  
Case No. : 1150/6/2001-2002  
Date : 31 May 2002

**CORAM**

**Justice Shri J.S. Verma, Chairperson  
Justice Shri K. Ramaswamy, Member  
Justice Smt Sujata V. Manohar, Member  
Shri Virendra Dayal, Member**

**Proceedings**

1. These Proceedings of the Commission in respect of the situation in Gujarat are in continuation of those recorded by the Commission on 1 and 6 March 2002 and 1 April and 1 May, 2002.

**Proceedings of 1 April 2002; transmittal of Preliminary Comments and Recommendations, together with Confidential Report, to Government of Gujarat, Ministry of Home Affairs, Government of India and Prime Minister**

2. It will be recalled that, in its Proceedings of 1 April 2002, the Commission had set out its Preliminary Comments and Recommendations on the situation. It had also directed that a copy of those Proceedings, together with a copy of the Confidential Report of the team of the Commission that visited Gujarat from 19-22 March 2002, be sent by the Secretary-General to the Chief Secretary, Government of Gujarat and to the Home Secretary, Government of India, requesting them to send the response/comments of the State Government and the Government of India within two weeks. In view of the visit of the Hon'ble Prime Minister to Gujarat that had been announced for 4 April 2002, the Chairperson was also requested to send a copy of the Proceedings and of the Confidential Report to him.

**Proceedings of 1 May 2002; response of Government of Gujarat, dated 12 April 2002 to Preliminary Comments and Recommendations of 1 April 2002**

3. In its Proceedings of 1 May 2002, the Commission noted that the Government of Gujarat had sent a reply dated 12 April 2002, but that the Ministry of Home Affairs had sent an interim response, dated 16 April 2002, seeking time until 30 April 2002 to send a more detailed reply. However, no further reply had been received from the Ministry of Home Affairs as of the time of recording the 1 May Proceedings.

**Lack of response to Confidential Report**

4. In the same Proceedings, the Commission further noted that the reply of the Government of Gujarat did not respond to the Confidential Report of the Commission's team, referred to in its Proceedings of 1 April 2002. The Commission also observed that a specific reply was sought to that Report in order to enable further consideration of the matter, in view of the allegations made, which are mentioned in that Report. While noting that, ordinarily, it would be in order for the Commission to proceed with the further consideration of this matter with the available reply alone while treating the contents of the Confidential Report as un rebutted, the Commission deemed it fit to give a further opportunity of two weeks to reply to the specific matters mentioned in the Confidential Report. The Ministry of Home Affairs, Government of India was also given a further two weeks for its detailed reply, which was to cover inter alia the contents of the Confidential Report that had already been sent to it.

**Response of Ministry of Home Affairs, Government of India to Preliminary Comments and Recommendations of 1 April 2002 and to the Confidential Report**

5. Later in the day on 1 May 2002, after it had recorded its Proceedings, the Commission received a further response from the Ministry of Home Affairs, Government of India. The covering letter, dated 1 May 2002, stated that the response related to "the Proceedings of the Commission dated 1st April 2002 and the recommendations made therein in so far as it concerns the Central Government." The response added that "the report of the visit of the team of the National Human Rights Commission to Gujarat between 19th and 22nd March, 2002 which was sent in a sealed cover has also been examined and since all the issues mentioned therein pertain to the Government of Gujarat, they have been requested to send their comments on the above report directly to NHRC."

**Failure of the Government of Gujarat, until the date of recording the present Proceedings, to respond to the Confidential Report**

6. Despite the above-mentioned response of the Government of India, and the extension of time until 15 May 2002 that was granted by the Commission to the Government of Gujarat to respond to the Confidential Report, no response has as yet been received from the State Government to that Report. This is so despite repeated oral reminders by the Commission and assurances by the State Government that a response would soon be forthcoming.

7. In these circumstances, the Commission is now adopting the following procedure:

- (A) It will offer additional Comments upon the response of the Government of Gujarat of 12 April 2002, in respect of the Preliminary Comments of the Commission of 1 April 2002;



- (B) It will not wait any longer for the response of the Government of Gujarat to the Confidential Report that was sent to it on 1 April 2002, enough time and opportunity having been provided to the State Government to comment on it. Instead, the Commission now considers it to be its duty to release that Confidential Report in totality. It is, accordingly, annexed to these Proceedings as *Annexure I*. The Commission had earlier withheld release of the Confidential Report because it considered it appropriate to give the State Government a full opportunity to comment on its contents, given the sensitivity of the allegations contained in it that were made to the team of the Commission that visited Gujarat between 19-22 March 2002. As and when the response of the State Government to that Confidential Report is received, the Commission will also make that public, together with the Commission's views thereon.
- (C) It will make a further set of Recommendations developing on its earlier recommendations, in the light of the reply received from the Government of Gujarat dated 12 April 2002 and from the Ministry of Home Affairs, Government of India, dated 1 May 2002.

8. In proceeding in this manner, the Commission will also keep in mind, in particular, the reports that it has been receiving from its Special Representative in Gujarat, Shri P.G.J. Nampoothiri, a former Director-General of Police of that State, who has been requested by the Commission to continue to monitor the situation and to report on developments. The State Government has been advised of Shri Nampoothiri's responsibilities and it has informed the competent officers of the Government of Gujarat of this arrangement in writing. The Commission will, in addition, continue to be mindful of the extensive coverage of developments relating to Gujarat in the print and electronic media.

**A. Comments of the Commission on the response of the Government of Gujarat of 12 April 2002, in respect of its Preliminary Comments of 1 April 2002**

**Failure to protect rights to life, liberty, equality and dignity**

In its Preliminary Comments of 1 April 2002 the Commission had observed that the first question that arises is whether the State has discharged its primary and inescapable responsibility to protect the rights to life, liberty, equality and dignity of all of those who constitute it. Given the history of communal violence in Gujarat, a history vividly recalled in the report dated 28 March 2002 of the State Government itself, the Commission had raised the question whether the principle of 'res ipsa loquitur' ('the affair speaking for itself') should not apply in this case in assessing the degree of State responsibility in the failure to protect the rights of the people of Gujarat. It observed that the responsibility of the State extended not only to the acts of its own agents, but also to those of non-State players within its jurisdiction

and to any action that may cause or facilitate the violation of human rights. The Commission added that, unless rebutted by the State Government, the adverse inference arising against it would render it accountable. The burden of proof was therefore on the State Government to rebut this presumption. 10. Nothing in the reports received in response to the Proceedings of 1 April 2002 rebuts the presumption. The violence in the State, which was initially claimed to have been brought under control in seventy two hours, persisted in varying degree for over two months, the toll in death and destruction rising with the passage of time. Despite the measures reportedly taken by the State Government, which are recounted in its report of 12 April 2002, that report itself testifies to the increasing numbers who died or were injured or deprived of their liberty and compelled to seek shelter in relief camps. That report also testifies to the assault on the dignity and worth of the human person, particularly of women and children, through acts of rape and other humiliating crimes of violence and cruelty. The report further makes clear that many were deprived of their livelihood and capacity to sustain themselves with dignity. The facts, thus, speak for themselves, even as recounted in the 12 April 2002 report of the State Government itself. The Commission has therefore reached the definite conclusion that the principle of 'res ipsa loquitur' applies in this case and that there was a comprehensive failure of the State to protect the Constitutional rights of the people of Gujarat, starting with the tragedy in Godhra on 27 February 2002 and continuing with the violence that ensued in the weeks that followed. The Commission has also noted in this connection that, on 6 May 2002, the Rajya Sabha adopted with one voice the motion stating

"That this House expresses its deep sense of anguish at the persistence of violence in Gujarat for over six weeks, leading to loss of lives of a large number of persons, destruction of property worth crores of rupees and urges the Central Government to intervene effectively under article 355 of the Constitution to protect the lives and properties of the citizens and to provide effective relief and rehabilitation to the victims of violence."

The Commission has further noted, in this connection, that it has proven necessary to appoint a Security Advisor to the Chief Minister, to assist in dealing with the situation. The appointment implicitly confirms that a failure had occurred earlier to bring under control the persisting violation of the rights to life, liberty, equality and dignity of the people of the State.

#### **Failure of intelligence**

11. The response of the State Government of 12 April 2002 also fails to dispel the observation made by the Commission in its Preliminary Comments that the failure to protect the life, liberty, equality and dignity of the people of Gujarat itself stemmed from a serious failure of intelligence and a failure to take timely and adequate anticipatory steps to prevent the initial tragedy in Godhra and the subsequent violence.

12. The report of the State Government of 12 April 2002 asserts that the State Intelligence Bureau "had alerted all Superintendents and Commissioners of Police as early as 7.2.2002 about the movement of karsevaks from the State by train on 22.2.2002 to Ayodhya. Besides the State Intelligence Bureau had also intimated UP State Police authorities on 12th, 21st, 23rd, 25th and 26th February 2002 about the number of karsevaks who had left the State for Ayodhya by train." However, "specific information about the return journey of karsevaks by the Sabarmati Express starting from Ayodhya was received only on 28.2.2002 at 0122 hrs i.e., after the incident had taken place on 27.2.2002 morning."

13. It appears incomprehensible to the Commission that a matter which had been the subject of repeated communications between the Gujarat Intelligence Bureau and the UP State Police as to the out-going travel plans of the karsevaks, should have been so abysmally lacking in intelligence as to their return journeys. This is all the more so given the volatile situation that was developing in Ayodhya at that time and the frequent reports in the press warning of the dangers of inter-communal violence erupting in Ayodhya and other sensitive locations in the country. In the view of the Commission, it was imperative, in such circumstances, for the Gujarat Intelligence Bureau to have kept in close and continuing touch with their counterparts in Uttar Pradesh and with the Central Intelligence Bureau. The inability to establish a two-way flow of intelligence clearly led to tragic consequences. The Commission must therefore also definitively conclude that there was a major failure of intelligence and that the response of the State Government has been unable to rebut this presumption.

#### **Failure to take appropriate action**

14. The failure of intelligence was, in the opinion of the Commission, accompanied by a failure to take appropriate anticipatory and subsequent action to prevent the spread and continuation of violence. The Preliminary Comments of the Commission had observed, in this connection, that while some communally-prone districts had succeeded in controlling the violence, other districts - sometimes less communally prone - had succumbed to it. The Commission had therefore pointed to "local factors and players" overwhelming the district officers in certain instances, but not in others, and had asked the State Government as to who these players were in the situations that had gone out of control. Such information had been sought from the State Government particularly since there were widespread reports of well-organized persons, armed with mobile telephones and addresses, singling out certain homes and properties for death and destruction. The reports had also implied that public servants who had sought to perform their duties diligently and to deal firmly with those responsible for the violence had been transferred at short notice to other posts without consulting the Director-General of Police and, indeed, over his protests.

15. The reply of the State Government of 12 April 2002 does not answer these questions. Instead, it refers to the "gravity of the communal incident

which provoked the disturbances” and the role of the electronic media. While there can be no doubt whatsoever about the gravity of the Godhra tragedy, it is the considered view of the Commission that that itself should have demanded a higher degree of responsiveness from the State Government to control the likely fall-out, especially in the wake of the call for the ‘Gujarat bandh’ and the publicly announced support of the State Government to that call. Regrettably, immediate and stringent measures were not adequately taken; the response of the Government thus proved to be unequal to the challenge, as vividly illustrated by the numbers who lost their lives, or were brutally injured or humiliated as the violence spread and continued.

#### **Failure to identify local factors and players**

16. As to the “local factors and players”, in respect of whom the Commission had sought specific information, the reply of the State Government is silent, taking instead the position that this is a “matter covered by the terms of reference of the Commission of Inquiry appointed by the State Government.” The Commission is constrained to observe that it found this answer evasive and lacking in transparency, not least because of the numerous eye-witness and media reports - including allegations specifically made to the Commission and communicated to the State Government - which identify and name specific persons as being involved in the carnage, sometimes within the view of police stations and personnel. The reply makes no effort whatsoever to rebut the allegations made against such persons, or to indicate the action taken by the State Government against those specifically named for participating in the egregious violation of human rights that occurred, or for inciting the acts of violence that resulted in murder, arson, rape and the destruction of lives and property.

#### **Pattern of arrests**

17. In this connection, the Commission has made a careful analysis of the pattern of arrests indicated to it by the State Government in its report of 12 April 2002. That report states that a total number of 27,780 arrests had been made, involving both crimes and as preventive detention. The response does not, however, make clear how many arrests, preventive or otherwise, were made in the worst afflicted areas of the State within the first 72 hours of the tragedy in Godhra, nor the community-wise break-up of those arrested in those areas in the immediate aftermath of Godhra, though such data would have enabled a proper scrutiny of the charge of discrimination brought against the State Government in respect of its conduct in the critical hours immediately after the Godhra tragedy and the call for the ‘bandh’. This lack of transparency seriously undermines the response. The report states instead, that, in relation to various offences, 11,167 persons were arrested, of whom 3,269 belonged to the “minority” community and 7,896 to the “majority.” As regards the 16,615 preventive arrests, it mentions that 13,804 belong to the “majority” community and 2,811 to the “minority.” The questions that arise, however, are when and where were the arrests made, who were arrested and for how

long were they kept in custody, and were those who were specifically named arrested. The Special Representative of the Commission, Shri Nampoothiri has observed in a report to the Commission dated 24 April 2002 that "almost 90% of those arrested even in heinous offences like murder, arson, etc., have managed to get bailed out almost as soon as they were arrested." Reports have also appeared in the media that those who have been released on bail were given warm public welcomes by some political leaders. This is in sharp contrast to the assertion made by the State Government in its report of 12 April 2002 that "bail applications of all accused persons are being strongly defended and rejected" (sic).

#### **Uneven handling of major cases**

18. The analysis made by the Commission of the State Government's reply of 12 April 2002 also illustrates the uneven manner in which some of the major cases had been handled until that date. In respect of the Godhra incident, where 59 persons were killed, 58 persons had been arrested and all were in custody (54 in judicial custody, 4 in police remand). In respect of the Chamanpura (Gulbarga Society) case, where some 50 persons including a former Member of Parliament were killed, 18 persons had been arrested (17 were in judicial custody, 1 was released by the juvenile court). As regards Naroda Patia, where some 150 persons were reportedly killed, 22 had been arrested, but the response is silent in respect of whether they had been released on bail or were in custody. In respect of the Best Bakery case in Vadodara, where some 8 persons were reportedly killed, 12 accused persons were in judicial custody. However, no details were given about the status of the 46 persons arrested in the Sadarpura case of Mehsana District where some 28 persons were reportedly killed.

#### **Distorted FIRs: 'extraneous influences', issue of transparency and integrity**

19. The Commission had recorded in its Proceedings of 1 April 2002 that there were numerous allegations made both in the media and to its team that FIRs in various instances were being distorted or poorly recorded, and that senior political personalities were seeking to influence the working of police stations by their presence within them. The Commission had thus been constrained to observe that there was a widespread lack of faith in the integrity of the investigating process and the ability of those conducting investigations. The Commission had also observed that according to the State Government itself, "in Ahmedabad, looting was reported in well-to-do localities by relatively rich people." Yet the State Government had not identified who these persons were.

20. The report of the State Government of 12 April 2002 once again fails to make the necessary identification of these persons. It also fails to rebut the repeatedly made allegation that senior political personalities - who have been named - were seeking to influence the working of police stations by their presence within them. It states that the Government "fully accepts the

view that there should be transparency and integrity in investigating instances of death and destruction" and adds that "this is being taken care of". The Commission's Special Representative, Shri Nampoothiri, however, has reported to the Commission on 24 April 2002 in a totally opposite vein. He has stated that, in respect of most of the "sensational cases," the FIRs registered on behalf of the State by the police officers concerned, the accused persons are shown as "unknown". His report adds that "this is the general pattern seen all over the State. Even when complaints of the aggrieved parties have been recorded, it has been alleged that the names of the offenders are not included. In almost all the cases, copies of the FIRs which the complainant is entitled to, has not been given." There has been widespread public outrage, in particular, in respect of atrocities against women, including acts of rape, in respect of which FIRs were neither promptly nor accurately recorded, and the victims harassed and intimidated. The Commission must conclude, therefore, that until the time of Shri Nampoothiri's 24 April 2002 report, the victims of the atrocities were experiencing great difficulty in having FIRs recorded, in naming those whom they had identified and in securing copies of their FIRs. Further - for far too long - politically-connected persons, named by the victims of the crimes committed, remained at large, many defying arrest. These are grave matters indeed that must not be allowed to be forgiven or forgotten. Based on Shri Nampoothiri's reports the Commission would therefore like to warn that the danger persists of a large-scale and unconscionable miscarriage of justice if the effort to investigate and prosecute the crimes that have been committed is not directed with greater skill and determination, and marked by a higher sense of integrity and freedom from 'extraneous political and other influences' than has hitherto been in evidence. Of particular concern to the Commission have been the heart-rending instances identified in its Proceedings of 1 April 2002, in respect of which it had called for investigations by the CBI: those cases relate to some of the very worst incidents of murder, arson, rape and other atrocities, including many committed against women and children whose tragic and inconsolable circumstances have profoundly shocked and pained the nation.

#### **Pervasive insecurity: Justices Kadri & Divecha**

21. In its Preliminary Comments of 1 April 2002 the Commission had referred to the pervasive sense of insecurity prevailing in Gujarat at the time of the visit of its team to that State between 19-22 March 2002. It added that this was most acute among the victims of the successive tragedies, but that it extended to all segments of society, including to two Judges of the High Court of Gujarat, one sitting (Justice Kadri) and the other retired (Justice Divecha) who were compelled to leave their homes because of the vitiated atmosphere.

22. The Commission has carefully considered the 12 April 2002 response of the State Government in respect of Justices Kadri and Divecha. In regard to the former, the response states that, "prior to 28th, there was already half a section of police guards" posted outside Justice Kadri's residence in Law Garden. It adds that on 28 February 2002, Justice Kadri

shifted to Judges Colony in Vastrapur “of his own accord.” It goes on to state that, from 9 March 2002, a further police guard was placed at his house “since he desired to shift back to his original residence.” The Commission is compelled to observe that the response of the State Government fails to acknowledge an incontrovertible fact: the movements of Justice Kadri from house to house were compelled on him because of the pervasive insecurity. They were not “of his own accord” because they were clearly involuntary. And the conclusion is inescapable that the insecurity was such that it was not dispelled by the police arrangements reportedly made for him.

23. As to the 12 April 2002 response of the State Government in respect of Justice Divecha, it totally ignores any mention of the repeated efforts made by him and his associates to seek appropriate police protection, the repeated visits of mobs to his home on 27 and 28 February, his forced departure, together with Mrs. Divecha, from their home at around 12.20 p.m. on 28 February 2002 and the fire that was set to their apartment and property at around 4 p.m. on that day. Justice Divecha’s letter to the Chairperson of this Commission dated 23 March 2002 (*Annexure II*)<sup>1</sup> speaks for itself. The fact that criminal case no. 121/2002 was subsequently registered, that 7 arrests had been made and that the matter was under investigation, does not explain the failure to protect Justice Divecha. The action taken was, sadly, too little and too late. Nor can the Commission accept the proposition that, “As the city of Ahmedabad was engulfed by the disturbance, it was not possible for the City Police to arrange for protection for every society.” The Commission would like to underline that there were communal reasons for the repeated and specifically targeted attacks on Justice Divecha’s property. The attacks were not a case of random violence against “every society” in the city, as the response of the State Government would have the Commission believe. Indeed, the response betrays a considerable lack of sensitivity in explaining what occurred. It is for this reason that the Commission must reject as utterly inadequate the response of the State Government, as contained in its reply of 12 April 2002, in respect of this matter.

24. There is a deeper point at issue here that the Commission wishes to make. If the response of the State Government to the security needs of two Justices of the High Court was so hopelessly inadequate, despite the time and the opportunity that it had to prevent the harm that was done, it must be inferred that the response to the needs of others, who were far less prominent, was even worse. Indeed, the facts indicate that the response was often abysmal, or even non-existent, pointing to gross negligence in certain instances or, worse still, as was widely believed, to a complicity that was tacit if not explicit.

#### **B. Release of the Confidential Report transmitted to the Government of Gujarat with the Commission’s Proceedings of 1 April 2002**

25. For the reasons indicated earlier in these Proceedings, the Confidential Report transmitted to the State Government of Gujarat on 1 April 2002, and to which the State Government has not responded for nearly

two months despite repeated opportunities to do so, is now being released by the Commission (*see Annexure I*). Even while doing so, however, the Commission urges that Government to come forward with a clear response, indicating in detail the steps it has taken in respect of the persons named in that report who allegedly violated human rights or interfered in the discharge of the responsibilities of the State to protect such rights. Further, the Commission once again calls upon the State Government to provide a full account of the incidents to which the Commission drew its attention in that Confidential Report, and to indicate the measures it has taken to investigate and redress the wrongs that were committed.

**C. Further set of Recommendations of the Commission, in the light of the reply of 1 April 2002 received from the Government of Gujarat, and of 1 May 2002 from the Ministry of Home Affairs, Government of India**

26. Having reviewed the responses received thus far, the Commission would now like to make a further set of Recommendations, keeping in mind those that it had made in its Proceedings of 1 April 2002.

**I. Law and Order**

**Involvement of CBI**

27. (i) In view of the widespread allegations that FIRs had been poorly or wrongly recorded and that investigations had been 'influenced' by extraneous considerations or players, the Commission had stated that the integrity of the process had to be restored. It had therefore recommended that certain critical cases, including five that it had specifically mentioned, be entrusted to the CBI.

(ii) The State Government responded on 12 April 2002 saying that "An investigation conducted by the State Police cannot be discredited, cannot be put into disrepute and its fairness questioned merely on the basis of hostile propaganda". It then recounted the steps taken in respect of the five cases listed by the Commission and added that transference of these cases to the CBI would "indefinitely delay the investigation" and help the accused persons to get bail. It also stated that the CBI is already understaffed and overburdened. The Commission was therefore requested to reconsider its recommendation as it was based on "unsubstantiated information given to the Commission by sources with whom authentic information was not available."

(iii) The response of the Ministry of Home Affairs, Government of India, dated 1 May 2002, summarizes the position of the State Government. It then adds that, under existing rules, the CBI can take up the investigation of cases only if the State Government addresses and appropriately requests the CBI to do so. Since the State Government had expressed the opinion that investigation into the cases is not required by the CBI at this stage, "it is not possible for the Central Government to direct the CBI to take up the investigation of the above cases."



(iv) The Commission has considered these responses with utmost care. It does not share the view of the State Government that the substance of the allegations made against the conduct of the police, and the reports of "extraneous" influences brought to bear on the police, were based on "hostile propaganda" or "unsubstantiated information." The allegations were made by those who were personally affected by, or witness to, the events, and by eminent personalities and activists who spoke to the Commission directly, or addressed petitions to it, with a full sense of responsibility. The Commission would like to underline that it is a central principle in the administration of criminal justice that those against whom allegations are made should not themselves be entrusted with the investigation of those allegations. It has universally been the practice to act on this principle, including in this country. To depart from that principle would, therefore, be to invite a failure of justice. In respect of the cases listed by the Commission, the allegations of inaction, or complicity by the elements of the State apparatus were grave and severely damaging to its credibility and integrity. It would thus be a travesty of the principles of criminal justice if such cases were not transferred to the CBI. Worse still, the inability to do so could severely compromise the fundamental rights to life, liberty, equality and dignity guaranteed by the Constitution to all of the people of India on a non-discriminatory basis. Further, in the light of the unanimously adopted resolution in the Rajya Sabha on 6 May 2002, urging the Central Government "to intervene effectively under Article 355 of the Constitution to protect the lives and properties of citizens," the Commission is emphatically of the view that the role of the Central Government in respect of the investigation of the cases identified by the Commission should go beyond a mere invocation of the "existing rules" in respect of when the CBI can take up a case for investigation and a statement to the effect that "it is not possible" for it to direct the CBI to take up the investigation of these cases given the position taken by the State Government.

(v) In these circumstances, the Commission urges once again that the critical cases be entrusted to the CBI and that the Central Government ensure that this is done, not least in view of the Rajya Sabha resolution referring to its responsibilities under Article 355 of the Constitution. The Commission is deeply concerned, in this connexion, to see from Shri Nampoothiri's report of 28 May 2002 that, of 16,245 persons arrested for substantive offences, all but some 2100 had been bailed out as of 10 May 2002. It also noted from that report that of the 11,363 Hindus arrested for such offences, 8% remained in custody, while 20% of the 4,882 Muslims thus arrested remained in such custody. This does not provide a particularly reassuring commentary on the determination of the State Authorities to keep in check those who were arrested or to bring them to justice.

### **Police Reform**

28 (i) The Commission drew attention in its 1 April 2002 Proceedings to the need to act decisively on the deeper question of Police Reform, on which recommendations of the National Police Commission (NPC) and of

the National Human Rights Commission have been pending despite efforts to have them acted upon. The Commission added that recent events in Gujarat and, indeed, in other States of the country, underlined the need to proceed without delay to implement the reforms that have already been recommended in order to preserve the integrity of the investigating process and to insulate it from 'extraneous influences'.

(ii) The report of the State Government of 12 April 2002 contains the ambiguous response that "the question of Police Reform is already under the consideration of the State Government." Nothing further is said.

(iii) As to the 1 May 2002 response of the Central Government, it recounts the history of the less than purposeful effort thus far made to bring about Police Reform. It takes the position that "Police" is a State subject and that "the Centre at best can lead and give guidance." Without going into details of the recommendations made, it recalls the work of the National Police Commission (NPC), the letters addressed to Chief Ministers in 1994, the judgement of the Supreme Court in the case filed by Vineet Narain, the PIL before the Supreme Court in yet another case, the work of the Ribeiro Committee constituted to review the action taken to implement the recommendations of the NPC, NHRC and Vohra Committee, etc. The response concludes "However, crucial recommendations of the Commission (the NPC) relating to the constitution of State Security Commission/selection of DGP, insulation of investigation from undue pressure etc., could not be implemented."

(iv) The Commission is fully familiar with this melancholy history of failure - and of the lack of political and administrative will that it signifies - to revive the quality of policing in this country and to save it from the catastrophic 'extraneous influences' that are ruining the investigative work of the police. The Commission therefore urges both the Central and State Governments once again, taking the situation in Gujarat as a warning and catalyst, to act with determination to implement the various police reforms recommended and referred to above.

(v) By drawing attention to the fundamental need for Police Reform, the Commission did not have in mind the temporary appointment of a Security Advisor to a Chief Minister, necessary as such a step may be, or the transfer of police personnel - sometimes for the right reasons, but frequently for the wrong. It had in mind, instead, the crucial reforms which are detailed in full in its submissions to the Supreme Court in the case *Prakash Singh vs. Union of India*. These are fully known to the Central and State Governments and are also published, in extenso, in the Commission's annual report for the year 1997-98, where they may readily be seen. Further, the Commission has in mind the judgement of the Supreme Court in the case *Vineet Narain & Others v. Union of India & Another (1998 1SCC 273)* in which the Apex Court, inter alia, set out the method of appointment and functioning of the Central

Bureau of Investigation (CBI) and the Central Vigilance Commission (CVC), and of a Central Prosecution Agency and went on to observe:

“In view of the problem in the States being even more acute, as elaborately discussed in the Report of the National Police Commission (1979), there is urgent need for the State Governments also to set up a credible mechanism for selection of Police Chiefs in the States. The Central Government must pursue the matter with the State Governments and ensure that a similar mechanism, (as indicated above) is set up in each State for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also of all police officers of the rank of Superintendent of Police and above. It is shocking to hear, a matter of common knowledge, that in some States the tenure of a Superintendent of Police is on an average only a few months and transfers are made for whimsical reasons. Apart from demoralizing the police force, it has also the adverse effect of politicizing the personnel. It is, therefore, essential that prompt measures are taken by the Central Government within the ambit of their Constitutional powers in the federation to impress upon the State Government that such a practice is alien to the envisaged constitutional machinery. The situation described in the National Police Commission’s Report (1979) was alarming and it has become much worse by now. The desperation of the Union Home Minister (then Shri Indrajit Gupta) in his letters to the State Government, placed before us at the hearing, reveal a distressing situation which must be cured, if the rule of law is to prevail. No action within the constitutional scheme found necessary to remedy the situation is too stringent in these circumstances.”

(vi) These observations of the Supreme Court, written in 1997, are singularly prescient when set against the situation in Gujarat. The Police Reforms directed by the Apex Court never took place. An unreformed police force thus allowed itself to be overwhelmed by the situation and by the ‘extraneous influences’ brought to bear on it. In the face of the challenges confronting it, the State Government thus failed in its primary and inescapable duty to protect the constitutionally guaranteed rights of the citizenry. In such a situation, it was widely reported that certain transfers of police personnel were made for whimsical, ‘extraneously’ influenced reasons. It was also reported that the Director-General of Police was not consulted in respect of them, but side-lined in the decision-making process and protested against the manner in which these transfers were made. With the Central Government now being fully associated with the unanimously adopted resolution of the Rajya Sabha requiring it to “intervene effectively under Article 355 of the Constitution,” it becomes doubly incumbent on it to ensure that “prompt measures” are taken by it, “within the ambit of its constitutional powers in the federation” to impress upon the State Government that much of what occurred in the aftermath of the Godhra tragedy was “alien to the envisaged constitutional machinery” and that there is, inter alia, urgent need for radical police reform along the lines already directed by the Supreme Court “if the situation is to be cured, if the rule of law is to prevail.” The Commission therefore urges that the matter of Police Reform receive attention at the highest

political level, at the Centre and in the States, and that this issue be pursued in good faith, and on a sustained basis with the greater interest of the country alone in mind, an interest that must over-rule every 'extraneous' consideration. The rot that has set-in must be cured if the rule of law is to prevail.

#### **Special Courts and Special Prosecutors**

29. (i) The Commission had recommended on 1 April 2002 that Special Courts be established to try the most critical cases on a day-to-day basis, the Judges being hand-picked by the Chief Justice of the High Court of Gujarat, with Special Prosecutors being appointed as needed. Emphasis was also placed on the need for procedures to be adopted of a kind that protected the victimized women and children from further trauma and threat. The deputation of sensitive officers, particularly those who were women, was recommended to assist in the handling of such cases.

(ii) The response of the State Government does not indicate whether it accepts the recommendation for Special Courts of the kind proposed by the Commission, the purpose of which was to ensure expeditious trial and disposal of cases. The Commission would like to stress that justice appropriately and speedily delivered after an outburst of communal violence is essential to the return of normalcy, and that delays in the process exacerbate the climate of violence and mistrust. The response of the State Government also does not comment on the recommendation regarding the appointment of Special Prosecutors. This is regrettable since media and other reports have alleged that the existing Public Prosecutors have, in critical cases, not asked the Courts to send the accused to police remand, but have informed the Courts that there was no objection to the granting of bail. The Government is therefore requested to clarify the facts pertaining to these matters.

#### **Special Cells**

30. The Commission had recommended that Special Cells be constituted under the concerned District Magistrates to follow the progress of cases not entrusted to the CBI and that these should be monitored by the Additional Director General (Crime). The response of the State Government accepts the role proposed for the latter, but does not confirm if appropriate action has been taken. Further, it is silent on the need for Special Cells under the concerned District Magistrates/Police Commissioners. The recommendations are therefore repeated.

#### **Time-frames for investigations**

31. The Commission had recommended that specific time-frames should be fixed for the thorough and expeditious completion of investigations. This recommendation appears to have been accepted by the State

Government, but it has not spelt out what the time-frames will be, so neither the Commission nor the public know how long the process will take. The State Government should therefore clarify its position on this matter.

#### **Police Desks in Relief Camps**

32. The Commission had recommended that police desks should be set-up in the relief camps to receive complaints, record FIRs and forward them to Police Stations having jurisdiction. The 12 April 2002 response of the State Government asserts that instructions to this effect had been given and that 3,532 statements and 283 FIRs had been recorded in the relief camps. The Commission, however, is constrained to observe that, according to a report received from its Special Representative dated 24 April 2002, police desks had been set up only in 9 out of a total of 35 relief camps then in existence in Ahmedabad, that these desks worked only for a few days and only for two hours on an average on those days. The Commission therefore calls for full compliance with its recommendation in respect of the setting-up of such police desks in the relief camps. That would go a long way towards ensuring that FIRs are more accurately and fully recorded, particularly in respect of crimes committed against women and children, especially rape and other acts of brutality. Regrettably, such cases are still not being adequately registered, a fact that emerges from Shri Nampoothiri's report of 28 May 2002, not least because of the insensitive questioning by police personnel. There is also a lack of evidence of sufficient women officers being appointed to help with such cases. In this connection, the Commission would also like to reiterate its view that, in the very nature of situations such as this, material collected and provided by other credible sources, e.g., NGOs, should be fully taken into account. There is little evidence to suggest that this is being done. There is therefore need for greater responsiveness to this recommendation and greater transparency on the part of Police Commissioners and Superintendents of Police who should establish a system whereby NGOs and others can know precisely what action has been taken in respect of material provided by them.

#### **Survey of all Affected Persons**

33. The Commission urges, in this connection, that a comprehensive survey be expeditiously completed to establish the facts concerning the number and names of those who have been killed, or who are missing, injured, rendered widows, orphans or destitute in the violence that has ensued. The response of the Government does not throw any light on what is being done to gather such data. This is posing a major legal and humanitarian problem, not least to those who are the next-of-kin of those who have been killed or who are missing. The procedure for declaring a person dead needs to be reviewed in the present circumstances, and a procedure developed based on affidavits by the next-of-kin and their neighbours or other reliable persons. The Commission further recommends that the State Government expeditiously publish the data that is compiled, on a district-wise basis. This would not only assist the survivors in receiving the compensation and benefits

that is their due, but also set to rest speculation about the number of persons killed or missing, and the widespread belief that there is a serious discrepancy between 'official' and 'unofficial' figures. A comparable recommendation by the Commission in respect of casualties after the Super-Cyclone in Orissa and the earthquake in Gujarat greatly assisted both the State and the affected population to arrive at the truth and to avoid painful controversy.

#### **Analysis of material collected by NGOs and others**

34. The Commission had recommended that material collected by NGOs such as Citizen's Initiative, PUCL and others should be used. The response of the State Government indicates that such material, provided by different organizations will be investigated and, if found to be correct upon investigation, appropriately used in accordance with law. The Commission has taken note of this and will be monitoring the action taken by the State Government, particularly in respect of certain critically important cases and of those involving crimes against women and children which have been extensively documented by NGOs and citizens groups. The Commission has also asked its Special Representative to keep it informed of developments in regard to these cases, the details of which are available in the widely circulated reports of these NGOs and citizens groups. The reports thus far received do not suggest that the State Government is acting with adequate diligence on this matter.

#### **Provocative Statements**

35. The Commission had drawn special attention to the provocative statements made by persons to the electronic or print media, especially the local media, and had urged that these be examined and acted upon, the burden of proof being shifted to such persons to explain or contradict their statements. The response of 12 April 2002 of the State Government merely states that such statements "will be examined and acted upon appropriately." It does not indicate which statements are being examined, nor does it provide the details of the action being taken under the provisions of the Indian Penal Code and other relevant acts to bring to book those individuals or organizations that have been making incendiary statements, or publishing articles or leaflets promoting communal enmity. The Commission would like to receive all relevant details of the persons or organizations identified by the State Government in this connection and of the statements or actions for which they are being prosecuted. Only then will the Commission be able to arrive at a conclusion as to whether the State Government has acted appropriately in respect of this most serious matter. A further detailed report from the State Government would therefore be appreciated in this respect.

#### **Identification of delinquent public servants**

36. The Commission had expressly called for the identification of officers who had failed to discharge their statutory responsibilities

appropriately and for proceedings to be instituted against them. Likewise, the Commission had added that those who had performed their duties well, should be commended. The State Government has stated that it will be guided by the findings of the Commission of Inquiry appointed by the State Government. It adds that "some of the officers who have performed their duties commendably have already been rewarded appropriately." The Commission is of the view that action against the delinquent public servants need not, in all instances, await the outcome of the Commission of Inquiry. In situations such as prevailed in Gujarat, the swiftness and effectiveness of the action taken against delinquent public servants itself acts as a major deterrent to misconduct or negligence in the performance of duty. It also acts as a catalyst to the restoration of public confidence and as an indication of the good faith of the Administration. Failure to take prompt action has the opposite effect. The Commission therefore recommends that prompt action be taken against the delinquent public servants and that the progress in the action initiated be communicated to the Commission.

## **II. Proper Implementation of Existing Statutory Provisions, Circulars and Guidelines**

37. Communal riots are not new to India and least of all so to Gujarat, as the responses of the State Government themselves indicate. The Commission would therefore like to stress that there already exists in the country a comprehensive body of material in the form of statutory provisions, circulars, guidelines and the like, that has been meticulously elaborated over the years, that can and must be followed by those responsible for the maintenance of law and order and communal harmony in the country. In assessing whether or not the Government of Gujarat discharged its responsibilities adequately in the face of the violence that convulsed the State for over two months, it is essential to assess its performance against this body of material. For purposes of these Proceedings, the Commission will not attempt to list out comprehensively the entire range of statutes, circulars and guidelines germane to developments in Gujarat, but it will, by way of illustration, draw attention to certain of them, since they are singularly relevant to an assessment of the conduct of the State Government and of its officials.

### *(i) Statutory Provisions*

38. Amongst the principal statutory provisions that could and should have been vigorously used to control the situation are the following:

39. *The Indian Penal Code (1860): Chapter VIII* entitled "Of offences against the public tranquility":

This is relevant in its entirety (Sections 141-160 IPC)

The Commission would, however, draw attention in particular to the following provisions of that Chapter:

- Section 153 - Wantonly giving provocation with intent to cause riot - If rioting be committed, if not committed;

- Section 153-A - Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony;
- Section 153-B - Imputations, assertions prejudicial to national integration.

*Chapter XV* entitled "Of offences relating to religion"

This, too, is most relevant and includes the following:

- Section 295 - Injury or defiling place of worship with intent to insult the religion of any class;
- Section 295-A - Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or beliefs;
- Section 297 - Trespassing on burial places, etc.;
- Section 298 - Uttering words, etc., with deliberate intent to wound religious feelings.

The Commission would also draw attention to the special relevance in *Chapter XXII* of Section 505 (1), (2) & (3) IPC, dealing respectively with Statements conducing to public mischief, Statements creating or promoting enmity, hatred or ill-will, between classes, and an Offence under sub-section (2) committed in a place of worship, etc.

*The Code of Criminal Produce (1973)*

40. Attention is drawn, in particular, to the contents of *Chapter V*, relating to Arrest of Persons, and especially to

- Section 41 - When police may arrest without warrant;
- Section 51 - Search of arrested person; and
- Section 52 - Power to seize offensive weapons.

The following sections of *Chapter X*, dealing with Maintenance of Public Order and Tranquility, are also particularly relevant:

- Section 129 - Dispersal of assembly by use of civil force;
- Section 130 - Use of armed force to disperse assembly;
- Section 131 - Power of certain armed force officers to disperse assembly;
- Section 144 - Power to issue order in urgent cases of nuisance or apprehended danger.

*Chapter XI*, dealing with Preventive Action of the Police, contains, in particular, the following:

- Section 149 - Police to prevent cognizable offences;
- Section 151 - Arrest to prevent the commission of cognizable offences.

*Chapter XII* concerning Information to the Police and their Powers to Investigate, is also of relevance, particularly Section 154 pertaining to the recording of information in cognizable cases.



41. In addition, attention is drawn to *The Police Act, 1861*.

Of particular relevance are the following provisions:

- Section 23 - Duties of police officer;
- Section 30 - Regulation of public assemblies and processions and licensing of the same;

42. *The National Security Act, 1980*, which provides for preventive detention, is also germane to the situation that prevailed in Gujarat, as is the *Arms Act, 1959*.

43. As indicated earlier, the statutory provisions mentioned above do not purport to be a comprehensive listing of all such provisions under the various acts of the country relevant to the maintenance of law and order and communal harmony. However, even the selected listing contained in these Proceedings gives an idea of the vast range of the provisions of law that the Government of Gujarat could and should have drawn upon to deal swiftly and effectively with the violence that ensued. The performance of the authorities, however, points to a less than vigorous use of these provisions.

(ii) *Circulars, Guidelines, etc.*

44. In examining the situation, the Commission has, in particular, been struck by the apparent failure of the Government of Gujarat to follow vigorously the "*Guidelines to Promote Communal Harmony*" issued by the Ministry of Home Affairs, Government of India, in 1997 and circulated to all Chief Ministers with a covering letter dated 22 October 1997 from the then Union Minister for Home Affairs, Shri Indrajit Gupta, who called for "urgent action" on the basis of those Guidelines.

45. Given the pointed relevance of those Guidelines to the situation in Gujarat, they are being attached to these Proceedings in full as *Annexure III*. In addition, however, it is essential to highlight certain portions of those Guidelines, by reproducing them in the main body of these Proceedings.

*Excerpts from the "Guidelines to Promote Communal Harmony"*

46. From the Chapter entitled *Intelligence*

- *Paragraph 2:* "The organizational aspect of intelligence, with special reference to its adequacy, scope and efficacy, both at the State level and in the Districts/Towns/Areas identified as sensitive/hyper-sensitive should be thoroughly reviewed on a priority basis."
- *Paragraph 8:* "There is an urgent need to make use of the intelligence feed-back so gleaned from the ground level. To ensure this there must be at least a monthly review of intelligence at the District level by the District Magistrate, Superintendent of Police and the Head of District Intelligence. Such reviews should not get 'routinised.' A monthly report of the review should be sent to the State Government."

47. From the Chapter entitled "*Periodical Review of Communal Situation at District level and State level*"

- Special arrangements are recommended to ensure that women are protected as they are "the most affected group in communal tensions"

or riots" (paragraph 11), as also for "industrial areas," as they "may be prone to communal flare-ups" (paragraph 14).

- Paragraph 15 requires: "At the first sign of trouble, immediate steps have to be taken to isolate elements having a non-secular outlook. Effective will needs to be displayed by the District Authorities in the management of such situations so that ugly incidents do not occur. Provisions of section 153(A), 153(B), 295 to 298 and 505 of IPC and any other law should be freely used to deal with individuals promoting communal enmity."
- Paragraph 16: "Activities of communal organizations fomenting communal trouble, should be under constant watch of intelligence/police authorities. Prompt action should be taken against them at the first sign of trouble."
- Paragraph 17: Processions have been the single largest cause of communal conflagrations.

48. Under the Chapter entitled *Stringent Implementation of Acts relating to Religious Places*, the Guidelines stress, in particular, the need to ensure respect for the *Religious Institutions (Prevention of Misuse) Act, 1988* and the *Places of Worship (Special Provisions) Act, 1991*. The Guidelines also call for the "strict enforcement of the penal provisions of these Acts" (paragraphs 25-27).

49. The responsibility of the *Press* is dealt with in the Chapter devoted to this subject. It calls on the Press to "report incidents factually without imparting a communal colour to them" (paragraph 30) and states that "Action should be taken against writers and publishers of objectionable and inflammatory material aimed at inciting communal tension." (paragraph 31).

50. In the "*Administrative Measures*" required for dealing with serious communal disturbances, the Guidelines state that, "as soon as a communal incident occurs, a report should be sent thereon to the Ministry of Home Affairs immediately, mentioning, inter alia, the grant of awards for good work or punishments for showing laxity in the district officer connected with the incidents" (paragraph 35). The Guidelines add "special Public Prosecutors, preferably from outside the district concerned or in any event from outside the affected area should be appointed" (paragraph 36).

51. The need to "*Detect and Unearth*" illegal arms and to cancel arms licences issued without adequate justification is considered in paragraph 40.

52. Thereafter, the "*Role of the Police*" is dealt with at some length. Paragraph 44 stresses the need for "minority community members in the police force deployed in communally sensitive areas;" it urges the "launching of special campaigns to recruit more members of minorities in the State Police Force" and the "creation of composite battalions of armed police which should include members of all religious communities including SC's/ST's for exclusive use in maintaining communal peace and amity in sensitive areas."

53. Under the heading "*Punitive Action*", the Guidelines state that "Laws relating to collective fines should be used without fear or favour, wherever the situation warrants" (paragraph 48). It is then urged that "Crimes committed during riots should be registered, investigated and the criminals identified

and prosecuted." "Stringent judicial action" is required to be taken against criminals and it should be well publicized in order to impose "a high degree of constraint upon others" (paragraph 49).

54. Paragraph 50 deals with *Special Courts* for expeditious trial and disposal of cases. It also suggests that when an Enquiry Committee/Commission is set up, "its recommendations should be expeditiously implemented, say within three months and the Central Government should be kept informed".

55. As regards "*Personnel Policy*," the Guidelines categorically state that the District Magistrate and the Superintendent of Police "will be responsible" for maintaining communal harmony in the district (paragraph 52) and that "A mention should be made in the ACRs of DMs/SPs which should reflect their capability in managing law and order situations, especially their handling of communal situations" (paragraph 53).

56. Of great importance in the Guidelines and of clear relevance to the situation in Gujarat is the view expressed on the "*Role of Ministers/Office Bearers of Political Parties*." Paragraph 57 states that "Ministers and office bearers of political parties should exercise maximum restraint and self-discipline in making public utterances on any issue concerning the communal disturbance" and paragraph 58 adds "No Minister or an office bearer of a political party should participate in any function or a meeting or a procession which may have a bearing on religious or communal issues. It would be best if the District Magistrate is consulted before participating therein."

57. The Guidelines recapitulated above were issued by the Government of India 18 years after the *Second Report of the National Police Commission (NPC)* which, in 1979, analyzed the grave issue of Communal Riots in great detail. Chapter XLVII of that Report contained specific observations and recommendations which retain a high degree of relevance to what occurred in Gujarat recently.

58. The Second Report of the NPC recalled and examined the work of various Commissions of Inquiry appointed earlier to look into major incidents of communal violence, including inter alia the Raghubar Dayal Commission (Ranchi-1967), the Madon Commission (Bhiwandi-1970), the Jaganmohan Reddy Commission (Ahmedabad-1969) and the Balasubramanian Commission (Bihar Sharief-1981) and reached the conclusion that there was a "pattern in the failures" to deal effectively with the outbursts of communal violence. The "pattern" pointed to the following "failures" (paragraphs 47.6 - 47.16):

- A failure in timely and accurate gathering of intelligence;
- A failure to make a correct assessment of the intelligence reports;
- A failure to anticipate trouble, and to make adequate arrangements on the ground;
- A failure to deploy available resources adequately and imaginatively in vulnerable areas; a tendency to disperse the force in penny-packets without sufficient striking reserves;

- A failure by the DM and SP to take “quick and firm decisions” and a “growing tendency among the district authorities to seek instructions from higher quarters, where none are necessary”;
- A failure of police officers and their men to function without bias; a pattern instead of such personnel showing “unmistakable bias against a particular community”;
- A failure of officers to take responsibility in dealing with a situation, “to avoid to go to a trouble spot, or when they happen to be present there, (to) try not to order the use of force when the situation demands, or better still slip away from the scene leaving the force leaderless”;
- A failure to post district officers on “objective considerations” or for “long enough tenures”; instead, officers “being posted and transferred due to political pressures,” adversely affecting the discipline and moral of the force, the “spate of transfers” undermining the “credibility of the administration.”
- A failure to be transparent in respect of a situation and a tendency to “hide the true-facts,” even among senior officers. The tendency to “minimize” the number of casualties often resulted in rumours, the populace then choosing to believe “sources other than the administration and the government media.”

59. The Second Report of the National Police Commission (NPC) then went on to make a number of powerful recommendations, many of which were subsequently used in the Guidelines of 1997, referred to above. Among the more relevant of the NPC recommendations, specifically in respect of communal situations, were the following:

- The administration should disseminate correct information to the public through all available means. In cases of mischievous reporting, the State Government and local administration should use every weapon in the legal armory to fight obnoxious propaganda prejudicial to communal harmony (*paragraphs 47.28, 47.29*).
- The authorities in dealing with communal riots should not be inhibited, by any consideration, to adopt luke-warm measures at the early stages; a clear distinction must be made between communal riots and other law and order situations and “the most stringent action taken at the first sign of communal trouble” (*paragraph 47.34*).
- Officers who have successfully controlled the situation at the initial stages with firm action should be suitably rewarded. Immediate and exemplary action should be taken against officers who willfully fail to go to the trouble spot or who slip away from there after trouble has erupted (*paragraph 47.35*).
- The NPC Report “strongly disapproves” of “the practice of posting and transfers on political pressures.” Only specially selected experienced officers with an image of impartiality and fair play should be posted to communally sensitive districts (*paragraph 47.36*).
- There should be a control room in all of those places which have been identified as prone to communal trouble. Even though some

information passed on to the control room may not be useful ..... every bit of information passed on to the control room should ..... be acted upon as if it were genuine (*paragraph 46.37*).

- Unless crimes committed are registered, investigated and the criminals identified and prosecuted, the police would not have completely fulfilled its role as a law enforcement agency..... The police should realize that the task of investigation is a mandatory duty cast upon it and any indifference to this task can attract legal sanctions (*paragraph 47.47*).
- In a riot situation registration of offences becomes a major casualty. "It is futile to expect the victim of the crime to reach a police station risking his (her) own life and report a crime to the police." The police should therefore open several reporting centers at different points in a riot-torn area (*paragraph 47.48*).
- The police forces of the various States in the country should truly represent the social structure in the respective States (*paragraph 47.58*).

60. In drawing attention to the Circulars, Guidelines and Reports mentioned above, the Commission would like to underline its sense of anguish that, despite the existence of such thorough and far-reaching advice on how to handle incidents of communal violence, the Government of Gujarat has conspicuously failed to act in accordance with the long-standing provisions of these important instructions and that, measured against the standards set by them, the performance of the State appears to be severely wanting. The Commission believes that there is need for careful introspection within the State Government in this respect; the shortcomings in its performance need to be analyzed, inter alia, in the light of the statutory provisions, circulars and guidelines referred to above, and a detailed report based on that analysis should be made available by the State Government to the Ministry of Home Affairs, Government of India, and to this Commission for their consideration. The report should indicate the precise conclusions that the State Government has reached, and the steps that it intends to take, to prevent the recurrence of the type and range of failures that have marred the performance of the State in the handling of the tragic events that occurred recently. The report should also indicate clearly what steps the Government intends to take against those who are responsible for these multiple failures, identifying the delinquent public servants, and others in authority, without equivocation.

### III. Camps

61. The Commission had recommended that the camps should be visited by senior political leaders and officers in a systematic way, that NGOs should be involved in the process, and that the management and running of camps should be marked by transparency and accountability. The State Government has, in its response of 12 April 2002, recounted the number of visits made, the medical, para-medical, sweepers, anganwadi and other staff appointed/deployed, the medicines distributed etc.

62. The Commission has taken note of these efforts. It would, however, like to draw particular attention to the following matters:

(i) There is a manifest need to improve sanitary conditions in the camps, and increase the provision of toilets and water supply. Particular care must be taken of the needs of women, for whom special facilities should be provided. There should be a reasonable ratio prescribed of toilets and bathing places to population.

(ii) Particular vigilance must be ensured to prevent the spread of epidemics, measles and other illnesses having already taken a toll.

(iii) While the response of the State Government indicates the quantity of food-grains, pulses, etc., supplied to the camps in 8 districts, it does not indicate the standards adopted in providing essential food-items. These standards must accord with the minimal nutritional levels set by WHO/ UNICEF and the competent Ministries of the Government of India in situations such as this. There have been alarming reports of arbitrary reductions in the quantity of foodstuffs being provided.

(iv) Given the scorching heat of summer, and the imminent monsoon that will follow, there is an immediate and most critical need to provide semi-permanent structures and better protection against the elements. Standards must also be set for the provision of fans etc., in terms of population, in order to ease the suffering of those who have sought refuge in the camps.

(v) Camp-wise monitoring committees should be appointed to watch over each of the camps.

(vi) The role and functions of NGOs should be more clearly defined than has been the case till now. Private sector organizations and business houses should be encouraged to 'adopt' certain camps, or specific activities within them, e.g., the provision of medicines, the improvement of shelter, sanitary conditions, etc.

(vii) The reports of the Secretary-level officers appointed to monitor work in the camps should be recorded on a prescribed form, and be available to the public as also to the Special Representative of the Commission in Gujarat.

(viii) An adequate number of trauma specialists should be sent to the camps and other distressed areas for the counseling and treatment of victims.

(ix) Procedures should be simplified for obtaining death certificates and ownership certificates, in order to expedite the giving of compensation. Time-frames should be set for the settlement of claims and the survey of townships and villages that have been affected. These should be indicated to the public and to this Commission. There are disturbing reports that the compensation being announced for damaged homes and properties is being arbitrarily fixed and serving as a disincentive to victims to start their lives anew. This should be urgently looked into by the State Government which should establish credible mechanisms for assessing damages done to homes and items of property and ensure that those who have suffered receive fair and just compensation.

(x) Confidence building measures should be elaborated and made public, in order to facilitate the return of camp inmates and others who have fled, to their homes and work. Leadership must be provided by the highest echelons of the State Administration.

(xi) The Commission has noted the assurance given by the State Government, in its response of 12 April 2002, and reiterated subsequently in media reports to the effect that the inmates will not be asked to leave the camps until appropriate relief and rehabilitation measures are in place for them and they feel assured, on security grounds, that they can indeed leave the camps and return to their homes. Reports reaching the Commission, however, still point to pressures being exerted on the inmates, or conditions in some camps being so inhospitable, that inmates have felt compelled to leave the camps and seek refuge with family or friends. The Commission recommends once again, in the circumstances, that no camp be closed without a clear recommendation from a Committee comprising the Collector, a representative of a reputed NGO, a representative of the camp, and the Special Representative of the Commission in Gujarat or a nominee of his.

#### **IV. Rehabilitation**

63. (i) The Commission has noted that the State Government, in its response of the 12 April 2002, has accepted its recommendation "in principle" that places of worship that have been destroyed be repaired expeditiously. However, little has been done to start work as yet. The Commission recommends that the full list of damaged and destroyed sites/monuments be published district-wise. This would constitute an essential confidence-building-measure as certain historical sites have not only been destroyed but efforts have been made to erase any trace of them. Plans should be announced for the future protection of historical, religious and cultural sites in the State and the entire exercise undertaken in consonance with articles 25 to 29 of the Constitution.

(ii) The Commission has taken note of the package of relief and rehabilitation measures announced by the State Government, including the contribution from the Prime Minister's Relief Fund. It has also noted that disbursement of assistance is "still under progress." The Commission is concerned that difficulties have arisen in obtaining death and ownership certificates and has referred to this matter earlier in these Proceedings. Delays have also occurred in assessing damages and paying compensation at an appropriate level. The Commission is aware of the immense amount of work that must be done to ensure proper relief and rehabilitation to those who have suffered. It would, however, urge that procedures be streamlined and expedited to deal with the issues mentioned above. Further, as long as inmates stay in the camps, there is need to ensure that this painful interlude in their lives is redeemed, in part at least, by the provision of work and training, by

the maintenance of appropriate nutritional standards, by medical and psychiatric care adequate to the demands of the situation. Particular care should also be taken of the needs of widows, victims of gender-related crimes, and orphans. Further, while a number of special schemes have been announced for the victims of the violence, as indeed they should have been, this should not imply that they should not be eligible for the existing range of anti-poverty and employment schemes. In other words, there should be a convergence of Government schemes for their care.

(iii) The Commission has noted the measures being taken to re-settle the victims. Various reports indicate, however, that compensation for damaged property is often being arbitrarily set at unreasonably low amounts and that pressure is being put on victims that they can return to their homes only if they drop the cases they have filed or if they alter the FIRs that they have lodged. It is important to ensure that conditions are created for the return of victims in dignity and safety to their former locations. Only if they are unwilling to return to their original dwelling sites should alternative sites be developed for them. The response of the State Government of 12 April 2002 does not indicate whether it has acted upon the Commission's recommendation that HUDCO, HDFC and international funding agencies be approached to assist in the work for rehabilitation. The Commission would like a further response to this.

(iv) The Commission had recommended that the private sector, including the pharmaceutical industry should be requested to assist in the relief and rehabilitation process. The State Government has responded on 12 April 2002 that it has not experienced any shortage of drugs and medicines thus far. The Commission intends to continue monitoring the situation in this and other respects through its Special Representative, Shri Nampoothiri.

(v) The Commission has also taken note of the response of the State Government in respect of the Commission's recommendation that NGOs and the Gujarat Disaster Management Authority be associated with the relief and rehabilitation work. The plight of women and children, particularly widows, victims of rape and orphans remains of particular concern to the Commission. It is essential their names and other details be recorded with care and individual solutions be pursued for each of them, whether this be for financial assistance, shelter, medical or psychiatric care, placement in homes, or in respect of the recording of FIRs and the prosecution of those responsible for their suffering. The Commission intends to monitor this matter closely.

#### **Concluding Observations**

64. The tragic events in Gujarat, starting with the Godhra incident and continuing with the violence that rocked the State for over two months, have greatly saddened the nation. There is no doubt, in the opinion of this Commission, that there was a comprehensive failure on the part of the State



Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the State. It is, of course, essential to heal the wounds and to look to a future of peace and harmony. But the pursuit of these high objectives must be based on justice and the upholding of the values of the Constitution of the Republic and the laws of the land. That is why it remains of fundamental importance that the measures that require to be taken to bring the violators of human rights to book are indeed taken.

65. The Commission has noted that there has been a decline in the incidents of violence in the past three weeks and that certain positive developments have taken place since the start of May 2002. However, as these Proceedings indicate, much remains to be done, and the integrity of the administration must be restored and sustained if those who have suffered are to be fully restored in their rights and dignity.

66. The Commission will therefore continue to monitor the situation with care, and it calls upon the Government of Gujarat to report to it again, by 30 June 2002, on all of the matters covered in the Comments and Recommendations contained in these Proceedings, including the Confidential Report of 1 April 2002 transmitted to it earlier (*Annexure I*).

67. The Commission would like to close with an invocation of the thoughts of Mahatma Gandhi and Sardar Vallabhbhai Patel who, born in Gujarat, illuminated the life of the country with their wisdom, foresight and courage.

68. Gandhiji once observed:

"It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings."

He also said:

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

69. And the comments of Sardar Patel, who chaired the Advisory Committee of the Constituent Assembly charged with the drafting of the articles on Fundamental Rights, are also of the deepest significance. The issue then was this: in the years preceding Independence, detractors of the National Movement, including elements of the retreating colonial power, repeatedly claimed that the minorities of India could not possibly find justice at the hands of other Indians. Sardar Patel was determined to refute this politically motivated assessment of the character of the country. Accordingly, on 27 February 1947, at the very first meeting of the Advisory Committee of the Constituent Assembly on Fundamental Rights, Minorities and Tribals and Excluded areas, Sardar Patel asserted:

"It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us, in India, in the protection of our minorities. Our mission is to satisfy every one of them.... Let us prove we can rule ourselves and we have no ambition to rule others."

70. So it was that the Constitution of the Republic included a series of articles having a bearing on the rights of minorities - some of general

applicability, others of greater specificity. The most notable were those relating to the Right to Equality (particularly articles 14, 15, 16 and 17), the Right to Freedom of Religion (articles 25, 26, 27 and 28), Cultural and Educational Rights (particularly articles 29 and 30) and, upholding them all, the Right to Constitutional Remedies (in particular article 32).

71. Critical and cruel as the communal dimension was to the tragedy of Gujarat, what was at stake, additionally, was respect for the rights of all Indians - irrespective of community - that are guaranteed by the Constitution. That Constitution assures the Fundamental Rights of all who dwell in this country, on a non-discriminatory basis, regardless of religion, race, caste, sex or place of birth. It was this guarantee that was challenged by the events in Gujarat. It is for this reason that the Commission has followed developments in that State closely, and that it will continue to monitor the situation for as long as is needed.

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

**(Justice K. Ramaswamy)**  
Member

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

**(Virendra Dayal)**  
Member

**Notes:**

1. Details of Annexures I, II, & III, could be seen at <http://www.nhrc.nic.in>

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

Name of the complainant : Suo motu  
Case No. : 1150/6/2001-2002  
Date : 1 July 2002

**CORAM**

**Justice Shri J.S. Verma, Chairperson  
Dr. Justice K. Ramaswamy, Member  
Justice Mrs. Sujata V. Manohar, Member  
Shri Virendra Dayal, Member**

**Proceedings**

1. In paragraph 66 of its Proceedings of 31 May 2002 in respect of the situation in Gujarat, the Commission had indicated that it intended to continue to monitor the situation with care and it called upon the Government of Gujarat to report to it again, by 30 June 2002, on all of the matters covered in the Comments and Recommendations contained in those Proceedings, including the Confidential Report of 1 April 2002 transmitted to it earlier.

2. Subsequently, in paragraph 3 of its Proceedings of 10 June 2002, the Commission noted:

“On 31 May, after the Commission had despatched its Proceedings of that date, *inter alia* to the Chief Secretary, Government of Gujarat, the Secretary-General of the Commission received by fax a letter dated 30 May 2002 from the Chief Secretary, Government of Gujarat to which was attached a reply to the Confidential Report of the National Human Rights Commission.”

3. That reply was made public by the Commission on 12 June 2002, together with the Chief Secretary's letter dated 30 May 2002.

4. On 30 June 2002, the Commission received by fax a reply of that date from the Government of Gujarat to the Commission's Proceedings of 31 May 2002. That reply will be carefully studied and the Commission will comment upon it, as needed, in the period ahead.

5. On 1 July 2002, the Commission also received a response of that date from the Ministry of Home Affairs, Government of India to its Proceedings of 31 May 2002 and the recommendations made therein, “so far as it concerns the Central Government” (see Annexure I.<sup>1</sup>). The Commission has taken note of that response.

6. In the meantime, however, the Commission has learnt both from its Special Rapporteur in Gujarat, Shri P.G.J. Nampoothiri, and from numerous media reports, that there are imminent plans to hold a series of Gaurav Yatras all over Gujarat from 4 July 2002 and that Jagannath Rath Yatras are scheduled to be held on 12 July 2002 in over 70 locations of the State.

7. The reports indicate that there is a widespread apprehension both within sections of the Administration and among members of the public that

this could re-ignite communal violence in the State. Of particular concern is the situation in Ahmedabad and Bhavnagar which, in the view of Shri Nampoothiri, Special Rapporteur of the Commission, and a former Director General of Police of Gujarat, have "a distinct potential for disturbing communal peace." Shri Nampoothiri has recalled that large-scale rioting occurred in Ahmedabad in 1985 and 1992 at the time of the Jagannath Rath Yatra and that such violence had also occurred twice in Bhavnagar. Indeed, in 1985 in Ahmedabad, despite the police having persuaded the organizers to cancel the event in view of the on-going disturbances in the State, on the appointed day, a full procession was held, defying the police ban. Shri Nampoothiri adds that "though the army had been deployed in the city, the procession passed through sensitive areas resulting in large-scale rioting."

8. Given this unfortunate history, of which the authorities in the Centre and State are fully aware, the Commission urges all concerned - including non-State actors in Gujarat - to behave in such a way that the peace is not disturbed and innocent residents of the State are not exposed, yet again, to violence or the threat of violence. Apprehensions have also been expressed that the Gaurav Yatras being planned might be countered by rival rallies and that, as a result, the situation could become volatile for this reason as well. The Commission trusts that this danger, too, will be avoided and contained by the Government and others concerned. The Commission recalls that, when its team visited Gujarat between 19-22 March 2002, an appeal was made by its Chairperson that the 'Asthi-kalash Yatra' planned from 27 March 2002, in the wake of the Godhra tragedy, be not proceeded with. At that time the Chief Minister had personally intervened to have that programme withdrawn. The Commission therefore expects that all due care will be taken by the State Government in the coming days - both at the political and at the administrative levels - to prevent situations arising that have the potential to endanger lives and property and that can lead to the violation of human rights.

9. The Commission would like to recall, in this connection, certain positions that it took in its Proceedings of 1 April 2002, when it held, *inter alia*, that:

"... it is the primary responsibility of the State to protect the right to life, liberty, equality and dignity of all those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence."

The Commission then added that:

"... it is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights."

10. The Commission would, further, like to draw attention to its Proceedings of 31 May 2002, in which it underlined the unambiguous duty of the police and the magistracy to fulfil their statutory responsibilities under the laws of the land and in accordance with the circulars and guidelines

already issued by the Central Government on matters relating to the promotion of communal harmony and the maintenance of law and order. As those responsibilities and the relevant statutory provisions, circulars and guidelines are detailed fully in the Commission's Proceedings of 31 May 2002, they are not being repeated here. Suffice it to say, however, that those laws and directives clearly lay down the manner in which the police and magistracy are expected to function and that any failure to discharge their responsibilities in accordance with those statutory provisions, circulars and guidelines would render the delinquent public servants personally liable and accountable for their conduct.

11. It is opportune here to recall the rulings of the High Court of Madras in two cases having to do with the duty of a magistrate when public peace is threatened, inter alia, by the taking out of processions in public streets. In *Sundram Chetti and Others v. The Queen* (1883 ILR 6 Mad. 203 (F.B.)), it was held:

“ The first duty of the Government is the preservation of life and property, and, to secure this end, power is conferred on its officer to interfere with even the ordinary rights of members of the community .... In this view, it matters not whether the exercise of the rights of procession is of ancient usage or a novelty; the Government is not bound to deprive some members of the community of the services of the force that is found necessary for the protection of their lives and property to enable others to exercise a right which not only is not indispensable to life or to the security of property, but, in the case assumed, creates an excitement which endangers both..... Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of rights rather than in their suspension; in the repression of illegal rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot, he can hardly be ignorant of the persons from whom disturbance is to be apprehended, and it is his duty to take from them security to keep the peace”

In similar vein, in *Muthialu Chetti v. Bapun Saib* (1880 ILR 2 Mad. 142) the High Court of Madras held:

“For the preservation of the public peace he (the Magistrate) has a special authority - an authority limited to certain occasions ....If he apprehends that the lawful exercise of a right may lead to civil tumult, and he doubts whether he has available a sufficient force to suppress such tumult, or to render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorised to interdict its exercise.”

12. It is worth emphasizing, in this connection, that these two rulings of the High Court of Madras were quoted with approval by the Supreme Court in the Ayodhya Judgement (*M. Ismail Faruqui v. Union of India*, AIR 1995 S.C.605) when it was observed that, even prior to the guarantee of freedom of religion in the Constitution of India, it had been held that all

religions were to be treated equally, with the State maintaining neutrality between them having regard to the public welfare. It follows, then, that there is even greater need now, in the light of the Constitutional guarantees that exist, for the State and its agents to act in accordance with that principle.

13. The Commission has had occasion to stress that it is essential to heal the wounds and to look to a future of peace and harmony in Gujarat. The Commission has, however, added that the pursuit of these high objectives must be based on justice and the upholding of the Constitution and the laws of the land.

14. It therefore remains fundamentally important, in such circumstances, that those who are responsible for the promotion of communal harmony and the maintenance of law and order - whether in the political or administrative leadership - should discharge their duties in the present and future in accordance with that Constitution and the relevant statutory provisions, or be answerable for such acts of omission or commission that result in the violation of the law and the rights to life, liberty, equality and dignity of their fellow human beings.

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

**(Justice K. Ramaswamy)**  
Member

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

**(Virendra Dayal)**  
Member

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

Name of the complainant : Suo motu  
Case No. : 1150/6/2001-2002  
Date : 25 September 2002

**CORAM**

**Justice Shri J.S. Verma, Chairperson  
Justice Mrs. Sujata V. Manohar, Member  
Shri Virendra Dayal, Member**

**Proceedings**

The Commission, sharing the nation's shock and grief, strongly condemns the outrageous terrorist attack which occurred against innocent civilians at the Akshardham temple in Gandhinagar on 24 September 2002 and continued into this morning.

The Commission has consistently taken the position that such criminal acts are in any circumstances unjustifiable, whatever reasons may be invoked to justify them. They are violative of every conceivable human right. The full force of the law must be brought to bear in dealing with such acts of terrorism and in bringing to justice those who perpetrate or abet them.

The Commission extends its deepest condolences to the families of those who have lost their lives or been injured in the terrorist attack, including those of the security forces.

The Commission greatly appreciates the prompt statements made by leaders of political parties, as also leaders of various communities, urging that inter-communal harmony be maintained.

The Commission, for its part, urges all elements of civil society to cooperate fully with the authorities in their effort to maintain law and order and to preserve and protect the human rights of all of the people of Gujarat and, indeed, of the country as a whole. Nothing should be done to divert the attention of the authorities from the fulfilment of their responsibilities in this respect, nor should any encouragement be given to any act or statement that could exacerbate the present situation.

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

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

**(Virendra Dayal)**  
Member

## ***Right to Know***

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Kamini Jaiswal

**D**emocracy for the people, of the people, and by the people can have meaning only when the people know. This is the essence of the observation of James Madison, President of the United States in 1822, when he said, "A Popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both - and a people who mean to be their own governors, must arm themselves with the power which knowledge gives."

Ignorance is not bliss but bondage, and knowledge is not folly but duty, if government by the people is to possess a semblance of reality. The people's right to know is a basic right. Such a right, even though not specifically provided as a Fundamental Right in the Part III of the Constitution, has been implied by the Apex Court of the land as a natural right, which emanates or flows from the basic structure of our Constitution.

The Supreme Court in *Reliance Petrochemicals Ltd. v. Proprietors Indian Express Newspapers Bombay Pvt. Ltd.*<sup>1</sup> has held that the right to know emanates from the fundamental right to freedom of speech and expression. It was held that people have a right to know in order to be able to take part in a participatory development in industrial life and democracy. The right to know is a basic right to which citizens of a free country aspire in the broader horizon of the right to life-in our context, under Article 21 of the Constitution. More recently, this right has acquired new dimensions. It puts greater obligation upon those who take the responsibility to provide information. The elected representatives could meaningfully claim their true and democratic nature of their representation only if a people who were fully informed had given them that mandate.



The right to know has thus been recognised as a basic right—a natural right inherent in every citizen. However, even this right is subject to certain reasonable restrictions relating to public order, decency, morality or public interest as laid down by the Supreme Court in *S.P. Gupta's* case.<sup>2</sup> The reasonableness must be examined on the basis of the nature of the right and the evil sought to be remedied. The ratio between the harm caused to the citizen, the benefit to be conferred on the citizen, the urgency of the evil and the necessity to rectify the same has to be taken into consideration.

In *Secretary, Ministry of I&B v. Cricket Association Bengal*,<sup>3</sup> the right to know was once again reiterated as an implicit part of the right to freedom of speech and expression as including the right to acquire information to disseminate it. Freedom of speech and expression is necessary for self-expression, which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates of social and moral issues. *It is the best way to find a truest model of anything.* It has been held that these rights could be limited only by reasonable restrictions provided under a law, made for the purposes mentioned in Articles 19 (1) & (2) of the Constitution.

Once again in *U.O.I v. Association for Democratic Reforms*<sup>4</sup> the Supreme Court reiterated and reconfirmed that the right to get information in a democracy is recognised all throughout as a natural right, flowing from the concept of democracy and, also, found in Article 19(1) and (2) of the International Covenant on Civil and Political Rights, which provide as under:

“(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art, or through any other media of his choice.”

This statement of the law was made by the Apex Court, wherein it relied on several earlier decisions of the Court, in the context of the citizens' right to know the antecedents, assets and criminal propensities of a candidate contesting democratic elections for Members of Parliament or Legislative Assemblies.

Krishna Iyer, J, has very lucidly explained the field of this right in his article on Freedom of Information, where he says that:

“Speaking in the spirit of a democratic world order, it is basic that each one of us everywhere on the globe has a right to know and a duty to shape the course of things, on a national and even planetary scale. For, ‘There are no passengers on Spaceship Earth. Everybody’s crew.’ (Marshall Malcolm). Indeed the philosophy of information freedom and open government is best spelt out in the premise of the U.S. House Committee on Government Operations, which approved the Freedom of Information Act, in 1966.”

The Supreme Court has also recognised the right to know in their earlier decision in *Indira Nehru Gandhi v. Raj Narain*,<sup>5</sup> where the Hon’ble Supreme Court has expressly upheld this right and summed it up in the following propositions:

- The people of India have chosen a democratic form of Government;
- Accountability is an integral part of the democratic system;
- Accountability implies that the citizen has a right to know what the Government is doing;
- Accountability, with a right to know, leads to more efficient Government;
- Secrecy, on the other hand, promoted oppression and alienated citizenry;
- Therefore, Article 19(1) (a), which implies open government, is premised on the right to know.

The imperative of the right to know is summed up in the words of Lord Acton:

“Everything secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity.”

Clearly, self-governance is no substitute for good governance, and good governance cannot be attained without the right to know.

**Notes:**

1. (AIR 1989 SC 190).
2. (1981) Sup SCC 87.
3. (AIR 1995 SC 1236).
4. (2002) 5 SCC 294.
5. (AIR 1975 SC 1590).

***Opinion of the National Human Rights Commission  
on The Freedom of Information Bill, 2000<sup>1</sup>***

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**R**ight to freedom of speech and expression is a fundamental right guaranteed to every citizen by Indian constitution in Article 19(1)(a). It has been judicially recognized that the *right to freedom of speech and expression in Article 19(1)(a) includes right to acquire information*. The State is not merely under an obligation to respect the fundamental rights guaranteed by Part III of the Constitution but is also under an obligation to operationalise the meaningful exercise of this right. Thus, the State is under an obligation not only to respect but also to ensure conditions in which the right of acquiring information, which is part of freedom of speech and expression, can be meaningfully and effectively enjoyed (*Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* (AIR 1995 SC 1236)). The Court in the case of *Reliance v. Indian Express* ((1988) 4 SCC 692) said: "Right to know is a basic right which citizens of a free country aspire to in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution." The High Court of Australia in *Nationwide News Pty. Ltd. v. Wills* (1992 177 CLR 48) held that freedom of communication in relation to political matters was necessary for the efficacious operation of the system of representative government which is mandated by the text and structure of the Australian Constitution. Since the right to information is an integral part of the fundamental right of freedom of speech and expression under Article 19(1)(a), any reasonable restriction on this right must fall within the permissible parameters of Article 19(2).

Thus, the aims and objectives of any law on the subject have to be to regulate and operationalize the right to information and facilitate the enjoyment of this right by citizens. The question is whether and to what extent the Freedom of Information Bill, 2000 introduced in Parliament last year and on which the

Standing Committee of Parliament has recently submitted its report, meets these aims and objectives.

The Commission feels that in order to make the proposed law conform to Articles 19(1)(a) and 19(2) of the Constitution, the title of the Bill should be changed from "The Freedom of Information Bill" to "The Right to Information Bill." Also, the Preamble at present proceeds on the basis that the Bill confers, for the first time, the freedom to access information. Instead, the Preamble should convey that the Bill provides a system for access to a right which already exists. The Bill should be examined in the light of Article 19(1)(a) and in particular, Section 8 of the Bill should be reexamined to ensure that the provisions are within the ambit of permissible restrictions under Article 19(2).

The Commission is giving its opinion in respect of salient features only, leaving consideration of minor details in the light of the basic premise indicated above.

**Notes:**

1. Marginally edited version of the original Order.

### ***Statement of the NHRC at the World Conference on Racism, held at Durban<sup>1</sup>***

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**T**his World Conference against Racism, Racial Discrimination, Xenophobia & Related Intolerance holds, in reality, a mirror to the soul of each of us.

Our comments, therefore, require a degree of introspection and honesty not always associated with the expression of views in such gatherings.

Mrs. Robinson has been right in observing:

“There has never been a UN Conference where there has been such a strong quest for the recognition of historical injustices”; and in asserting:

“In different parts of the world, people are hurting because of problems of inequality or injustice and are pressing their case at this Conference.”

Indeed, no part of the world is exempt from such pain. India is no exception.

The National Human Rights Commission of India, for which I have the honour of speaking at this Conference, has therefore considered it its duty to listen attentively to those in our country who have been the victims of historical injustices, and who are hurting because of discrimination and inequality. I refer in particular to those who, under our Constitution, comprise the Scheduled Castes and Scheduled Tribes - the Dalits and Adivasis of India - with the protection of whose human rights our Commission is itself deeply involved. It was to hear their voices, and to benefit from an exchange of views with them, and with eminent jurists, academics and human rights activists, that our Commission organised two major consultations in August 2001, in Bangalore and Delhi respectively, as steps preparatory to the formulation of the views of our Commission for this Conference. The Commission has, naturally, also taken note of the discussions leading to the drafting of the document that has been submitted by the Preparatory Committee to this Conference, and in particular, of the contents of the proposed paragraph on discrimination based on race and descent which had yet to be discussed by Member States prior to this Conference, and on which decisions will need to be taken by them. It has also carefully considered the Working Paper prepared in June 2001 by Mr. Rajendra Goonesekere for the Sub-Commission on the Promotion and Protection of Human Rights on the topic of discrimination based on work and descent.

With these introductory words, may I now outline the views of my Commission, as succinctly as possible, on certain issues before the Conference that are particularly germane to my country.

1. There can be no doubt that in India - as everywhere else in the world - history and society have been scarred by discrimination and inequality.
2. It was in recognition of this - and to end such injustice - that Part III of the *Constitution of our Republic* dealing with Fundamental Rights, contained powerful provisions to combat all forms of discrimination, notably those forms which were based on race, caste or descent. These provisions of the Constitution, which are justiciable, include *inter alia*:
  - *Article 14*, which stipulates that the State shall not deny to any person *equality before the law or the equal protection of laws* within the territory of India. This also applies to non-citizens.
  - *Article 15*, which expressly declares that the State shall not discriminate against any citizen on grounds only of *religion, race, caste, sex, place of birth or any of them*. It specifically adds that no citizen shall be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, and places of public entertainment; or to 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. In addition, Article 15(4) permits the State to make special provision for the advancement of any socially and educationally backward class of citizens as well as Scheduled Castes and Scheduled Tribes. It is under this provision that the States of the Union are permitted to make reservations in educational institutions for these groups of citizens.
  - *Article 16*, which provides for equality of opportunity in matters of public employment. It stipulates that no citizen shall on grounds only of *religion, race, caste, sex, descent, place of birth, residence or any of them*, be ineligible for, or discriminated against in respect of employment or office under the State. This Article further provides for *affirmative action*, through the reservation of appointments or posts, in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State. It also covers promotions and provides further for the carry-forward of unfilled vacancies of the quota for succeeding years.
  - *Article 17*, which abolishes "Untouchability", and forbids its practice in any form.
  - *Article 21*, which protects life and personal liberty.
  - *Article 23*, which prohibits trafficking in human beings and forced labour.
  - *Article 29(2)*, which prohibits denial of admission to any educational institution on grounds only of *religion, race, caste, language or any of them*.
  - Further, *Article 38(2)* of the Constitution, in Part IV, setting out the Directive Principles of State Policy, requires the State, in particular, to

strive to minimize the inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

- *Article 45* calls upon the State to provide free and compulsory education for all children until they complete the age of fourteen years.
  - *Article 46* enjoins the State to promote with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.
  - *Article 51(c)* enjoins the State to foster respect for international law and treaty obligations.
  - *Article 325* prohibits disenfranchisement on grounds of caste.
  - *Articles 330 & 333* provide for the reservation of seats for members of the Scheduled Castes and Scheduled Tribes in Union and State Legislatures.
  - *Article 335* states that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in the affairs of the Union or of a State. In order to strengthen this provision, the Constitution Eighty Second Amendment Act of 2000 provided that nothing in this Article shall prevent the making of any provision in favour of the members of Scheduled Castes and the Scheduled Tribes for relaxation of qualifying marks in any examination or lowering the standards of evaluation for reservation in matters of promotion to any class or classes of services or posts.
  - *Article 341* makes possible the *specification of the castes, races or tribes* which shall be deemed to be Scheduled Castes.
  - *Article 366(24)* defines Scheduled Castes to mean such *castes, races or tribes or parts of or groups within such castes, races or tribes* as are deemed under Article 341 to be Scheduled Castes for the purposes of the Constitution.
3. To give clear expression to Constitutional provisions, an impressive range of *legislative measures* have been enacted to end discrimination against Scheduled Castes and Scheduled Tribes. These inter alia include:
- The Protection of Civil Rights (Anti-Untouchability) Act, 1955.
  - The Bonded Labour (Abolition) Act, 1976.
  - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
  - The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.
  - And various land reform acts.
4. In pursuance of the Constitutional provisions and legislative measures just enumerated, it can, with good reason, be said that India has

embarked on a *programme of affirmative action* which is, perhaps, without parallel in scale and dimension in human history. It is all the more remarkable for being undertaken in a country that has demonstrated, in the 54 years since its Independence, an unshakeable faith in the capacity of its people to effect fundamental social, economic and political change through the processes of democracy.

5. Despite this, however, and the powerful role of the judiciary in ensuring respect for the Constitution, the laws and affirmative action programmes of the country, it is widely recognised that much remains to be done to bring to an end the discrimination and inequality that have been practised for centuries and that this requires both sustained effort and time. There are manifest inadequacies in implementation which are deeply frustrating and painful to the Scheduled Castes and Scheduled Tribes and, indeed, to all Indians who strive to end the injustice that persists in several forms and the atrocities that occur.
6. Because of its history and convictions, it was *India* that proposed that the word "descent" be introduced in Article 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) when it was being drafted and adopted in 1965. And it was also India that proposed that the concept of affirmative action be included in Article 1(4) of that Convention so as to make the latter consistent with the Constitution of India and the aspirations of its people.
7. The National Human Rights Commission of India believes it is essential that all Member States, including India, respect the international human rights regime established under the auspices of the United Nations and observe the discipline of the treaties to which they are States Parties. It, therefore, attaches the highest importance to the views of the Treaty Bodies established, *inter alia*, under the Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, as also under the Conventions dealing with the Elimination of All Forms of Racial Discrimination (CERD), the Elimination of All Forms of Discrimination against Women (CEDAW) and the Rights of the Child (ROC), all of which have commented on the country reports of India and on the efforts being made, and the difficulties being faced, in promoting and protecting the human rights of Scheduled Castes and Scheduled Tribes. It is worth mentioning, in this connection, that Section 2(d) of the Protection of Human Rights Act 1993, which establishes the National Human Rights Commission, defines "human rights" to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants.
8. Respect for the UN Treaty system, the Commission believes, is also consistent with the landmark judgement of the Supreme Court of India which has dealt with the applicability of International Conventions to the country. The Apex Court has held:



“..... Any international convention not inconsistent with the fundamental rights and in harmony with their spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee..... regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic laws.” (*Visakha v. State of Rajasthan* (1997) 6 SSC 241).

9. In the light of this, the Commission is of the opinion that the exchange of views on human rights matters, whether at the national, regional or international level, can all contribute constructively to the promotion and protection of such rights and that this Conference provides a singular opportunity to the international community to deal openly and courageously with the vexed issues of discrimination and inequality as they exist all over the world, in all of their variety, including the forms of discrimination that persist in India and all other countries. In such a context, it is not so much the nomenclature of the form of discrimination that must engage our attention, but the fact of its persistence that must cause concern. Given this perception, the Commission is of the view that the debate on whether race and caste are co-terminus, or similar forms of discrimination, is not the essence of the matter. The Constitution of India in Article 15 expressly prohibits discrimination on either ground, and that Constitutional guarantee must be rigorously implemented. In this connection, the Commission believes deeply in the value of engaging Governments, non-governmental organisations, national institutions, and all concerned elements of civil society in the process of fighting discrimination, and urges that this process be conducted at all levels in a spirit that is genuinely interested in the furtherance of human rights, and not vitiated by self-righteousness or by political and other extraneous considerations.
10. As far as its own role is concerned, the Commission has been deeply engaged, ever since its establishment in October 1993, in the promotion and protection of the human rights of all of the people of India, acting in a manner that is complementary to that of the higher Courts of the country. The Commission has been especially concerned with the rights of the weakest sections of society, notably the Scheduled Castes and Scheduled Tribes. Under the provisions of its Statute, contained in the Protection of Human Rights Act 1993, the Commission is expressly required to review the safeguards provided by or under the Constitution or any law in force for the protection of human rights and recommend measures for their effective implementation; it is expected to review the factors including acts of terrorism that inhibit the enjoyment of human rights; and to study treaties and international instruments and make recommendations for their effective implementation. In light of its Statute, therefore, the Commission has

a clear responsibility to ensure the proper observance of International Conventions, including CERD.

11. In furtherance of its statutory responsibilities, the Commission has thus accorded the highest priority to ending discrimination against Scheduled Castes and Scheduled Tribes and in seeking to eradicate, in particular, two pernicious practices which largely affect members of these communities: these relate to manual scavenging and bonded labour. In respect of both these matters, the Commission is coordinating its activities closely with all concerned Governmental and Non-Governmental Organisations in an effort to end these practices and to rehabilitate those who have been affected by them. In both cases, too, the Commission has sought to involve the political leadership of the country, at the highest level, in the tasks that remain to be accomplished. Thus, as recently as 14 August 2001, on the eve of the 55th anniversary of India's Independence, the Chairperson of the Commission wrote to the Prime Minister of India and the Chief Ministers of all States, urging that measures should be taken to end the scourge of manual scavenging by 2<sup>nd</sup> October 2002, the birth anniversary of Mahatma Gandhi. He described this practice as a "national shame."
12. The Commission has also taken up the issue of the rights of persons displaced by mega projects, specifically those affected by the construction of large dams, many of whom are tribals. The efforts of the Commission in this respect are greatly facilitated by the presence of the Chairperson of the National Commission for Scheduled Castes and Scheduled Tribes, who is also an ex-officio Member of the National Human Rights Commission.
13. In the final analysis, the Commission believes that the promotion and protection of the human rights of the weakest sections of society are clearly related to their full and proper empowerment. That is why the Commission has urged the adoption and implementation of policies at the Central and State levels that will open the doors of opportunity to them: free and compulsory primary education upto the age of 14 years, as the Constitution requires; access to proper primary health care; freedom from malnutrition and maternal anaemia; and the re-allocation of resources to back such programmes in a manner that has true meaning. In addition, the Commission has continued to receive and redress numerous individual complaints that it has received daily from persons who are included among the Scheduled Castes and Scheduled Tribes; these have alleged acts of discrimination, "untouchability", violence against the human person, atrocities of various kinds, and high-handedness by public servants and others.
14. Economic upliftment and empowerment of Dalits is the most effective tool to combat casteism. More avenues must be opened for the economic betterment of the disadvantaged. Experience shows that economic upliftment and improvement in the status of Dalits eliminates inequalities. It is the poor who remain vulnerable. The fight to eradicate

poverty must be intensified. National policies must be so formulated, and that is the mandate in the Directive Principles in Part IV of the Constitution of India. The National Human Rights Commission takes these factors into account in the discharge of its functions and in making recommendations to Government for improving the quality of governance. The Commission's involvement in the areas of illiteracy, malnutrition and lack of adequate health care, which afflicts the majority of Dalits, is to achieve this end.

15. *To conclude:* The Commission is acutely aware that the journey to end discrimination, injustice and inequality will be long and often frustrating. But it is convinced that, in this mission, the Constitution of the Republic has shown the way. Legislative and affirmative action programmes are firmly in place, but unquestionably need to be far better implemented. The Commission is convinced that discrimination on any of the grounds contained in the Constitution of India, and these include race, caste and descent, constitute an unacceptable assault on the dignity and worth of the human person and an egregious violation of human rights. Such discrimination must therefore be eradicated, as must other forms of discrimination covered by United Nations treaties. The Commission holds the view that the instruments of governance in our country, and the energetic and committed non-governmental sector that exists, can unitedly triumph over the historical injustices that have hurt the weakest sections of our country, particularly Dalits and Scheduled Tribes. This is above all a national responsibility and a moral imperative that can and must be honoured.

**Notes:**

1. Marginally edited version of the Original Statement.

## **Book Review**

Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002) pp. 210, Rs. 495.00. ISBN 0-19-565289-4

G. Mohan Gopal

**H**uman Rights" is an idea that is fervently espoused across ideological divides today – from the far right to the far left. Human rights occupy an important place in the agendas of the most powerful governments as well as corporate, governmental and multilateral agencies around the world; and, equally, of social and peoples movements, NGOs and civil society organisations. George Bush and Saddam Hussein equally champion the cause of human rights, as do Cuban communists and American libertarians. National governments as well as grassroots NGOs champion the cause equally vociferously. The most powerful capitalist countries in the world are pouring tens of millions of dollars into human rights advocacy in developing countries, while civil society groups strongly opposed to the capitalist ideologies are also focusing on the same areas of work. No longer an issue confined to a narrow political realm, human rights considerations are today being introduced into nearly every sphere of public and private activity – trade and finance, investment and development, environment and technology. Aside from a fringe group of academic voices that question the 'euro-centric' nature of the idea and its 'imposition' on non-European societies, only supporters of traditionalism and religion-based ideologies actively and publicly oppose the idea.

This protean, chameleonic idea of human rights raises a number of important but troubling questions:

- Why is the human rights idea embraced and advocated by the very people and entities accused by voices representing poor and marginalized people as perpetrators of human

rights violations – of what use is the human rights agenda to them?

- Is the *idea* of human rights used and advocated by economically and politically powerful organisations the *same idea* as that used by poor and marginalized sections and their representatives?
- Does the idea of human rights have definable objective content? Or is its meaning and content widely varied and variable?
- Are there mandatory policy choices for those who espouse the human rights cause? Or is the idea of human rights capable of being used, by those who wish to do so, as a misleading signalling device – a diversionary symbol – to create a chimera of concern for human suffering – with little or no consequent requirements for policy choices and actions? Would this be an equivalent of a ‘trade mark violation’? Is there any accountability for espousing the human rights cause while retaining the same degree of freedom of policy and action choices?
- What is the significance of sponsorship and financing of human rights organisations and movements by governments, inter-governmental agencies and corporations in terms of the goals, programs and activities of these organisations and movements?
- Why do industrial country governments allocate resources to support human rights organisations and movements in some countries even as they support and sustain dictatorial, repressive governments in other countries – what is the ethical and moral framework of their policies?
- What is the significance to peoples struggles of the emergence of a political economy of human rights, including ‘human rights’ having become a means of resource mobilization for many, especially ‘third world’, academics and activists? What has been the impact of this “purchasing” of the cheap labour of (especially ‘third world’) academics and activists on the goals, agendas and outcomes of struggles to alleviate human suffering and advance the cause of peace?

- What outcomes have emerged – and are likely to emerge – from these various uses of human rights ideas by groups with varied interests? Who has benefited? Who has lost?
- What explains the sweeping popularity of the human rights idea?
- Is the human rights idea the only – or even an adequate – basis for struggles to alleviate human suffering and strive for peace? Are alternate approaches needed?

'Traditional' academic discussions do not provide adequate answers to these troubling questions. The traditional academic view of human rights is largely dominated by simplistic approaches that present the idea with a great deal of certitude, as clearly understood and well defined. 'Human rights' is presented as an idea that is Euro-American in its origin and essence, developed and adapted to local situations across the world over the last 50 or so. It is seen as having developed – and as continuing to develop – in a fairly straightforward, linear and logical manner, following an evolutionary path of Social Darwinism. Take, for example, the following passage written recently by a prominent American legal scholar:

Much of substantive human rights law, namely the nature or content of these rights, has its conceptual source in the principles of domestic constitutional law embodied in the fundamental laws of various countries. Their historical and philosophical origins can, in turn, be traced back to such great milestones of human freedom as the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, among others. These instruments, and the national constitutions which inspired them, greatly influenced the contents of much of modern international human rights law. One cannot, for example, read Article 1 of the Universal Declaration of Human Rights, 'All human beings are born free and equal in dignity and rights', without recognising the debt this formulation owes to the American and French Declarations and to the idea of human freedom they articulate... The end of the Cold War has de-ideologized the struggle for human rights and reinforced the international human rights movement... The past 50 years has seen a vast expansion of the meaning of international human rights. It began with basic civil and political rights on one hand, and economic, social and cultural rights on the other, and continues to evolve into a greatly enlarged catalogue of new or related rights.<sup>1</sup>

Here is a further example of a 'clear and certain definition' of 'human rights' set out by another scholar:

The phrase "human rights" asserts that all persons, regardless of race, gender, sexual preference, culture or society should be provided certain entitlements, simply as a result of these persons' humanity.<sup>2</sup>

Traditional academic and official views also present instruments such as the Universal Declaration of Human Rights as a complete and completed idea, universal in its scope, application and acceptance, with the only challenge being the development, refinement, adaptation and application of the (obviously incontestable) idea. For example, India's Protection of Human Rights Act, 1993 *defines* "human rights":

Section 2(d). "Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

Nor can we find an adequate answer to the 'troubling questions' from the critics of human rights. While questioning the human rights project they too largely treat human rights — the object of their opposition — as a reasonably well-understood and well-defined concept. Consider, for example, the criticism offered by an eminent critic (emphasis added):

The adoption in 1948 by the United Nations of the Universal Declaration of Human Rights sought to give universal legitimacy to a *doctrine* that is fundamentally Euro centric in its construction. Sanctimonious to a fault, the Universal Declaration underscored its arrogance by proclaiming itself the "common standard of achievement for all peoples and nations."

The fact that *human rights have since become a central norm* of global civilization does not prove their universality. It is rather a testament to the conceptual, cultural, economic, military, and philosophical domination of the European West over non-European peoples and traditions.

No one familiar with Western liberal traditions of political democracy and free market capitalism would find international human rights law unusual.

*Its emphasis on the individual egoist as the center of the moral universe underlines its European orientation.* The basic human rights texts drew heavily from the American Bill of Rights and

the French Declaration of the Rights of Man. There is no evidence of inspiration from Asian, Islamic, Buddhist, Hindu, African, or any other non-European traditions.

The West was able to impose *its human rights philosophy* on the rest of the world because in 1948 it dominated the UN. Most Asian and African societies at the time were European colonies. The two non-Westerners who were at the table, Charles Malik of Lebanon and Peng-chun Chang of China, were educated in the West and firmly rooted in the European intellectual traditions of the day.<sup>3</sup>

In Prof. Baxi's thoughtful, scholarly and deeply insightful book, *The Future of Human Rights*, however, we begin, at last, to be able to explore in a meaningful manner the 'troubling' questions set out earlier.

The human rights discourse takes place today in a context where there are only friends and enemies and no prisoners are taken, where there is inadequate *conceptual / fundamental* introspection and where only "politically correct" discussions are allowed. In this world, Prof. Baxi's work is a refreshing piece of candid and honest introspection about the state of human rights thought, by one whose credentials as a quite traditional human rights activist and thinker are beyond question. The book presents a very interesting post-modern-type critique of human rights.

The book – although physically 'small' (under 200 pages) – is a catalogue of a very large number of very interesting ideas, many of which are barely discussed and are set aside for future analysis. Consequently, my attempt here is to identify and briefly explore some of the ideas in the book.

A most important contribution of this book is that, in contrast to the simplistic, one-dimensional definitions of human rights offered by traditional authors, Prof. Baxi freely accepts and analyses the immense complexity of the idea ("the haunting ambiguities of human rights"). Prof. Baxi notes, "the semiotic entity human rights invites deconstruction even to the point of demonstration of its incoherence... human rights constitute not just a multitude of normative orderings, but also distant realms of human experience." In this context, the book "problematizes the very notion of human rights."



Prof. Baxi offers, instead, a new framework for understanding the various ideas, movements and actions that pass under the rubric of human rights. His framework distinguishes between *modern* human rights and *contemporary* human rights; the politics of human rights and the politics for human rights; *universal* human rights and *trade-related, market friendly* human rights (TRMFHR); and human rights *movements* and human rights *markets*.

The distinction between *modern* and *contemporary* human rights is perhaps the most interesting and innovative idea in the book. Based on this distinction, Prof. Baxi offers a devastating criticism of several dimensions of what passes off today as human rights speech and actions, categorising them as *modern* human rights. This criticism is no less fierce than that offered by scholars such as Prof. Makau Mutua. Prof. Baxi argues, for example:

'Modern' human rights were developed around exclusive ideas of who is "human" for the purposes of enjoying human rights. "Exclusionary criteria" have provided the signature tune of the 'modern' conceptions of human rights. The foremost historical role performed by these was to accomplish the justification of the unjustifiable: namely colonialism and imperialism. That justification was inherently racist: colonial powers claimed a collective human right of 'superior' races to dominate the 'inferior' ones.... The collective human right to colonise the less well-ordered peoples and societies for the common good of both as well as of humankind was also by definition indefeasible, not in the least weakened by the contradictions of evolving liberalism." (29-30). "The languages of human rights are often integral to tasks and practices of governance, as exemplified by the constitutive elements of the 'modern' paradigm of human rights, namely the collective human right of the coloniser to subjugate 'inferior' peoples and the absolutist right to property. The manifold, though complex, regime of justifications offered for these human rights ensured that the 'modern' European nation state...was able to marshal the right to property, as a right to imperium and dominium. The construction of a collective human right to colonial/imperial governance is made sensible by the co-optation of languages of human rights into those of racist governance abroad and class and patriarchal domination at home. In contrast, the contemporary human rights paradigm is based on the premise of radical self-determination. (30-31). In the modern era, the authorship of human rights was both state-

centric and Euro-centric; in contrast, the processes of formulation of contemporary human rights is multitudinous. (31). The 'modern' human rights cultures, tracing their pedigree to the Idea of Progress, Social Darwinism, racism and patriarchy (central to the Enlightenment ideology), justified global imposition of cruelty as natural, ethical and just. This 'justification' boomeranged in the form of the politics of genocide in the Third Reich." (32-33). The 'modern' liberal ideology that gave birth to the very notion of human rights, however Euro-enclosed and no matter how riven with contradiction between liberalism and empire, regarded the imposition of dire and extravagant suffering upon individual human beings as wholly justified. *In the modern human rights paradigm, it was thought possible to take human rights seriously without taking human suffering seriously.* (34) The notions of efficiency and clarity are further complicated by an insistence on the rhetoric of universality, interdependence, indivisibility and inalienability of human rights. Eminently desirable according to the prevailing hegemonic models of human rights enunciations, these four mantras introduce imponderables in the markets for the manufacture of human rights,

Prof. Baxi discusses a number of challenges faced by the human rights movement including capture by states, powerful corporations and cynical international organisations; exhaustion (human rights weariness); suspicion of "sinister imperialistic manoeuvres animating all human rights enunciation (human rights wariness)"; and the development of human rights "as a new global faith or a new civic religion (evangelism)". Prof. Baxi points out that "we have as yet no historiography nor an adequate social theory of human rights".

Prof. Baxi criticises the "bureaucratisation of human rights (65). He says, "Increasingly, NGOs seem to believe that proliferation of human rights agencies within state structures is perhaps the best hope there is for human rights fulfilment. In the absence of significant public participation in constituting these agencies, their personnel are both regime-favoured and dependent, as is their performance. Such agencies bureaucratise human rights and human suffering." Placing the NHRC in this category of bureaucratization of human rights and the capture of the idea by the state, Prof. Baxi offers strong criticism of the NHRC's institutional framework:

My opposition to the way in which the Indian Human Rights Commission was structured. My opposition was based on the very premise they negated: that is, at times, something is far worse than nothing! It is no solace for me to have these very friends complain that these agencies in their pro-regime composition, now present another hurdle in human rights activism!

Prof. Baxi expresses strong concern about the metamorphosis of human rights – posing problems of “too few” as well as “too many”. He voices concern about the state and international organisations dominated processes that are responsible for the birth and growth of forms of human rights.

Against these challenges and criticisms of *modern* human rights, Prof. Baxi develops the idea of *contemporary* human rights.

Contemporary human rights discursivity is rooted in the illegitimacy of all forms of cruelty. ..Contemporary human rights cultures have constructed new criteria of legitimation of power. These increasingly discredit any attempt to base power and rule on the inherent violence institutionalised in imperialism, colonialism, racism and patriarchy. Contemporary human rights make possible, in most remarkable ways, discourse on human suffering... The distinction between modern and contemporary human rights is based on taking suffering seriously (34). The practice of Contemporary Human Rights Activism - heavily influenced by complex and contradictory practices of human rights movements, admitting of no simple formulation, the agenda, overall, of most contemporary international human rights NGOs espouses four principles: the primacy of human rights, non-retrogression, the right to effective remedies and rights to participation. However, what constitutes the totality called human rights bears diverse meanings in the contemporary human rights NGO worlds; each of these principles presents a contested site.

The constant conversion of needs into rights is a hallmark of contemporary human rights. Human Rights movements as social movements. The notion of social movement raises many perplexing (117) issues. including a fuller grasp of the potential benefits and costs of exploring human rights movements as social movements. How the former define their identify, their antagonists and teleology (visions of transformation) shape the future of human rights as a whole.

Prof. Baxi argues that the “historic mission of contemporary human rights is to give voice to human suffering, to make it

visible, and to ameliorate it.”(at 4) and states that “a principal message of [his] work is that the originary authors of human rights are people in struggle and communities of resistance which standard scholarship denotes to lowly status – the politics of inter-governmental desire resulting in constitutional or international law enunciations of human rights is not the sole, nor even primary, source of origin of human rights”.

As against Western-dominated, Euro centric ‘modern’ approaches to ‘human rights’, Prof. Baxi declares that Human Rights (‘contemporary’) are not “a gift of the West to the Rest”.

Another important distinction offered in the book is between the politics *of* and the politics *for* human rights. Prof. Baxi argues “the politics *of* human rights deploys the symbolic or cultural capital of human rights to the ends of management of distribution of power as national and global arenas. Human rights become the pursuit of politics, and even aggression and war by other means. The politics of human rights at times becomes associated with terroristic repression of realms of human autonomy and expression, where dissent becomes subversion and the sycophancy of the ruling ideology the commanding height of free expression; and international diplomacy deftly uses in this form of politics visions of global futures for the prediction of ideological compliance”.

In contrast, a “revolution in human sensibility marks the passage from the politics *of* human rights to the politics *for* human rights. That new form of sensibility, arising from responsiveness to the tortured and tormented voices of the violated, speak to us of an *alternate politics* seeking against heavy odds of a traumatically changeful human history; that order of progress which makes the state more ethical, governance progressively just, and power increasingly accountable. The struggles which these voices name draw heavily on cultural and civilizational resources richer than those provided by the time and space of the Euro-enclosed imagination of human rights, which they also seek to innovate. The historic achievement of the ‘contemporary’ human rights movements consists in positing peoples’ polity against state polity; or in the fashioning and articulation of visions of human future, through the practices of politics *for* human rights, that the shrivelled soul of Realpolitik must forever resist.”