



**STUDENTS  
FOR  
HUMAN  
RIGHTS**

# human rights training module



# STUDENTS FOR HUMAN RIGHTS human rights training module

Concept & compilation  
**Janice Birch**

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**HRLN**

Human Rights Law Network

# HRLN Vision

- To protect fundamental human rights, increase access to basic resources for the marginalised communities, and eliminate discrimination.
- To create a justice delivery system that is accessible, accountable, transparent, efficient and affordable, and works for the underprivileged. Raise the level of *pro bono* legal expertise for the poor to make the work uniformly competent as well as compassionate.
- Professionally train a new generation of public interest lawyers and paralegals who are comfortable in the world of law as well as in social movements, and who learn from social movements to refine legal concepts and strategies.

## SHR: Human Rights Training Module

2010

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## FOREWORD

The module is a compilation of contributions from various sources but primarily Combat Law magazine for which we thank the editor Harsh Dobhal. Thanks are also due to Suresh Nautiyal for his advice and guidance; members of SHR – Sushant Waidande, Anand Radhakrishnan, Mayur Guldagad, Chetan Nehete, Swapnil Khade, Rashmi Naik Nimbalkar and Gaurav Borse – for their illustrations and ideas; Sanjai Sharma, Anant Kumar Asthana, Smriti Minocha and Kranti Chinappa for reading and advising on sections of the module; and to the various HRLN advocates and activists who contributed PowerPoint presentations along with their in-depth knowledge of the legal system in India. We also acknowledge the contribution of the SHR Team.

We thank Justice H Suresh for permission to use his book “All Human Rights are Fundamental Rights” (HRLN/Universal 2010) as a companion text to this module and an invaluable reference point on the Indian Constitution and International Human Rights Law.

It is not possible in a publication of this length to address the myriad of human rights issues in India. The purpose of this module is to provide an introduction to the concept of human rights and the framework in which the laws of India operate.

The intention is to provide a starting point to engage students in discussion and, hopefully, activism, to provide a template for those wishing to develop human rights training programmes. There is plenty of material available in the press, online and from local activists about specific issues pertinent to the present situation or any period of history or location. The person using this module is encouraged to use it as a basis on which to build further discussion material and training resources on the issues most relevant to their target group.

This module has been produced with the financial assistance of the European Commission and Dan Church Aid whom we thank for their support.

**Janice Birch**

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HR LN

Human Rights Law Network

1<sup>st</sup> National Convention of Students for  
Human Rights



# INTRODUCTION

**S**tudents for Human Rights (SHR) is a movement of concerned students and young activists who are determined to bring about a situation in India in which the artificial barriers that divide people are eliminated and an equal, just and open society can flourish.

While India opens its economic borders to multinational companies, controls on the freedoms of its own people have become more rigid than ever. India is the largest democracy in the world but in several parts of the country the actions of police and security forces bear all the hallmarks of a militant dictatorship. To those in the cities it can seem that communal conflict, guerrilla movements and violent repression are distant problems only affecting the rural margins but in reality every state in India is affected with some kind of internal conflict. The government spends millions on restraining opposition, and all the while the rights and freedoms of every citizen are surreptitiously eroded. Human rights abuses abound.

Members of SHR recognise that the future of India's secular democracy is seriously under threat. We realise that the next generation of leaders and voters are those who are now studying at schools, colleges and universities and in the first stages of their working lives. It is here that change can take place. Students for Human Rights is determined to bring these issues to light, ready to defend the concept of a free and equal India as enshrined in our great Constitution. We invite students and young people everywhere to join us.

## How SHR makes a difference

Being part of the solution means taking an active role in putting things right. Through SHR, Human Rights Law Network (HRLN) facilitates, supports and enables cells of young human rights defenders to develop in higher and further education establishments across India.

- **Training workshops:** Workshops facilitated by HRLN take place in universities and colleges to inform and educate young people about human rights.
- **SHR cells:** HRLN regional offices provide advice and information to enable students to form SHR cells in which they can develop human rights campaigns and activities in line with whatever issues most concern them. These groups are supported to take public interest litigation in their own name.
- **Legal aid clinics:** Law and social work students are encouraged and enabled to establish legal aid clinics where law students provide pro bono initial legal advice and put members of the public in touch with advocates and NGOs who can take their cases to court.
- **National conventions:** Each year HRLN organises a national convention for SHR. This brings together students from across India to share their experiences and promote their campaigns. Well-known activists and legal experts are invited to address the gatherings and the group enjoys entertainment programmes including films, theatre and music performances are enjoyed.
- **Internships:** HRLN offers the opportunity to intern in any of our offices, to students interested in learning more about human rights issues and how the law can be used to promote and protect them.

## Spread the word

The subjects covered in this resource are only a scratch at the surface of current affairs regarding human rights in India and a brief introduction to Indian and international human rights law. It is intended to be used by SHR cells to run their own workshops and discussion groups.



# NOTES FOR THE FACILITATOR

This resource pack is organised into eight units—each covering an element of international human rights instruments, important human rights issues in India as relevant to that instrument and aspects of Indian law that relate to the issue. There are no set session plans but a series of resources intended for dipping in and out of. Facilitator can mix and match elements according to the topic group and their existing resources and plans.

## **Each unit contains the following resources:**

### **1. Introduction sheets**

This section in each unit provides opening remarks and context to the session. It can be copied and distributed as notes in a course pack, translated into a presentation or used simply to provide the facilitator with food for thought.

### **2. Powerpoint presentations**

These are given in hard copy in the manual and soft copy on the CD Rom. Each one has been selected to provide hard facts and information on the law in India and how it can be used. They can be uploaded and presented as they stand amended to form part of shorter or longer presentation.

### **3. Participation exercise**

There is one participatory exercise to accompany each unit. All can be adapted to suit the size, age and level of understanding of the group and the time available. In some cases debates or juries are suggested. Where time does not allow for, simple facilitator-lead discussions can be used instead.

### **4. Background reading**

Two or more articles have been selected to provide background or context to the subjects of the unit. These can be updated and supplemented by new articles and commentaries as they become available or as the facilitator may find suitable.

### **5. Human rights defenders**

Short biographies of human rights defenders have been included in the manual to provide inspiration and role models as well as to give historical context to the issues and struggles.

### **6. Companion text**

This module has been developed to be accompanied by the text “All human rights are fundamental rights” by Justice Hosbet Suresh. Although not essential, the lectures give a more thorough grounding in the facts about human rights law in India as well as expert commentary and analysis from this highly regarded and respected retired Justice.

### **7. DVDs**

Documentary films have been included on DVDs. These can be used to stimulate discussion and reinforce learning during the session.

## 8. Experts and activists

It is strongly suggested that where time allows expert speakers are invited to the SHR session. Impassioned speeches from personal experience bring the sessions to life and engage the students more powerfully than any Powerpoint presentation, exercise or film.

### Facilitation tips and techniques

Participation is the most effective means of reinforcing learning. It is also the most enjoyable method of teaching. Participants who are encouraged to share their views encourage others to think and join in with their own views. These exchanges can do more to widen horizons and change opinions than a brilliant speech by the most seasoned expert.

Time spent on discussion is never wasted but it is important to keep the discussion focussed and flowing, to keep it within time constraints and to ensure that it is not dominated by a particular individual or group.

Effective chairing of a discussion is the best method of controlling proceedings but in informal situations facilitators can use a number of devices to keep discussions inclusive and relevant:

- **Just a minute:** This allows the speaker one minute (you can make it longer) to speak without repetition or deviation from the point. If s/he breaks this rule any of the participants can buzz (call 'buzz') to object.
- **Time out rule:** Impose a maximum time for each participant to speak and impose this rigidly or flexibly depending on the circumstances.
- **Three strikes and you're out** (two strikes or one strike also possible): This allows any participant to speak a maximum number of times; after that they must remain silent. As before, this can be imposed as rigidly or flexibly as the circumstances demand.
- **Gender balance:** For every male that speaks one female must speak and vice versa, even if just to say "pass". This draws attention to the gender balance of the discussion and can make people more aware of how decision-making can become biased towards the views of the dominant group.
- **Record and recap:** Take brief notes of the points raised, recap and summarise. This ensures that points are understood properly and keeps them relevant. This works well in smaller groups but can also be useful in question and answer and feedback sessions with larger groups when time is short.
- **Written questions:** After a controversial or keynote speaker has addressed the group, ask for participants to submit written questions. These can be read by the speaker while another activity or a break is taking place and addressed after some time.
- **Suggestion box:** Keep a suggestion and comments box in the room for participants to post notes into at any time. If appropriate, you can read them out to the group at the end of the day or in the wind up session. They will also be useful for evaluating the workshop.

### Developing new topics and resources

- Keep an eye out for current and local issues that will engage participants in human rights debates. Use newspaper clippings to make case studies and if possible invite local activists or community members to address the workshop participants.
- Steal ideas for quizzes and activities from TV game shows but be careful not to make things too complicated or time consuming. Don't let the activity draw attention away from the subject.
- Be sure you know the rules, materials, procedures for any activity before you embark on it. Be prepared to accommodate more or fewer participants than you had expected for any activity you devise.

- Be liberal in your use of visual aids. Preparing a room before hand with posters and leaflets makes it more vibrant. Showing films, Powerpoints and photos slides can break up long tracts of lectures and can be far more memorable as means of getting a message across.

# CAN I ASK...

WHY A HUMAN SETTLEMENT IS ILLEGAL?

IN WHICH COUNTRY ONE IN EVERY  
TWO CHILDREN IS MALNOURISHED...



Stop The Ignorance Join The Movement



# SUGGESTED WORKSHOP PLAN

**Aim:** What you hope to achieve from this workshop

**Duration:** How long will it last (allow about 3 ½ hours)

**Number of participants:** Ideally?

**Language:** Hindi, English, Sign language?

## 1. Raise the issue 45 min

- ❖ Explain the purpose of the session, give the general background;
- ⇒ Present an overview of the issues

## 2. Air the problem 60 min

- ❖ Ask the group questions to explore their attitudes and understanding of the issues using the discussion points – keep the discussion on course to explore the human rights issues by asking how it affects them. For example—
  - ⇒ People in general – communities and individuals
  - ⇒ Livelihood and dignity (health, education, shelter, land, etc.)
  - ⇒ Liberty and autonomy
  - ⇒ Women and girls
  - ⇒ Disabled People
- ❖ Use visual aids or case studies to give another perspective on the issue

## 3. Focus on the practical 30 min

- ❖ Present and analyse potential remedies and solutions; e.g. relevant laws and how to use them;

## 5. Test understanding 60 min

- ⇒ Open a discussion or debate to consolidate understanding or give the group an exercise to practice applying the remedy to the problem;

## 4. Achieve closure 15 min

- ⇒ Summarise the contents of the workshop, reiterating the main points; give contact details and information on how to get involved; congratulate the group and thank everyone for their participation.



Orphaned souls  
cry for help



# 1

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UNIT

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## **King Hammurabi in Babylon**

**1750 BCE**

Recognised the necessity to honour broad codes of justice among people; created one of the earliest legal codes to govern behaviour: “Let the oppressed man come under my statue to seek equal justice in law.”

## UNIT-1 SESSION-I

# HUMAN RIGHTS AND JUSTICE

**T**he very concept of justice is intrinsic to any definition of human rights and rights are intrinsic to justice. It is an indication of the chasm that has appeared between justice and law that human rights need to be protected by specific pieces of legislation.

Much of the legal system is based on property ownership stemming from an ideology that breaks down all aspects of existence to commodities. Natural resources including water, air, land, plants and minerals are raw materials for manufacture and exchange. Even people are part of this commodification both in the form of labour and as consumers.

The system relies on market forces, whereby the wants and needs of some people are to be met, at a price, by the goods or services provided by others. To sustain the market, the system must create the need either by raising aspirations or by taking ownership of the means of satisfying what we all need for survival. Once people are required to buy what they need, they must then get the money to pay for it. A labour force is born.

Within this system Human Rights Law often serves as a safety net to ensure that the worst excesses of capitalism are not realised. People should not starve or be forced into slavery because they cannot afford the prices demanded for food. They should not be exploited due to the vulnerability of their age, disability or lack of resources. They should not be abused or rejected because they come from a certain class, ethnicity or social group.

Another approach is to see human rights law as underpinning the principle of justice and the reason for having laws at all – this is the human rights based approach.

Points for discussion (no right or wrong answers should be suggested or implied. This exercise is to raise the issues and get people thinking about the inter-relation between rights, ideology and the law and to prepare the ground for closer analysis later).

1. To what extent could or should the law intervene to control market forces?

Consider the following:

- Cigarette advertising
- Child labour
- Sex work (including pornography and prostitution)
- Minimum wages
- Depleting natural resources such as fish, forests and water

2. To what extent should judges be able to intervene to modify policies made by democratically elected governments?

### **The rights-based approach**

The rights-based approach (RBA) has evolved in response to decades of failed strategies to eradicate world poverty and, at minimum, starvation. Previous development policies were formulated either on the concept of charity whereby the rich were to give aid to the poor out of sympathy, or on the basis of humanitarian aid and the moral duty of society to meet the basic needs of all human beings. RBA recognises that poverty is a human rights violation and the result of injustice in one form or another.

According to the RBA exploitation, discrimination and marginalisation cause poverty. Starvation is due to unequal distribution of resources not due to bad luck or natural disasters. The RBA demands analysis of the causes, assessment of the programme goals and likely impact on beneficiaries and



other stakeholders, but most importantly holistic consideration of the rights of the poor including autonomy, freedom and dignity. It demands strategies that concentrate on eradicating poverty by changing systems that create poverty and not just on providing welfare benefits to reduce its effects. It also emphasises that people are not passive recipients of aid but are the main participants in their own development. Therefore strategies must empower the poor and marginalised to hold their governments to account.

A woman is hungry because she lacks the means to procure food

- a) Charitable aid approach: Give her food. It is a short-term measure and is determined by those willing to give to charity.
- b) Needs-based approach: Develop a ration card scheme to resolve her food problem. Her entitlement to a ration card is determined by a policy based on her perceived needs.
- c) Rights-based approach: Address the lack of means problem. Do both of the above as short term measures but also ensure that she has access her right to livelihood, property, health, education and any other factor that is impeding her ability to procure food for herself. This puts her at the heart of the solution, is long term and sustainable into the next generation.

Most hunger exists where there is an abundance of food. People are prevented from accessing it by systematic economic and social exclusion.

### **Do human rights work?**

The benefit of that RBA is that apart from the issues of autonomy and dignity it also yields sustainable results. There are a number of pragmatic arguments for defending rights and these are often put forward by rights-based organisations themselves. For example, it is argued that the continuation of inequality between the sexes is to waste half the world's human potential; Capital punishment is wrong because of the risk of a miscarriage of justice; That forcing children to marry leads to birth defects in children born to underage mothers. All of these arguments might be valid but they miss the point about human rights. What about those who are too old or infirm to contribute to society? There might be incontrovertible evidence sufficient to convict someone of a crime; Does that make a death sentence justifiable? A girl could be married at the age of fourteen and given temporary contraceptives until she is sixteen. Would that make her marriage acceptable? If human life and well-being can be reduced to such practicalities there is no reason for any safeguards or protections. Argument for human rights must be based simply on the value of human life otherwise there is no argument at all.

### **Rights and duties**

Human Rights are indivisible; There is no hierarchy of rights; Each is as important as the others. Human rights are also interdependent; The denial of one right leads inevitably to the violation of others. Freedom and dignity are as important, and contingent to, food and livelihood. Human rights are universally recognised inalienable legal guarantees that the bearer can claim.

For every right there is a corresponding duty. If, in the context of development, we regard the poor as rights bearers we can also consider the State as the duty bearer. It is the responsibility of governments to protect and promote the human rights of people within its State's boundaries. Acts of omission on the part of governments are as culpable as acts of commission but lack of understanding can lead to rights violations. A government that turns a blind eye to land grabbing and displacement of its indigenous people by a mining company is as guilty of rights violations as one that uses the army to forcefully evict the same people.

According to RBA, it is not acceptable for a government to cut spending on food distribution programmes on the ground of competing priorities any more than it would be for them to decide to execute prisoners in order to save money. Likewise, rich countries cannot justify cutting aid to poor countries on the grounds of economic recession at home. All humans have the right to live with dignity

and all humans have a corresponding duty to ensure that these rights are upheld. Neither economic issues nor distance from the problem are justifiable excuses for failing to act to defend human rights.

RBA development strategies require strengthening the capacity and accountability of duty bearers to meet their responsibilities, ensuring that they understand the root causes of poverty and know how to engage and involve those affected. Secondly RBA means ensuring that rights bearers have knowledge and understanding of their rights as legal entitlements and of the skills and resources necessary to claim them.

### **The International Bill of Human Rights**

The scale and impact of World War II led to the foundation of the United Nations in 1945, and three years later, in 1948, to 50 States signing the Universal Declaration of Human Rights (UDHR).

UDHR, although not conceived as a legally binding agreement, has acquired the force of international customary law. The accompanying treaties, the Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and the International Covenant on Civil and Political Rights, 1966 (ICCPR), were drawn up collectively by representatives of all continents and major religions and in consultation with leading human rights activists of the time including MK Gandhi. Together these three documents form the International Bill of Rights and the foundation for international human rights law.

- UDHR: Universal Declaration of Human Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- ICCPR: International Covenant on Civil and Political Rights

A series of subsequent Treaties and Conventions have bound most States, either nationally or regionally (e.g. The European Convention on Human Rights) to establish formal constitutions and laws to formalise respect, protection and promotion of human rights.

By becoming party to an international treaty, States assume obligations to refrain from curtailing human rights, duties to protect individuals from human rights abuses and to take positive action to ensure that human rights can be enjoyed by everyone. In ratifying (approving) an international treaty governments agree to put in place domestic legislation to comply with the obligations and duties of that treaty. In human rights law individuals and groups are protected and the conduct of States and State actors is regulated. (See Lecture of All Human Rights are Fundamental Rights, 2010 by Justice Hosbet Suresh)

## UNIT-1 SESSION-II

### Constitution of India

#### Fundamental Rights Duties & Directive Principles

#### What are Fundamental Rights

- Rights are guarantees of entitlements which are necessary for the overall development of a human being
- 'Fundamental rights' is a term used in the Constitution of India to guarantee citizens conditions considered to be essential for survival with dignity
- Fundamental rights in the constitution also act as limitations to the powers of the Executive and the Legislature

#### Fundamental Rights in the Constitution

The Constitutions of India classifies fundamental as:

- Right to Equality
- Right to particular freedoms
- Right against exploitation
- Right to freedom of religion
- Cultural and educational rights
- Right to constitutional remedies
- Right to property (Eliminated)

#### The Right to Equality

- Enumerated in Article 14 to Article 18
- No citizen can be discriminated against on grounds of
  - Religion
  - Race
  - Caste
  - Sex
  - Place of birth

#### Right to Equality

- This does not prevent special provisions being made for:
  - Women
  - Children
  - Socially/Economically/Educationally backward classes
  - Scheduled Caste & Scheduled Tribes

#### The Right to Freedom

- Enumerated in Article 19
- All citizens shall have the right to:
  - Freedom of speech and expression
  - Assemble peaceably and without arms
  - Form associations or unions
  - Move freely throughout the territory of India
  - Reside and settle in any part of the territory of India
  - Practice any profession, occupation, trade or business as allowed by law

## UNIT-1 SESSION-II

### Right Against Exploitation

- Enumerated under Article 20 to Article 24
- No person shall be convicted arbitrarily
- No person shall be subjected to a penalty greater than provided under the law
- No person shall be prosecuted and punished for the same offence more than once
- No person accused of any offence shall be compelled to be a witness against him/herself

### Right Against Exploitation

- No person shall be deprived of his/her life or personal liberty except according to procedure established by law (Article 21)
  - Has been broadly interpreted by Courts
  - Now covers all possible aspects of life with dignity including food/water/a healthy environment and privacy

### Right Against Exploitation

- No person shall be detained in custody without being informed of the grounds for such arrest
- A person has a right to consult, and to be defended by a legal practitioner of their choice
- Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours
- No person shall be detained in custody beyond the said period without the authority of a magistrate

### Right Against Exploitation

- Traffic in human beings and forced labour are prohibited
- No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment

### Right to Freedom of Religion

- India is a secular state (Articles 25 – 28)
- Indian citizens have a right to choose any religion that he / she wants
- No one shall be forced to pay taxes for the promotion or maintenance of any particular religion
- No religious instruction shall be provided in any educational institution run by the State

### Cultural and Educational Rights

- Article 29, 30 and 21A
- Right to conserve a distinct language/ script /culture
- Right to free and compulsory education up to the age of 14 years

## UNIT-1 SESSION-II

### **Right to Constitutional Remedies**

- The right to move to the Supreme Court for appropriate proceedings for the enforcement of fundamental rights
- The Supreme Court shall have power to issue directions or orders or writs for the enforcement of fundamental rights
- Fundamental rights shall not be suspended except as provided for by the Constitution

### **Fundamental Duties**

- Under Article 51A all citizens have duties to:
  - Abide by the Constitution
  - Respect the national flag and national anthem
  - Cherish and follow the noble ideals which inspired our national struggle for freedom
  - Protect the sovereignty, unity and integrity of India
  - Defend the country

### **Fundamental Duties**

- Promote the spirit of common brotherhood
- Preserve the rich heritage of our composite culture
- Protect and improve the natural environment
- Develop the scientific temper and spirit of inquiry
- Safeguard public property
- Strive towards excellence in all spheres

### **Directive Principles**

- Are not enforceable in Court
- Provide guidelines or instructions to the State
- Are required to be implemented in situations where there is no existing law
- Are fundamental to good governance
- It is the duty of the State to apply these principles while making laws

## EXERCISE: HUMAN RIGHTS AND DEVELOPMENT

### Population

In many parts of the world, the effects of population growth are very clear. In other areas they are less obvious. The impact of this phenomenon is universal, however. Statistics show how the world population is expanding at an exponential rate and how this growth will affect the environment and competition for resources.

### In groups

Using a 'Rights-based approach'

1. List the potential human rights issues that could result from unchecked population growth.
2. List any past and present policies (of any country) either encouraging or discouraging population control, for example:
  - Forced sterilisation and/or abortion
  - Penalties for families who have more than two children
  - Financial incentives to restrict or increase family size
  - Refusal to allow some methods of birth control due to religious or cultural objections
3. Discuss:
  - Do any of these policies conflict with individual rights
  - If so, how should these conflicts be resolved
  - Critique the case of *Javed vs. state of Haryana* (below)

**Javed vs. State of Haryana and Ors** (AIR 2003 SC 3057) – This decision sets a precedent for upholding the two-child norm. The constitutionality of a coercive population control provision in the Haryana Panchayati Raj Act of 1994 (the Haryana Provision) that governs the election of panchayat (village council) representatives in Haryana was challenged.

The Haryana Provision disqualified “a person having more than two living children” from holding specified offices in panchayats. The objective of this two-child norm was to popularise family planning by having community leaders serve as role models. The issues raised before the court were: Is the classification arbitrary? Is the provision discriminatory and does it violate Article 21 of the Constitution of India?

The Supreme Court held that the impugned provision was neither arbitrary nor discriminatory and did not violate Article 44 of the Constitution, as it sought to achieve a laudable purpose – “socio-economic welfare and health care of the masses and is consistent with the national population policy... The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz. two, is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny... it has to be remembered that complacency in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.”

## **TWO-CHILD NORM: STATE GOVERNMENTS POISED TO BLUNDER**

**Colin Gonsalves**

**A**fter the Supreme Court made mistaken observations in respect of the 'two-child norm' in *Javed vs. state of Haryana*, several state governments have taken steps and are on the brink of enacting legislation to enforce a two-child norm. A blunder of epic proportions is about to be committed. From 1951 to 2001, India's population grew from 360 million to 1020 million. This growth has been characterised as a 'population explosion'. The antidote, we are told is the punitive enforcement of the two-child norm. To understand the folly of such a step one must, as Dr. Almas Ali explains in 'Population and Development', separate myth from reality in the population debate.

All nations typically go through three phases: the first of high birth rates and high death rates, the second of high birth rates and low death rates and the third of low birth rates and low death rates. After World War II, advances in health technology – including the discovery of antibiotics – caused a dramatic decline in death rates. This caused population to grow at an unprecedented rate. 84% of India's population increase took place during this period. At the same time, and this is not commonly known, the total fertility rate (TFR) i.e. the average number of children a woman would have, came down from 6 in 1951 to 3.2 in 2001. Yet the population continues to grow not because of the family size but because of, what is called, 'population momentum'. This is an accelerated in-built growth due to the high percentage of young people (60%) in the population who, even as they have fewer children, produce large quantum increases. This takes place despite the fact that family size is declining across the board for rural and urban families and for poor and middle class families alike.

The single most important factor that reduces momentum is the raising of the age of marriage. The strongest impact of this comes through increasing the years of schooling for girls. In Sri Lanka, where this has been done, fertility rates were quickly reduced without coercion.

Based on a misunderstanding that poorer people and particularly those in rural areas and slums are having too many children some were quick to suggest a two-child norm with punitive disincentives. Superficial comparisons were made with China and its one-child norm. A closer look shows precisely how wrong these comparisons were. China's TFR drop from 2.8 in 1979 to 2.0 in 1991 was comparable to Kerala's TFR drop from 3.0 in 1979 to 1.8 in 1991, the difference being that as compared to China's atrocious human rights record, in Kerala there was no coercion. Stress on education and development did the trick. However, the Chinese decline also stemmed from the emphasis placed on education by the Chinese Communist Party during the prior decade, 1970-1979.

It was the realisation that education, development and woman and child welfare was a better way to lower the family size rather than punitive disincentives that led to the paradigm shift from population control to reproductive health at the Cairo Conference in 1994. It was agreed that quality of life be emphasised and that there would be no force, coercion, incentives or disincentives. India too got out of its 'Emergency Model' family planning approach and introduced the Target Free Approach and followed this up with the national population policy (NPP) 2000.

NPP 2000 defined the overriding objective as the improvement in the quality of lives. One of the several immediate objectives was to address the unmet needs of contraception; 25% of poor families seek contraception but are unable to get it. There is no mention made in the policy of the two-child norm, of targets or disincentives.

The two-child norm came in by a side wind. Persons who were disqualified from contesting pan-

chayat elections in Haryana filed a petition in the Supreme Court impugning the constitutionality of the state notifications laying down the norm. In these proceedings, the central government appears to have given the Supreme Court the impression that the two-child norm was indeed part of the national population policy. Nothing could be farther from the truth. The consultations that took place prior show that the two-child norm with its package of disincentives were emphatically opposed due to the anticipated adverse impact on poor women and hence omitted from the policy altogether.

The decision of the apex court in *Javed vs. state of Haryana* is a classic example of how a court can make a terrible mistake while dealing with an intricate social issue merely because the parties before the court are unable or unwilling to properly explain the complexities involved. The court made several mistakes. First it relied on an obsolete 1960's Club of Rome framework and characterised "the torrential increase in the population...as more dangerous than a Hydrogen bomb" (Russel). It quotes with approval two obscure writers on the subject who say that "the rate of population growth has not moved one bit from 1979". Nothing could be more wrong. The truth is that India has experienced the sharpest fall in decadal growth from 23.81 in 1991 to 21.34 in 2001. This is the lowest population growth rate since Independence! Secondly, it refers to the Five-Year Plans from the first to the seventh (ending 1991) with their emphasis on punitive disincentives and fails to notice the landmark departure in approach in the Cairo Conference (1994) with the emphasis on development, quality of life and women welfare and the rejection of disincentives. Thirdly, it fails to notice that none of the grounds taken in the petition related to the impact on women. Towards the end of the judgement under the title "incidental questions" reference is made to the impact on women but even these are dismissed out of hand. The Court was not informed that population experts throughout the country were unanimous in their view that the impact on poor women would be immediate and severe.

What are the implications and fallout of the judgment? Dr. Ali points out that research conducted in Orissa, Rajasthan, Haryana and Madhya Pradesh indicates that the norm to disqualify candidates has led to the desertion of wives and families, seeking of abortions with the associated abortion-related health risks, giving away of children for adoption and initiation of new marriages by male elected members. Women bear the brunt of the disqualification clause.

For breach of the two-child norm several states have put together a package of punitive measures including exclusion from elections, exclusion from ration cards, kerosene and other BPL incentives, denial of education in government schools to the third child and withdrawal of welfare programmes for SC/STs. These punitive measures will operate mainly against poor women. Total fertility is 3.47 among illiterate women as compared to 1.99 for the middle classes. The infant mortality rate among SCs, STs and OBCs is 83, 84 and 76 respectively as compared to 62 for others. These sections have a high wanted fertility rate due to the prevailing high infant mortality rate.

Clearly, to impose the two-child norm is to widen the inequality gap among the people as the disincentives would disproportionately impact on the already deprived population. More terrible, the two-child norm would provide an impetus for an increase in sex selective abortions and female foeticide, worsening the alarming decline in the child sex ratio noticed in the 2001 Census.

There is a lesson to be learnt from this. NGOs are the natural ally of the judiciary. In matters of general social significance they ought to be brought in to guide the Court and give it the larger picture, particularly, when the contesting parties have narrow vested interests.

To conclude, momentum will carry through for the next 30 years after which the falling TFR (total fertility rate) will assert itself and India will move into the third phase of low birth rate and low death rate. In the meanwhile, India must stop counting people and start counting on people, and invest in them, thus improving the quality of their lives.

*—Writer is Founder of HRLN and Senior Advocate, Supreme Court of India*



## UNIT-1 ADDITIONAL MATERIAL-I

# UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

### UNOFFICIAL SUMMARY

#### **Article 1**

All human beings are born free and equal.

#### **Article 2**

Everyone is entitled to the same rights without discrimination of any kind.

#### **Article 3**

Everyone has the right to life, liberty, and security.

#### **Article 4**

No one shall be held in slavery or servitude.

#### **Article 5**

No one shall be subjected to torture or cruel or degrading treatment or punishment.

#### **Article 6**

Everyone has the right to be recognised everywhere as a person before the law.

#### **Article 7**

Everyone is equal before the law and has the right to equal protection of the law.

#### **Article 8**

Everyone has the right to justice.

#### **Article 9**

No one shall be arrested, detained, or exiled arbitrarily.

#### **Article 10**

Everyone has the right to a fair trial.

#### **Article 11**

Everyone has the right to be presumed innocent until proven guilty.

#### **Article 12**

Everyone has the right to privacy.

#### **Article 13**

Everyone has the right to freedom of movement and to leave and return to one's country.

#### **Article 14**

Everyone has the right to seek asylum from persecution.

#### **Article 15**

Everyone has the right to a nationality.

**Article 16**

All adults have the right to marry and found a family. Women and men have equal rights to marry, within marriage, and at its dissolution.

**Article 17**

Everyone has the right to own property.

**Article 18**

Everyone has the right to freedom of thought, conscience and religion.

**Article 19**

Everyone has the right to freedom of opinion and expression.

**Article 20**

Everyone has the right to peaceful assembly and association.

**Article 21**

Everyone has the right to take part in government of one's country.

**Article 22**

Everyone has the right to social security and to the realisation of the economic, social and cultural rights indispensable for dignity.

**Article 23**

Everyone has the right to work, to just conditions of work, to protection against unemployment, to equal pay for equal work, to sufficient pay to ensure a dignified existence for one's self and one's family, and the right to join a trade union.

**Article 24**

Everyone has the right to rest and leisure.

**Article 25**

Everyone has the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and necessary social services.

**Article 26**

Everyone has the right to education.

**Article 27**

Everyone has the right to participate freely in the cultural life of the community.

**Article 28**

Everyone is entitled to a social and international order in which these rights can be realised fully.

**Article 29**

Everyone has duties to the community.

**Article 30**

No person, group or government has the right to destroy any of these rights.

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## HUMAN RIGHTS-BASED APPROACH

### Statement of Common Understanding

Secretary-General Kofi A. Annan had called on all agencies of the United Nations to mainstream human rights into their activities and programmes within the framework of their respective mandates. A number of them have adopted such an approach and gained experience in its implementation, and are now working on a common understanding of what this means.

#### Statement of Common Understanding\*

1. All programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

A set of programme activities that only incidentally contributes to the realisation of human rights does not necessarily constitute a human rights-based approach to programming, where the aim of all activities is to contribute directly to the realisation of one or several human rights.

2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.

Human rights principles guide programming in all sectors, such as health, education, governance, nutrition, water and sanitation, HIV/AIDS, employment and labour relations and social and economic security. This includes all development cooperation directed towards the achievement of the Millennium Development Goals and the Millennium Declaration. Consequently, human rights standards and principles guide both the Common Country Assessment and the UN Development Assistance Framework.

Human rights principles guide all programming in all phases of the programming process, including assessment and analysis, programme planning and design (including setting goals, objectives and strategies), implementation, monitoring and evaluation.

Among these human rights principles are: universality and inalienability; indivisibility; interdependence and interrelatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law.

- Human rights are universal and inalienable. All people in the world are entitled to them. They cannot voluntarily be given up, nor can others take them away. As stated in Article 1 of the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights."
- Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every person. Consequently, they all have equal status as rights, and can not be ranked in a hierarchical order.
- Human rights are interdependent and interrelated. The realization of one right often depends, wholly or in part, upon the realisation of others. For instance, realisation of the right to health

\*Developed at the Inter-Agency Workshop on a human rights-based approach in the context of UN reform, 03 to 05 May, 2003.

may depend, in certain circumstances, on realisation of the right to education or information.

- All individuals are equal as human beings and by virtue of the inherent dignity of each person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies.
- Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.
- States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicators in accordance with the rules and procedures provided by law.

3. Programmes of development cooperation contribute to the development of the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.

In a human rights-based approach, human rights determine the relationship between individuals and groups with valid claims (rights-holders) and State and non-State actors with correlative obligations (duty-bearers). It identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.

### **Implications of a human rights-based approach**

The application of good programming practices does not by itself constitute a human rights-based approach, which requires additional elements.

The following elements are necessary, specific and unique to a human rights-based approach:

- a) Assessment and analysis identifies the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying, and structural causes when rights are not realised.
- b) Programmes assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfill their obligations. They then develop strategies to build these capacities.
- c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- d) Programming is informed by the recommendations of international human rights bodies and mechanisms.

In addition, it is essential that—

1. People are recognised as key actors in their own development, rather than passive recipients of commodities and services.
2. Participation is both a means and a goal.
3. Strategies are empowering.
4. Both outcomes and processes are monitored and evaluated.
5. Analysis includes all stakeholders.
6. Programmes focus on marginalised, disadvantaged, and excluded groups.
7. The development process is locally owned.
8. Programmes aim to reduce disparity.

9. Both top-down and bottom-up approaches are used in synergy.
10. Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
11. Measurable goals and targets are important in programming.
12. Strategic partnerships are developed and sustained.
13. Programmes support accountability to all stakeholders.

## JUNIOR KG FEES 49,250/- ONLY

The last decade of a liberalised economy and unregulated market has not only distanced education from the poor but also accentuated right wing leanings of most educational campuses which shamelessly churn out anti-poor professionals who undoubtedly in the near future will be at the helm of affairs chartering a dark course for India, if unchecked.

As a counter current, SHR through its units across the country is helping build an independent national network of students. Reaching out to students, getting them involved and educating them on pertinent issues strengthens our resource base and helps us meet our goals. Students are those who have most at stake in India's future.



### Stop The Ignorance Join The Movement

HRLN through SHR provides scholarships for atleast twenty Dalits, Muslim, and Tribal students every year, this to enable them to intern with HRLN offices and acquire leaderships skills to work with their community in the due course.

website: [www.hrln.org/shr](http://www.hrln.org/shr)



## UNIT-1 SESSION-IV

### Globalisation in a nutshell

#### Aims of modern globalisation

- Globalisation was a post WW2 strategy of Western States to build and strengthen international co-operation
- It was intended to encompass trade and industry but also education, information and other forms of 'progress'
- It would lead to greater international understanding and break down barriers

#### Colonisation was globalisation

- Joining world economies by combining their resources for food or manufacturing has been happening for centuries
- Demand for tea, sugar, bananas, rubber, etc, in countries that couldn't produce them led to colonisation of resource rich southern countries by those in the north
- Sharing ideologies by influence, education, coercion or force has always been part of the process

#### How the rich win

- There has been vastly increased mobility between countries
- Cultural barriers have reduced and English has greater dominance
- Education is global – people not only study overseas but information and resources are shared internationally via the Internet
- Multinational trade and industry has dramatically expanded

#### How it's done (1)

- The eradication of protectionist barriers to trade and fusion of individual national markets
- Stimulation of free movement of capital and encouragement to companies to set up bases in different parts of the world
- Outsourcing and off-shoring enabling a shift of investment and employment from rich countries to poor

#### How it's done (2)

- Joining economies has given rich countries control over the policies of poor countries
- Governments are wary of raising taxes or imposing restrictions for fear of companies pulling out
- Multinationals are able to exploit cheap labour, natural resources and local markets and poor countries are powerless to resist

### How the poor lose

- Local communities are displaced both forcefully to make way for industry and mining (SEZs) or through necessity due to loss of livelihood
- The resulting landlessness increases rural migration, trafficking and child labour
- Irreparable damage is done to the environment by deforestation and depletion of the water table
- Companies can deplete resources, damage the environment, cause starvation, disease and social breakdown – and then move on to the next poor country

### Globalisation is colonisation

- Globalisation has enabled multinational companies to become the new super-powers
- It has raised GDP and benefited a small proportion of businessmen and employees in poor countries
- There has been no trickle down effect to the poor and the gap between rich and poor has widened
- The fall out of pollution, poverty, civil unrest and environmental damage is left to the governments of poor countries to deal with

## WHY ARE THERE SO MANY SOLDIERS IN KASHMIR?

In its 2009 edition, Guinness Book of World Records described Jammu & Kashmir as the 'largest militarised territorial dispute' in the world, a fact which didn't get any space in any electronic news channel or the newspapers. Even in Kashmir, the news didn't get much coverage. "The dispute between China, India and Pakistan for the Kashmir region is the largest and most militarised territorial dispute currently taking place on the planet earth." The record book reads: "At any time, up to one million troops confront each other across the Line of Control that represents India and Pakistan administered Kashmir,"



Both countries have gone to war on three occasions over Kashmir and the possibility of war between the two countries has become frightening given their nuclear weapon capability. Claims of human rights abuses have been made against the Indian armed forces and the armed militants operating in Jammu & Kashmir. A 2005 study conducted by Médecins Sans Frontières found that Kashmiri women are among the worst sufferers of sexual violence in the world, with 11.6% of respondents reporting that they had been victims of sexual abuse. Draconian laws like the Armed Forces Special Powers Act (AFSPA) have taken more lives than saved.

Stop The Ignorance Join The Movement

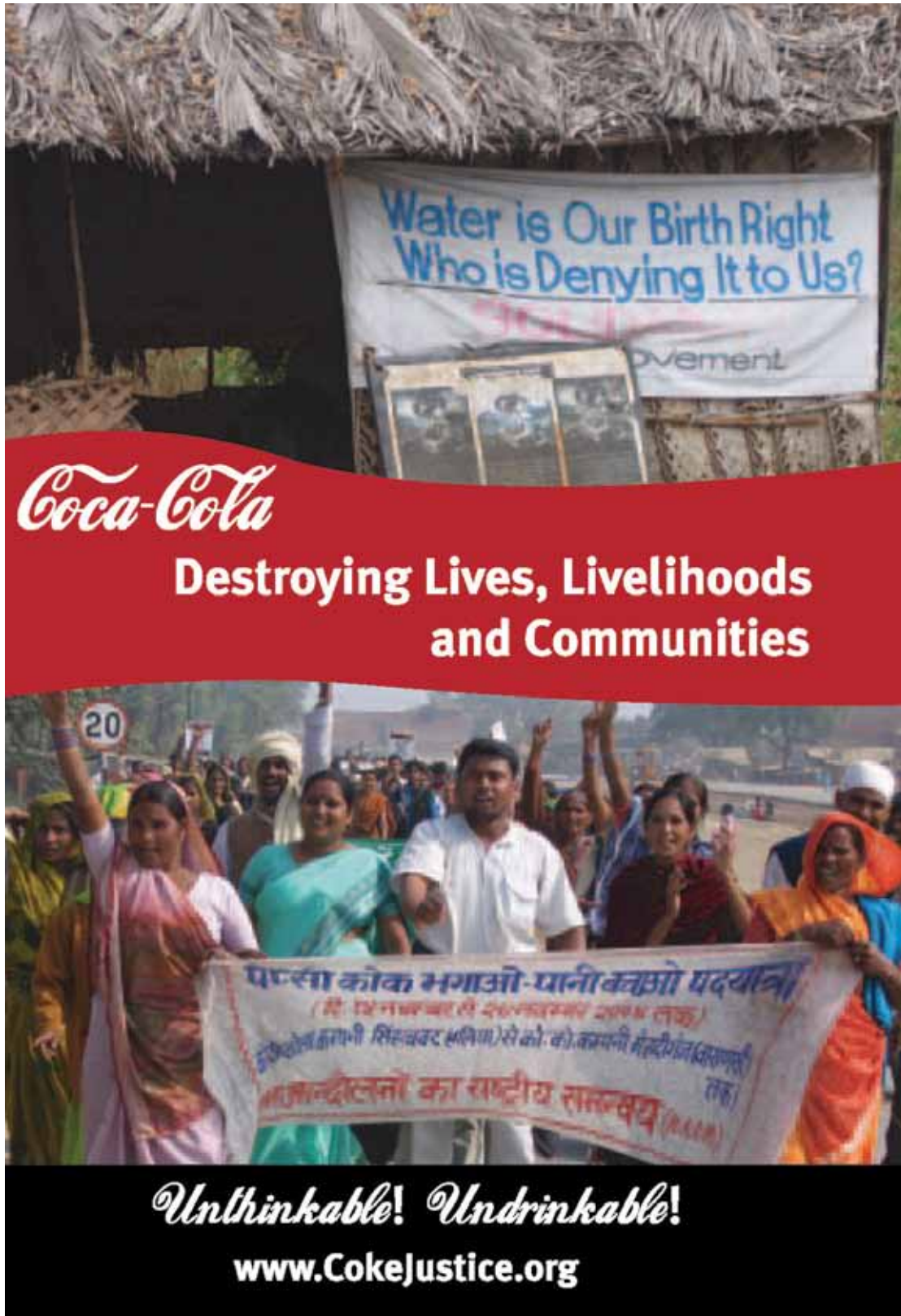
website: [www.hrln.org/shr](http://www.hrln.org/shr)





UNIT-1 SESSION-IV

How one NGO challenged a multinational



*Coca-Cola*

**Destroying Lives, Livelihoods  
and Communities**

*Unthinkable! Undrinkable!*

[www.CokeJustice.org](http://www.CokeJustice.org)



## UNIT-1 SESSION-IV



Communities in India are at the forefront in challenging corporate globalization today. Tens of thousands of villagers across India have mobilized to confront the arrogance and impunity of one of the largest corporations in the world—the Coca-Cola company.

*Coca-Cola's largest bottling plant in India—in Plachimada—has been shut down since March 2004 due to community opposition.*

Strong and formidable community campaigns across India—in Mehdiganj, Kala Dera and Gangaikodan—are underway to shut down Coca-Cola plants.

A **PATTERN OF ABUSE** has emerged as a result of Coca-Cola's operations in India:



**WATER SCARCITY:** Communities living around Coca-Cola's bottling plants in India are experiencing severe water shortages—directly as a result of Coca-Cola's over extraction of groundwater. A government study in the desert state of Rajasthan found that groundwater levels had dropped 10 meters in just 5 years since Coca-Cola started operations.

In 2004, Coca-Cola used **283 billion liters of water** worldwide— enough water to meet the world's drinking needs for 10 days!



**POLLUTION OF LAND AND WATER:** Coca-Cola has severely polluted both the groundwater and the soil around its bottling plants. A government study of seven Coca-Cola plants found that all plants were generating large amounts of toxic waste. In violation of Indian laws, the waste was not being classified and handled as industrial hazardous waste. In some areas, the company was distributing its toxic waste to farmers as “fertilizer!”

In 2004, Coca-Cola converted **2/3 of the freshwater** it used into wastewater globally!

## UNIT-1 SESSION-IV

**PESTICIDES IN DRINKS:** In 2003 and again in 2006, studies found that Coca-Cola products in India contain dangerously high levels of pesticides, including DDT, lindane and malathion. On an average, the pesticide residues were 24 times higher than European Union (EU) standards. Seven states in India imposed partial or full bans on the sale of Coca-Cola.



### THE LIFE OF COKE

Access to clean drinking water is a fundamental human right. However, over 1.2 billion people—about 20% of the world—do not enjoy this right. Providing access to potable water remains one of the greatest challenges facing us today.

India already faces declining per capita availability of water. Over-exploitation of groundwater resources are rapidly lowering groundwater tables.

In addition to water scarcity and pollution, there is a huge public health cost associated with increased consumption of Coca-Cola—diabetes, obesity and dental problems.

The entire life cycle of Coca-Cola, from extraction to consumption, is unsustainable.

## UNIT-1 SESSION-IV

**JOIN US** as we build a unique, community-led, global campaign that puts pressure on the Coca-Cola company and links HUMAN RIGHTS, ENVIRONMENTAL JUSTICE and LABOUR RIGHTS.

The International Campaign to Hold Coca-Cola Accountable recognizes that the Coca-Cola company understands only one language—the language of money. As a result, the campaign advocates for cutting financial ties with the Coca-Cola company until it cleans up its act.

Over twenty colleges and universities in the US and UK have stopped doing business with the Coca-Cola company. Coca-Cola has been removed from a major “socially responsible” index and individuals and institutions have made a choice that they will not consume Coca-Cola.

The International Campaign has been credited by the *Wall Street Journal* with costing Coca-Cola millions of dollars in lost sales and legal fees in India, and growing damage to its reputation elsewhere. The growing movement to put pressure on the company is working. The Coca-Cola company has finally admitted that they have made mistakes in India, but the company is refusing to do anything substantial to address the problems.

**JOIN US TO DEMAND THAT COCA-COLA CLEANS UP ITS ACT IN INDIA.**

**Contact us at:**

International Campaign to Hold Coca-Cola Accountable

E: [info@IndiaResource.org](mailto:info@IndiaResource.org)

W: [www.CokeJustice.org](http://www.CokeJustice.org)

Design Action Collective



## HUMAN RIGHTS DEFENDER

### **CHEN GUANGCHENG**

**C**hen Guangcheng was born on November 12, 1971 in Linyi, Shandong province in the People's Republic of China. He lost his sight at an early age due to an illness and was unable to read until 1994 when he enrolled at Qingdao High School for the Blind. Just four years later he entered Nanjing University to study Chinese medicine. After graduating he returned to his hometown and worked as a masseur in a local hospital. At the same time he studied law in evening classes and began to give legal assistance to people in his village.

Chen was struck by the plight of many local women; thousands of whom had been illegally forced to undergo abortions and sterilisation by officials enforcing the one-child policy. In 2005, Chen filed a class action lawsuit on behalf of the women. The officials were accused of detaining and torturing relatives of people who had escaped from the forced measures.

The lawsuit was rejected but the issue drew international attention and Chen was interviewed by the American magazine *Time*. This prompted the National Population and Family Planning Commission to launch an investigation in August 2005. A month later, the Commission announced that several Linyi officials were detained.

However, Chen's activism was not appreciated by the local authorities and within three hours of the *Time* magazine interview, Chen was detained by heavy-handed security officials. In September 2005, he was placed under house arrest and remained there until March 2006. Three months later, the authorities made a formal arrest accusing Chen of destroying property and assembling a crowd to disrupt traffic.

His trial was scheduled for July 17, 2006 but was postponed when Chen's supporters gathered at the court house. Giving only a few days notice, officials announced that his trial would be rescheduled to August 18, 2006. On the day before the trial began, all three of Chen's lawyers were detained. None of them were allowed in the courtroom for the trial. Chen's wife was also prevented from hearing the proceedings and only his brothers were present and able to report what happened. A public defender was appointed by the authorities. Chen had not met him in advance and he had not read the case. He was completely unable to support his client. After a two-hour trial Chen was convicted. On August 24, 2006 he was sentenced to four years and three months in prison.

In 2007, Chen was awarded the Ramon Maqsaysay Award, known as the 'Asian Nobel Prize'. On her way to collect the award on Chen's behalf, his wife, Yuan Weijing was prevented from boarding the plane and was also placed under house arrest.

Chen was released from prison on September 8, 2010 after serving his full sentence, but remains under surveillance.

## A JUST SOCIETY THROUGH JUST LAWS

**Justice Zakeria Yakoob**

Once, after becoming a lawyer, I was sitting outside a court in South Africa waiting for my case to be called. The applicant was to be brought to the court. He was virtually treated as nobody. Had a White applicant been called, he would have been named as Mr-so-and-so with polite courtesy. I sat back seeing junior lawyers as they scurried around to cross-examine State witnesses who were like magistrates and judges only in the sense that they were whites. The white prosecutors cross-examining the applicant and accused were often assisted by the court. It was a normal practice for judges and magistrates during the days of apartheid. In relation to black accused the assumption used to be that the person must be guilty and in relation to white accused the assumption was that the accused may not be guilty.

And that became a problem as the criminal justice system operated horribly in relation to the African people despite the fact that we had a principle which said that the State must prove its case beyond reasonable doubt. So the fundamental point I want to make is that the designation of the onus in a piece of legislation is not the end of the matter; it is only the beginning and a fair trial means much more than incorporating matters related to an offence into pieces of law.

Another important thing in those days was political trials. In Africa, political trials are highly complicated. They were held far away from the accused person's home so that there could be no one there to support and defend. The trials were held very quickly so that there was no opportunity given to the people to prepare their defence. They were held in consequence of evidence given by the people in detention and our apartheid style judges never took it particularly seriously. There were confessions taken which were alleged to have been freely and voluntarily made. All those confessions were admitted despite fairly strong evidence in many cases to the contrary. So political trials in the country represented a travesty of justice and the court system.

It was in this context that we had to draft our Constitution in relation to the fair trial provisions of the same. We came from a society where justice system was manipulated to ensure segregation, discrimination, and to ensure that poor people continued to be treated as if they were animals. That was the context. And we had the context where the negotiators of the constitution themselves, as a part of the African National Congress, had been victims of political trials which had been badly handled and many of them had been political prisoners before. So they understood, better than anybody else, having been victims themselves, how police's improper conduct could result in injustice and impropriety. And, therefore, we made it perfectly clear that, we in our country would never tolerate a system in which there would be any injustice at all not on the basis of constitutional provisions but on the basis of these other hidden things. So we regarded the achievements of a non-racial society as fundamentally important to the achievement of justice because unless the society itself was non-racial we could not have justice at all. So the reconstruction of our society and the reconstruction of our criminal system began with our Constitution, which made it perfectly clear that all rights were interdependent and interrelated and therefore, the fair criminal trial right too, was not a right which was to be taken independently of all other rights. It had to be taken in conjunction with the right to equality.

But before I get to the fair trial right, there were certain values entrenched in section 1 of our Constitution that made it perfectly clear that this Constitution stood for the dignity of human beings, the achievement of equality and advancement of all human rights and freedoms. It made it clear that it stood for the abolition of sexism and racism and that our Constitution stood for the supremacy of the Constitution and the rule of law. So in our country it is not only the Constitution that is supreme but

also the rule of law. And these principles have been entrenched in our Constitution to a greater degree than all others. The rest of the bill of rights can be amended with a 2/3rd majority subject to certain conditions but these values, these principles, this particular section can be amended only with a 75% majority. So these principles are fairly important because we believe that the fair trial provisions are in fact concerned with the dignity, equality and freedom of all human beings.

And now we come to the fair trial provision which has been in our Constitution. There are many people in our society who have commented on the fair trial provisions of our Constitution, saying said that this has been taken rather too far. Police have claimed that it is the fair trial provision which has been the cause of absence of convictions and so on. People have said that the fair trial provision means that our Constitution caters more to the people who are accused than people who are victims. This is an argument advanced all over the world.

The first problem is, how do you view the accused people. If you view accused people as people who are guilty as the Malimath report in the Indian case does, then obviously you have adopted a different approach. You would say that these people are guilty and they must not go free. It is a difficult assumption to make as it is an assumption which is against the presumption of innocence. You assume that there is no smoke without fire. You assume that there must be something and therefore, there is something essentially wrong with acquittals.

Yet, I want to say something about proving a case beyond a reasonable doubt and what it means. The Malimath report regarded this with some circumspection and came to the conclusion that what is required is that once the court is convinced it is alright. Now the ridiculousness of this proposition can only be understood if we introspect just a little bit about what proof beyond a reasonable doubt means. What it means is this; It doesn't mean that the judge doesn't arrive at the truth; It doesn't mean that the judge is God and decides whether something happened or did not happen. It is absolutely impossible for a human being listening to the witnesses to decide whether something that has been said is true or not. Chasing after the truth and trying to discover the truth is an impossible thing. Only God knows the truth and nobody else does. How can a judge ever presume what is the truth. All a judge can ever decide is to say whether the case brought before him has proof beyond reasonable doubt from the point of view of the evidence he has heard. Therefore, the search for the truth to me is something which is utterly unachievable and nonsensical. In the end you are a human being, you hear the evidence brought before you and decide whether the case has been proved beyond reasonable doubt or not. But again what does that mean? That simply means that if a judge has reasonable doubt after hearing all the evidence about whether the person committed the offence, the person must be acquitted. What is required for an acquittal is that the judge must have not just a mere simple doubt, a vague doubt, but the judge must experience a reasonable doubt in relation to whether the accused is guilty before the judge acquits the accused.

What are the government, the judiciary and Malimath saying? Are they saying here that the judges and magistrates must convict accused persons even if they have a reasonable doubt in relation to whether the conviction is proper or not? That is what truth beyond a reasonable doubt means and we must not get caught up with expressions like balance of probability and reasonable doubt. Let us take the Malimath proposition. He says that if there is proof beyond reasonable doubt then the judge must be convinced. He doesn't understand the onus. How can a judge be convinced that the accused did it on the one hand and have reasonable doubt on the other. You cannot be convinced if you have a reasonable doubt. So anybody who says that you must replace reasonable doubt with another onus that the judge must be convinced is talking nonsense because a judge cannot be convinced, if a he has a reasonable doubt.

So the real question that we have to answer is whether we want a society, for our sake and not for the sake of the accused, or in India where we want to say to our judges that please convict these people even though you have a reasonable doubt as to the guilt of the accused. I don't know about all of you but I don't want to live in this kind of a society, I don't think even the judges want to live in

such a society.

If you abandon this principle and say that judges must convict even if they have reasonable doubt, what you are saying is that the police allegation and the police suspicion that they are guilty is worth more than the reasonable doubt of the judge having heard all the evidence. What you are saying is that the judgement of the police officer is more important than the judgement of the court. And if that is so, why are there courts anyway? Then why have courts if they are going to work on the basis of the judgement of the police that is more important. So let the police decide whether the person is guilty or not. In the end giving this sort of a power to the police, convicting people even where a judge has a reasonable doubt as to the guilt of the accused is a thin edge of the wedge. What we then start doing is compromising the judicial system. What I think is that you need to have an independent judiciary that can stand against the government in case this is needed to uphold justice.

*—The author is Judge, Constitutional Court, South Africa  
Combat Law; Vol. 6, Issue 4, July-August 2007*



**UNIT**



## **Ancient Egypt**

Explicit social justice: “comfort the afflicted . . . refrain from unjust punishment. Kill not . . . make no distinction between the son of a man of importance and one of humble origin.”

## UNIT-2 SESSION-I

# HUMAN RIGHTS ARE INDIVISIBLE AND INTERDEPENDENT

**“Extreme poverty and exclusion from society constitute a violation of human dignity”<sup>1</sup>**

**A** basic principle of human rights is that they are non-hierarchical. The International Covenant on Economic, Social and Cultural Rights came into force in 1976, followed three months later by the International Covenant on Civil and Political Rights. From the outset the two Covenants were explicit about their interdependence.

“Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”.<sup>1</sup>

Articles 1 of both Conventions, concern the right to self-determination in both political and economic context. This recognises that socio-economic disadvantages in relation to education, employment, financial capability, crime and health not only determine a person’s outcomes in life, but also their political influence. Disabled people, minorities, ‘lower’ castes, older people and women are disproportionately represented in disadvantaged socio-economic groups. They are also chronically under-represented in decision making processes.

<b>Indivisible</b>	There is no hierarchy of rights. Each is as important as the others;
<b>Interdependent</b>	The violation of any human right will almost always lead to consequential violation of others;
<b>Inalienable</b>	Human rights are yours by birth they cannot be given or taken away by any person or authority;
<b>Universal</b>	The same human rights are applicable to everyone wherever they are and in whatever circumstances;
<b>Equality</b>	Human rights are to be enjoyed equally and unconditionally by every person.

### **Democracy and the right to food**

The term ‘human rights’ was probably first used in Europe in the 18<sup>th</sup> century and tended to focus on the limits to freedom of ownership and independence. The link drawn between human rights and liberal democracy has led critics to claim that human rights are biased towards Western religion and culture.

Various revolutionary movements have rejected democracy and prioritised alleviating poverty above the right to participate in government. In some cases, democracy is held as an aspiration to be realised once food security and economic parity have been achieved.

“Food is still more important than the right to vote. Until most of China’s citizens have decent shelter, adequate food, clean water, affordable healthcare and access to education, the issue of political reform is likely to remain on the back burner.”<sup>2</sup>

1. Commentary: In China, food is more important than the vote; by Zhang Quanyi, Column: Global Survey, Published: October 09, 2007.

2. Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2003/73: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/74552c7e9853750bc1256d6000524830?Opendocument>

The question, “what good is a vote to a starving person” was addressed by Eleanor Roosevelt, the first UN General Secretary and the driving force behind the International Bill of Human Rights. She recognised that “Freedom means nothing to a man with an empty stomach. He will accept a dictator if, with the dictator, comes the promise of food and shelter.” But she also recognised the freedom to eat as the first essential freedom. She contended that freedom to meet one’s essential needs including the ability to ensure food security was dependent on self-determination and personal security.

It could be argued that a benevolent dictatorship could provide citizens with a decent standard of living and sufficient freedom to live life as they choose. However, the very principle of dictatorship puts some people above others and above the law. Without some form of accountability there are no means to prevent a benevolent dictatorial regime becoming a despotic one.

Democracy enables citizens to hold the government accountable but still does not in itself assure human rights. Even in a democracy where the poor are in the majority of the electorate, economic systems and traditions can prevent their access to rights. Large corporations often have greater power than individual governments or can effectively bribe, or blackmail or arm-twist political powers to allow unfettered industrialisation or marketing, regardless of the cost to the community, local economy or environmental sustainability.

Civil and political rights go beyond the right to vote. For a democracy to be meaningful people must be able to live without restrictions to their freedom of movement and association, without fear of arbitrary arrest, persecution or torture. People must be free to protest when their right to livelihood and access to food, shelter or health is impeded by government actions, whether or not the government was democratically elected. The freedom to actively pursue your rights is as important as freedom from their violation.

Governments can be guilty of violating rights as much by failing to enable their pursuance as by active suppression. It is one thing to admit to an entitlement but quite another to make it achievable. Therefore fundamental to protection of human rights is positive action to enable their realisation.

This puts individuals at the centre of rights but also recognises that certain groups are at greater risk of their violation and are less able to pursue them.

#### **Points for discussion**

1. If a slave was given good food, nice accommodation, access to healthcare and education, would s/he still be a slave?
2. Does democracy ensure justice, dignity and freedom for citizens?

### **The right to health and interdependence with other human rights**

It is an obvious point to make that violating the right to health is likely to impair the enjoyment of other human rights, such as the rights to education or work. Likewise the rights to food, water, an adequate standard of living, housing, freedom from discrimination, privacy, access to information, right to participation, and the right to benefit from scientific progress and its applications – all contribute to the enjoyment of the right to health.

### **Non-discrimination and the right to health**

The marginalisation of specific population groups is generally at the root of fundamental structural inequalities in society. This, in turn, may make these groups more vulnerable to poverty and ill health. Such groups have less access to health services, receive less health information and are less likely to have adequate housing and safe drinking water. Their children have a higher mortality rate and more likely to be severely malnourished than the general population. Multiple disadvantages such as being female and disabled have the effect of multiplying the discrimination.

The International Covenant on Economic, Social and Cultural Rights (art. 2 (2)) and the Convention

on the Rights of the Child (art. 2 (1)) identify the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status. According to the Committee on Economic, Social and Cultural Rights, “other status” may include health status (e.g. HIV/AIDS) or sexual orientation. States have an obligation to prohibit and eliminate discrimination on all grounds and ensure equality to all in relation to access to health care and the underlying determinants of health. The International Convention on the Elimination of All Forms of Racial Discrimination (art. 5) also stresses that States must prohibit and eliminate racial discrimination and guarantee the right of everyone to public health and medical care. States must also recognise and provide for the differences and specific needs of groups that generally face particular health challenges, such as higher mortality rates or vulnerability to specific diseases. They must also ensure that particular population groups, such as women, children or persons with disabilities receive additional protection and standards of health care.

The UN Committee on Economic, Social and Cultural Rights has made it clear that vulnerable members of society must be protected and that affordability is no excuse when relatively low-cost targeted programmes can have the desired health impacts.

### **Constitution of India (1950)**

Part IV, art. 47, articulates a duty of the State to raise the level of nutrition and the standard of living and to improve public health: “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. . . .”

### **The right to health in international human rights law**

The right to the highest attainable standard of health is a human right recognised in international human rights law. The International Covenant on Economic, Social and Cultural Rights, widely considered as the central instrument of protection for the right to health, recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” It is important to note that the Covenant gives both mental health, which has often been neglected, and physical health equal consideration.

In addition, the treaty bodies that monitor the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child have adopted general comments or general recommendations on the right to health and health-related issues. These provide an authoritative and detailed interpretation of the provisions found in Treaties. Numerous conferences and declarations, such as the International Conference on Primary Health Care (resulting in the Declaration of Alma-Ata), the United Nations Millennium Declaration and Millennium Development Goals, and the Declaration of Commitment on HIV/AIDS, have also helped clarify various aspects of public health relevant to the right to health and have reaffirmed commitments to its realisation.

### **Declaration of Alma-Ata, 1978**

The Declaration affirms the crucial role of primary health care, which addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly (art. VII). It stresses that access to primary health care is the key to attaining a level of health that will permit all individuals to lead a socially and economically productive life (art. V) and to contributing to the realization of the highest attainable standard of health.

## **International Covenant on Economic, Social and Cultural Rights**

### **Article 12**

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
  - a) The provision for the reduction of stillbirth rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Subsequent international and regional human rights instruments address the right to health in various ways. Some are of general application while others address the human rights of specific groups, such as women or children.

### **International human rights treaties recognising the right to health**

- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination: Art. 5 (e) (iv)
- The 1966 International Covenant on Economic, Social and Cultural Rights: Art. 12
- The 1979 Convention on the Elimination of All Forms of Discrimination against Women: Arts. 11 (1) (f), 12 and 14 (2) (b)
- The 1989 Convention on the Rights of the Child: Art. 24
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Arts. 28, 43 (e) and 45 (c)
- The 2006 Convention on the Rights of Persons with Disabilities: Art. 25

## UNIT-2 SESSION-II

### How to file a Public Interest Litigation (PIL)

#### What is a PIL?

- Public Interest Litigations are to protect the fundamental rights of people who are poor, unaware or otherwise disadvantaged
- Differs from ordinary litigation in that it is not filed by one private person against another for their own advantage
- The presence of 'public interest' is essential

#### Public interest – public involvement

- Public Interest Litigation costs only a nominal fixed court fee so provides concerned citizens with an inexpensive legal remedy to social injustices
- Litigants can use PIL to draw attention to public issues, especially in the fields of human rights, consumer welfare and environmental issues

#### When can a PIL be filed

- When injury or harm is caused to an individual or community by the wrongful act or omission by the state or a public authority
- When the fundamental human rights of weaker sections of the community are ignored or violated
- When such persons/community cannot approach court themselves due to financial or social constraints
- Where there is no frivolous or malicious intent or vested interests

#### Against whom a PIL lies

- A PIL is always against a government or government funded body
- It is always done on behalf of persons who are unable to take the case themselves
- It cannot be used to settle a private dispute

#### Who can file a PIL?

- Any adult person with bona fide intention in the interest of the public
- Any NGO or like organisation or Association (better if registered)
- It can be helpful if prominent people are also associated with the petition

## UNIT-2 SESSION-II

### Where to file a PIL

- In the Supreme Court  
–Under Article 32 of the Constitution
- In the State High Court  
–Under Article 226 of the Constitution

### How to draft a PIL

- A PIL begins with the Cause (title).  
The title consists of the name & address of the petitioner and the respondents
- The respondents are all those government officials/departments against whom you want an order or direction

### The first paragraph

- Here describe who you are
- What are your qualifications
- What work have you done on the issue
- Basically, one has to show that the petitioner is a responsible person

### The second paragraph

- Identify the respondents by name, title and or role
- Explain why you want orders against them
- Describe the wrong that has been done by them
- Say who is guilty of what violation

### The third paragraph onwards

- In chronological order, describe your grievance
- It is very important that you describe the facts in the greatest detail
- Use short paragraphs making clear the event took place on each date
- Use simple language. Its not necessary to use legal language

- Write as if you are preparing a report
- Make the presentation as factually detailed as possible
- If you have press clippings they will be annexed with the petition
- The same applies to reports, photos and other documents
- Make a short summary extract in the body of the petition and annex it to the petition

## UNIT-2 SESSION-II

### Remember...

- Never file a public interest petition based only on a news report. Every court wants to see a well researched, serious document, but not too long
- A balance must be drawn between the urgency of the issue and the requirement of a well prepared petition

### Legal pleadings

- A petition is required to state only the facts of the case. The court is expected to know the law
- If you know of any judgement from an Indian court or abroad which is special and relevant, annex the judgment
- You don't need to be a legal expert but you do need to know a few basic articles of the Constitution

### The relief clause

- Set out what you want the court to order
- Frame the clause as if you are the judge directing the government to do or to refrain from doing a certain act
- Don't repeat facts in the prayer clause
- Don't put arguments into the prayer clause

### How much does a PIL cost?

- In most states and in the Supreme Court the filing charges are between Rs 200 – Rs 500
- The main costs of a PIL are the advocate fees. If an advocate agrees to do the work free of charge (pro-bono) the cost is very accessible
- Typing and photocopy are additional costs
- Including all costs a normal PIL should not cost more than Rs 3000

### How long does it take?

- After a case is filed it normally comes before the court within three weeks. In an emergency it can come on board the next day (URGENT APPLICATION)
- The interim order can usually be made almost immediately. There are delays in certain circumstances
- A PIL done aggressively can result in an order almost immediately

### Do you need a lawyer?

- A committed and competent lawyer helps
- If you feel that the lawyer is not on your wavelength or does not share your passion then change your lawyer
- Do not allow yourself to be dominated by your lawyer
- If a committed and competent lawyer is not available you can file and argue your case yourself



## UNIT-2 SESSION-II

### Appearing for yourself

- In court do not attempt to read the whole petition
- First, explain the main point of the case (the grievance e.g. discrimination, abuse of power, denial of benefits etc) and tell the court what you want them to do
- After giving the judge an overview read only the most essential and striking features of your petition

- If some parts of the annexure are important draw the courts attention to them
- Every page of the petition is numbered so be ready with your points and your page numbers. Judges need to be taken to a particular page quickly so that time is not wasted
- A judge may give you anything between 5 minutes to 20 minutes to present your case. So be prepared to present your main case within 5 minutes

- Use the Right to Information Act for collecting information from government departments on your issues if necessary
- Some of the best PILs in the country have been done by non-lawyers who appeared in person

### Landmark PILs

#### **Hussainara Khatoon (I) vs State of Bihar**

- One of the earliest cases of public interest litigation
- Right of Persons in Jail
- A person cannot be detained longer than he is sentenced
- The Supreme Court accepted the locus standi of the advocate to maintain the writ petition

### Landmark PILs

#### **Upendra Baxi vs State of UP (1983) 2 SCC 308**

- This case highlighted various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution
- These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for sexual purposes, and the non-payment of wages to bonded labourers among others

### Landmark PILs

#### **Sheela Barse vs State of Maharashtra (1983) 2 SCC 96**

- Detention of female prisoners only in designated female lock-ups guarded by female constables and accused females could be interrogated only in the presence of a female police official

## UNIT-2 SESSION-II

### Landmark PILs

#### **Sunil Batra vs Delhi Administration (1978) 4 SCC 494**

- It was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court
- The prisoner complained of a brutal assault committed by a Head Warden on another prisoner

### Landmark PILs

#### **Parmanand Katara vs Union of India (1989) 4 SCC 286**

- Medical establishments to provide instant medical aid to people injured in road accidents, notwithstanding the formalities to be followed under the procedural criminal law

### Landmark PILs

#### **MC Mehta vs Union of India**

- Strict liability for the leak of Oleum gas from a factory in New Delhi
- Directions to check pollution in and around the Ganges river
- The relocation of hazardous industries from the municipal limits of Delhi
- Directions to state agencies to check pollution in the vicinity of the Taj Mahal

### Landmark PILs

#### **Vishaka vs State of Rajasthan (1997) 6 SCC 241**

- The petition in that case originated from the gang-rape of a grassroots social worker
- The court invoked the text of the CEDAW and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces

### Landmark PILs

#### **Right to food campaign: People's Union for Civil Liberties vs Union of India (2007) 1 SCC 728**

- Court sought to ensure compliance with the policy of supplying mid-day meals in government-run primary schools and other schemes ensuring food securities

### Landmark PILs

#### **Olga Tellis vs Bombay Municipal Corporation (1985) 3 SCC 545**

- A petition was filed by a journalist Olga Tellis challenging the decision of the municipality to remove huts from pavements, sometimes without even giving a hearing to the slum dwellers
- The court held that such an action could be challenged as violative of Article 21 of the Constitution of India

## UNIT-2 SESSION-II

### PILs on civil liberties

- There have been a series of cases dealing with civil liberties making public interest litigation as a medium. These have led to the expansion of the ambit and scope of Article 21. The right to live with human dignity is considered as one of the cardinal fundamental rights available to a person for the “dignity of man supersedes all other considerations”. It includes inter alia the following cases:
- **Charles Sobhraj vs Superintendent, Central Jail [(1978) 4 SCC 104]**
- The court emphasised “that imprisonment does not spell farewell to fundamental rights...”

- The principle that free legal services to the poor and the needy was an essential element of any reasonable, fair and just procedure under Article 21 was upheld in **MH Hoskot vs State of Maharashtra 1978 (3) SCC 544**

### Rights of a convict available against the State

- The rights of an arrested person are highlighted in **DK Basu vs State of West Bengal [(1997) 1 SCC 416]**
- The Supreme Court’s observation was as follows: “An enforceable right to compensation in cases of ‘torture’ including ‘mental torture’ inflicted by the State or its agencies is now a part of the public law regime in India”
- In **TV Vatheeswaran vs State of Tamilnadu [(1983) 2 SCC 68]** the Supreme Court held a prisoner on death row has a right to move the court for quashing of the sentence in case of unreasonable delay in the carrying out of the sentence

## UNIT-2 SESSION-III

### **EXERCISE: THE RIGHT TO FOOD**

**Step 1:** Provide each participant with a summary of the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant of Civil and Political Rights, and the Convention on the Rights of the Child.

Provide participants with background information on these documents, noting especially that the International Convention on Civil and Political Rights and on Economic, Social and Cultural rights are part of the body of international law and are international legal standards designed to implement the purposes of the Universal Declaration of Human Rights.

**Step 2:** Divide participants in three groups. Each group is to study one Convention and record the articles and paragraphs that could be cited to support the argument that the right to food is stipulated or implied in the international standards. Point out the difference between a right being stipulated and one being implied.

**Step 3:** Bring the groups together again and on a board of flip chart

- create one large retrieval chart with headings for each Convention
- fill in the chart with the findings of each group
- review the articles which might support the Right to Food as a human right in each document

**Step 4:** Students explain how the Articles might be interpreted to support a human right to food; How can or do they argue that access to sufficient amounts of nutritious food can be a human right? What counter-arguments might be expected? What do the participants themselves believe? Are there different opinions in the group? Is it realizable to have a right to food? What reasons do they give for holding their respective opinions?

Keep in mind: As long as they are based on clearly stated reasons, all opinions will be considered.

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(Adapted from *Understanding Human Rights: A Manual for Human Rights Education* by Education and Training Research Council for Human Rights and Democracy [www.etc-graz.at](http://www.etc-graz.at))

## UNIT-2 ADDITIONAL MATERIAL-I

# **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESR)**

### **UNOFFICIAL SUMMARY**

#### **Article 1**

All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development.

#### **Article 2**

Each State Party undertakes to take steps to the maximum of its available resources to achieve progressively the full realisation of the rights in this treaty. Everyone is entitled to the same rights without discrimination of any kind.

#### **Article 3**

The States undertake to ensure the equal right of men and women to the enjoyment of all rights in this treaty.

#### **Article 4**

Limitations may be placed on these rights only if compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

#### **Article 5**

No person, group or government has the right to destroy any of these rights.

#### **Article 6**

Everyone has the right to work, including the right to gain one's living at work that is freely chosen and accepted.

#### **Article 7**

Everyone has the right to just conditions of work; fair wages ensuring a decent living for himself and his family; equal pay for equal work; safe and healthy working conditions; equal opportunity for everyone to be promoted; rest and leisure.

#### **Article 8**

Everyone has the right to form and join trade unions, the right to strike.

#### **Article 9**

Everyone has the right to social security, including social insurance.

## UNIT-2 ADDITIONAL MATERIAL-I

### **Article 10**

Protection and assistance should be accorded to the family. Marriage must be entered into with the free consent of both spouses. Special protection should be provided to mothers. Special measures should be taken on behalf of children, without discrimination. Children and youth should be protected from economic exploitation. Their employment in dangerous or harmful work should be prohibited. There should be age limits below which child labor should be prohibited.

### **Article 11**

Everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Everyone has the right to be free from hunger.

### **Article 12**

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.

### **Article 13**

Everyone has the right to education. Primary education should be compulsory and free to all.

### **Article 14**

Those States where compulsory, free primary education is not available to all should work out a plan to provide such education.

### **Article 15**

Everyone has the right to take part in cultural life; enjoy the benefits of scientific progress.

## UNIT-2 ADDITIONAL MATERIAL-II

# INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

### UNOFFICIAL SUMMARY

#### **Article 1**

All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development.

#### **Article 2**

Each State must respect and ensure to all people within its territory and jurisdiction all rights in this treaty without discrimination of any kind.

#### **Article 3**

The States undertake to ensure the equal right of men and women to the enjoyment of all rights in this treaty.

#### **Article 4**

Derogation from State obligations is to be strictly limited.

#### **Article 5**

Derogation from State obligations is to be strictly limited.

#### **Article 6**

Everyone has the right to life.

#### **Article 7**

No one shall be subjected to torture or cruel or degrading treatment or punishment.

#### **Article 8**

No one shall be held in slavery or servitude.

#### **Article 9**

Everyone has the right to liberty and security of person. No one shall be arrested or detained arbitrarily.

#### **Article 10**

Everyone deprived of liberty shall be treated with respect.

## UNIT-2 ADDITIONAL MATERIAL-II

### **Article 11**

No one shall be imprisoned merely for failing to pay a debt.

### **Article 12**

Everyone has the right to freedom of movement and to leave and enter his own country.

### **Article 13**

An alien lawfully in the territory of a State Party may be expelled only in accordance with law.

### **Article 14**

Everyone is equal before the law. Everyone has the right to a fair trial. Everyone has the right to be presumed innocent until proven guilty. No one may be compelled to testify against himself.

### **Article 15**

No one shall be held guilty of a criminal offence when the act did not constitute a criminal offence at the time it was committed.

### **Article 16**

Everyone has the right to be recognised everywhere as a person before the law.

### **Article 17**

Everyone has the right to privacy.

### **Article 18**

Everyone has the right to freedom of thought, conscience and religion.

### **Article 19**

Everyone has the right to freedom of opinion and expression.

### **Article 20**

Propaganda for war shall be prohibited. Hate speech that constitutes incitement to discrimination or violence shall be prohibited.

### **Article 21**

Everyone has the right to peaceful assembly.

### **Article 22**

Everyone has the right to freedom of association, including the right to join a trade union.



## UNIT-2 ADDITIONAL MATERIAL-II

### **Article 23**

All adults have the right to marry and found a family. Women and men have equal rights to marry, within marriage, and at its dissolution.

### **Article 24**

Every child shall have protection as required by his status as a minor, without discrimination of any kind. Every child has the right to a nationality.

### **Article 25**

Every citizen has the right to take part in public affairs and to vote.

### **Article 26**

Everyone is equal before the law and has the right to equal protection of the law, without discrimination of any kind.

### **Article 27**

Ethnic, religious, or linguistic minorities shall not be denied the right to enjoy their own culture.

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## THE RIGHT TO HEALTH CARE: MOVING FROM IDEA TO REALITY

Abhay Shukla

*“Should medicine ever fulfil its great ends, it must enter into the larger political and social life of our time; it must indicate the barriers which obstruct the normal completion of the life cycle and remove them. Should it ever come to pass, medicine, whatever it may then be, will become the common good of all.”*

—Rudolf Virchow, c.1850

India is known to have poor health indicators in the global context, even in comparison with many other developing countries. However, we also bear the dubious distinction of being among the more iniquitous countries of the world, as far as health status of the poor compared to the rich is concerned. This underscores the fact that there is a tremendous burden of unnecessary morbidity and mortality, which is borne almost entirely by the poor. Some striking facts in this regard are –

- Infant mortality among the economically lowest 20 percent of the population is 109, which is 2.5 times the IMR among the top 20 percent population of the country.
- Under-five mortality among the economic bottom 20 percent of the population (bottom quintile) is 155, which is not only unacceptably high but is also 2.8 times the U5MR of the top 20 percent (top quintile).
- Child mortality (1-5yrs age) among children from the ‘low standard of living index’ group is 3.9 times that for those from the ‘High standard of living index’ group, according to recent NFHS data (IIPS, 2002). In India, every year two million children under the age of five years die, of largely preventable causes and mostly among the poor. If the entire country were to achieve a better level of child health, for example the child mortality levels of Kerala, then 16 lakh deaths of under-five children could be avoided every year. This amounts to 4380 avoidable deaths every day, which translates into three avoidable child deaths every minute.
- Tribals, who account for only 8 percent of India’s population, bear the burden of 60 percent of malarial deaths in the country.

Such gross inequalities are of course morally unacceptable and are a serious social and economic issue. In addition, such a situation may also be considered a gross violation of the rights of the deprived sections of society. This becomes even more serious when viewed in the context of gross disparities in access to health care –

- The richest quintile of the population, despite overall better health status, is six times more likely to access hospitalisation than the poorest quintile. This actually means that the poor are unable to afford and access hospitalisation in a large proportion of illness episodes, even when it is required
- The richest quintile has three times higher level of coverage for measles immunization compared to the poorest quintile. Similarly, a mother from the richest 20 percent of the population is 3.6 times more likely to receive antenatal care from a medically trained person, compared to a mother from the poorest 20 percent. The delivery of the richer mother is over six times more likely to be attended by a medically trained person than the delivery of the poor mother

- As high as 82 percent of outpatient care is accessed from the private sector, met almost entirely by out-of-pocket expenses, which is again often unaffordable for the poor
- About three-fourths of spending on health is made by households and only one-fourth by the government. This often pushes the already vulnerable poor into indebtedness, and in over 40 percent of hospitalisation episodes, the costs are met by either sale of assets or taking loans
- The per capita public health expenditure in India is abysmally low at rupees 21 per person, among the lowest in the world. India has one of the most privatized health systems in the world (only five countries on the globe are worse off in this respect), effectively denying the poor access to even basic health care.

The gist of these sample facts is that the existing system of 'leave it to the market' effectively means **'leave health care for the rich and leave the poor to fend for themselves'**.

One implication that emerges from the above discussion is that the problem of large-scale ill-health in India should not be seen as primarily a technical-medical issue. The key requirement is not newer medical technologies, more sophisticated vaccines or diagnostic techniques. The fact that the prosperous sections of the population enjoy a reasonably good health status implies that *the technical means to achieve good health do broadly exist in our country today* (though there is definitely a need to better adapt these to our country's conditions and traditions, and certain improved techniques might help in specific contexts).

*In fact, for the vast majority, the key barriers to good health is not the lack of technology but poverty and health system inequity.* Poverty, a manifestation of social inequity, leads to large sections of the population being denied adequate nutrition, clean drinking water and sanitation, basic education, good quality housing and a healthy local environment – which are all prerequisites for health. At the same time, we have a *highly inequitable health system* which denies quality health care to all those who cannot afford it (the fact that even those who can afford it do not always get rational care is another important, but somewhat separate issue!). In this paper, which is primarily addressed to those working in the health sector, we will focus on the critical *health system* issues, with a rights-based approach. Let us see how we can view this entire situation from a rights-based perspective.

### **The right to health care as a component of the right to health**

Looking at the issue of health under the equity lens, it becomes obvious that the massive burden of morbidity and mortality suffered by the deprived majority is not just an unfortunate accident. It constitutes the daily denial of a healthy life to crores of people because of deep structural injustice, within and beyond the health sector. This denial needs to be addressed in a rights based framework, by systematically establishing the right of every citizen of this country, to a healthy life. More specifically, health care can no longer be viewed as just a technical issue to be left to the experts and bureaucrats, an issue of charity to be dealt with by benevolent service delivering institutions, or a commodity to be sold by private doctors and hospitals. The role of all these actors needs to be redefined and recast in a framework where every person, including the most marginalized, is assured of basic health care and can demand and access this as a right.

It is clear that achieving a decent standard of health for all requires a range of far-reaching social, economic, environmental and health system changes. There is a need to bring about broad transformations both within and beyond the health care sector, which would ensure an adequate standard of health for all. To promote the right to health requires action on two related fronts (WHO, 2002):

### **Promoting the right to underlying determinants of health**

This involves working for the right to 'the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing,

healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health' (WHO, 2002). Agencies engaged in the health sector cannot deal with most of these issues on their own, though they need to highlight the need for better services and conditions, and can advocate for improvements in these areas in a rights-based framework. Organisations working in the health sector can support other agencies working directly in these areas, to help bring about relevant improvements.

### **Promoting the right to health care**

Given the gross inequities in access to health care and inadequate state of health services today, one important component of promoting the right to health would be to ensure access to appropriate and good quality health care for all. This would involve reorganisation, reorientation and redistribution of health care resources on a societal scale. The responsibility of taking forward this issue lies primarily with agencies working in the health sector, though efforts in this direction would surely be supported by a broad spectrum of society.

In the remaining portion of this paper, we will focus on the process of establishing the right to health care as a imminent task, to be taken up by organisations in the health sector in the broader context of right to health outlined above.

### **Justification for establishing the right to health care**

We may view the justification for this right at three levels – constitutional-legal, social- economic and as a human right issue.

#### **Constitutional and legal justification**

The right to life is recognised as a fundamental right in the constitution (Article 21) and this right has been quoted in various judgements as a basis for preventing avoidable disease producing conditions and to protect health and life. The Directive Principles of the Indian Constitution include article 47, which specifies the duty of the state in this regard:

“The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.”

In an important judgement (*Paschim Banga Khet Mazdoor Samity and others vs state of West Bengal and another, 1996*), the Supreme Court of India ruled that –

In a welfare state the primary duty of the government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the government in a welfare state.... Article 21 imposes an obligation on the state to safeguard the right to life of every person.... the government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. *Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life guaranteed under Article 21.* (emphasis added)

Similarly in the case of *Bandhua Mukti Morcha vs Union of India and others, 1982* concerning bonded workers, the Supreme Court gave orders interpreting Article 21 as mandating the right to medical facilities for the workers.

Basic social services are now being recognised as fundamental rights with the 93<sup>rd</sup> amendment in the Constitution accepting education as a fundamental right. Despite the controversy and problems regarding the actual provisions of the Bill, it is now being accepted that essential social services like education can be enshrined in the fundamental rights of the Constitution. This forms an appropriate

context to establish the right to health care as a constitutionally recognised fundamental right.

### **Social and economic justification**

It is now widely recognised that besides being a basic human right, provision of adequate health care to a population is one of the essential preconditions for sustained and equitable economic growth. The proponents of 'economic growth above all' may do well to heed the words of the Nobel Laureate economist Amartya Sen:

“Among the different forms of intervention that can contribute to the provision of social security, the role of health care deserves forceful emphasis . . . A well developed system of public health is an essential contribution to the fulfilment of social security objectives. We have every reason to pay full attention to the importance of human capabilities also as instruments for economic and social performance . . . Basic education, good health and other human attainments are not only directly valuable . . . these capabilities can also help in generating economic success of a more standard kind” (*from India: Economic Development and Social Opportunity by Jean Dreze and Amartya Sen*)

### **Human rights justification**

The right to basic health care is recognised internationally as a human right and India is a signatory to the International Covenant on Economic, Social and Cultural Rights which states in its Article 12 –

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health . . . The steps to be taken . . . shall include those necessary for . . . The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Reference can be made to other similar international conventions, wherein the Government of India has committed itself to providing various services and conditions related to the right to health, e.g. the Alma Ata declaration of 'health for all by 2000'. The National Human Rights Commission has also concerned itself with the issue of 'public health and human rights' with one of the areas of discussion being 'access to health care'. The time has come to begin asking as to how these human rights related commitments and concerns will be translated into action in a realistic, time-bound and accountable framework.

### **Core content of the right to health care in the first phase**

Moving towards establishing the right to health care is likely to be a process with various phases. First let us see what could be the core content of this right in the first phase, which could be achieved in short to medium term.

### **Right to a set of basic public health services**

In the context of the goal of 'health for all' and various health policy documents, an entire range of health care services are supposed to be provided to all from village level to tertiary hospital level. As of today these services are hardly being provided adequately, regularly or of the required quality. Components of the public health system to be ensured in a rights-based framework include:

1. Adequate physical infrastructure at various levels
2. Adequate skilled humanpower in all health care facilities
3. Availability of the complete range of specific services appropriate to the level
4. Availability of all basic medications

The expected infrastructure and services need to be clearly identified and displayed at various levels and converted into an enforceable right, with appropriate mechanisms to functionalise this. In a justiciable framework, basic medical services especially at primary and secondary levels cannot be

refused to anyone, for example, a PHC cannot express inability to perform a normal delivery or a rural hospital cannot refuse to perform an emergency cesarean section. In case the requisite service is not provided by the facility when required, the patient would be entitled to approach a private hospital and receive care, for which the hospital would receive time-bound reimbursement of costs incurred, at standard rates. This would firstly constitute a strong pressure on the public health system to perform and deliver all services, and secondly, would ensure that the patient receives the requisite care when required, without incurring personal expenses. This forms one of the first steps towards accessing the right to health care.

Similarly, the state has an explicit obligation to maintain public health through a set of preventive and promotive services and measures. These include coverage by immunisation, antenatal care, and prevention, detection and treatment of various communicable diseases. However, it should also encompass the operation of epidemiological stations for each defined population unit (say a block), organising multi-level surveillance and providing a set of integrated preventive services to all communities and individuals.

### **Right to emergency medical care and care based on minimum standards from private medical services**

Although the right to health care is not a fundamental right in India today, the right to life is. In keeping with this 'emergency medical care' in situations where it is lifesaving, is the right of every citizen. No doctor or hospital, including those in the private sector, can refuse minimum essential first aid and medical care to a citizen in times of emergency, irrespective of the person's ability to pay for it. The Supreme Court judgement quoted above (*Paschim Banga Khet Mazdoor Samity and others vs State of West Bengal and another, 1996*) directly relates to this right. Clear norms for emergency care need to be laid down if this right is to be effectively implemented. As a parallel, we can look at the constitutional amendments enacted in South Africa, wherein the right to emergency medical care has been made a fundamental right.

There is an urgent need for a comprehensive legislation to regulate qualification of doctors, required infrastructure, investigation and treatment procedures especially in the private medical sector. Standard guidelines for investigations, therapies and surgical decision making need to be adopted and followed, combined with legal restrictions on common medical malpractices. Maintaining complete patient records, notification of specific diseases and observing a ceiling on fees also needs to be observed by the private medical sector. The government of Maharashtra is in the process of enacting a modified act to address many of these issues; The national health policy 2002 stipulates enactment of suitable regulations for regulation of minimum standards in the private medical sector in the entire country by the year 2003. This would include statutory guidelines for the conduct of clinical practice and delivery of medical services. There is a need to shape such social regulations within the larger, integrated framework of right to health care.

### **Right to essential drugs at affordable cost**

Attaining this right would consist of two components:

1. Availability of certain basic medications free of cost through public health system
2. A national essential drug policy ensuring the production and availability of an entire range of essential drugs at affordable prices

The Union as well as state governments need to publish comprehensive lists of essential drugs for their areas. A ceiling on the prices of these drugs must be decided and scrupulously adhered to, with production quotas. A strict ban be imposed on irrational combinations and unnecessary additives to these drugs.

## **Right to patient information and redressal**

The entire range of treatment and diagnosis related information should be made available to every patient in both private and public medical sector. Every patient has a right to information regarding staff qualifications, fees and facilities for any medical centre even before they decide to take treatment from the centre. Information about the likely risks and side effects of all major procedures can be made available in a standard format to patients. Information regarding various public health services, which people have a right to demand at all levels, should be displayed and disseminated. This should include information about complaint mechanisms and for redressal of illegal charging by public health personnel.

Superseding the CPA, a more patient-friendly grievance redressal mechanism needs to be made functional, with technical guidance and legal support being made available to all those who approach this system. This would provide an effective check on various forms of malpractice. In case the services mandated under this right are not given by a particular facility, the complainant need not take recourse to lengthy legal procedures. Rather, the grievance redressal mechanism with participation of consumer and community representatives should be empowered to take prompt, effective and exemplary action.

## **Right to monitoring and accountability mechanisms**

Keeping in mind the devolution of powers to Panchayati Raj system, we need to propose an effective system of people's monitoring of public health services which would be organised at the village, block and district levels. Community monitoring of health services would significantly increase the accountability of these services and will lead to greater people's involvement in the process of implementing them. The union ministry of health and family welfare, with support from WHO, has been successfully implementing an innovative pilot project for 'empowering the rural poor for better health' in six talukas of the country. Taking this and various other experiments into account, a basic framework for such monitoring needs to be developed.

## **The broader objective – a system for universal health care and basic health care as a fundamental constitutional right**

While trying to achieve these specific rights in the first phase, our overall goal should be to move towards a system where every citizen has assured access to basic health care, irrespective of capacity to pay. A number of countries in the world have made provisions in this direction, ranging from the Canadian system of universal health care and NHS (National Health Service) in Britain to the Cuban system of health care for every citizen. In the Indian context, the right to health care needs to be enshrined in the Constitution as a fundamental right. One conception of the minimum content of the fundamental right to health care is outlined in the accompanying box—



**Proposed minimum content of the fundamental right to health care:**

1. Making right to health care a legally enforceable entitlement by legal enactment
2. A national health policy with a detailed plan and timetable for realization of the core right to health care
3. Developing essential public health infrastructure required for health care; investing sufficient resources in health and allocating these funds in a cost-effective and fair manner
4. Providing basic health services to all communities and persons; focusing on equity so as to improve the health status of poor and neglected communities and regions
5. Adopting a comprehensive strategy based on a gender perspective so as to overcome inequalities in women's access to health facilities
6. Adopting measures to identify, monitor, control and prevent the transmission of major epidemic and endemic diseases
7. Making reproductive health and family planning information and services available to all persons and couples without any form of coercion
8. Implementing an essential drug policy

*(Adapted from Audrey R. Chapman, The Minimum Core Content of the Right to Health)*

One realistic scenario to make this right functional could be a system of universal social health insurance. The services could be given by a combination of strengthened and community-monitored public health system along with publicly regulated and financed private providers, under a single umbrella. The entire system would be based on public subsidisation and cross-subsidy, with free services to the majority population of rural and urban working people (including vulnerable sections) and affordable premium amounts (which could be integrated with the taxation system) for higher income groups. One key aspect would be that it should be a universal system (not targeted), which would ensure coverage of the entire population and also retain a strong internal demand for good quality services. (Of course, certain very affluent sections may choose to pay their share of taxation / premium and yet opt out and access private providers.) Another issue is that there would be no fees or nominal fees at the time of giving the services. Finally, the patient would be assured of a range of services with minimum standards, whether given from the public health system or publicly financed and regulated private providers. The entire system could be managed in a decentralised manner, with consumers monitoring quality and accessibility of services.

This entire model would imply a significantly higher public expenditure on health services. However, with decentralised management and a focus on rational therapy, it has been estimated that it should be possible to organise the basic elements of such a system by devoting about 3 percent of the GNP towards public health care to start with. It should be progressively raised to the level of 5 percent of GNP to give a full range of services to all. The funds could be partly raised by appropriate taxation of unhealthy industries, reallocations within the health sector (including reorganising existing schemes like ESI) and ending all subsidisation of the private medical sector. This needs to be combined with changed budgetary priorities and higher overall allocation for the health sector. Incidentally, the new national health policy claims on paper the intention to more than double the financial allocation for the public health system and bring it to the level of 2 percent of the GDP, and to increase utilisation of public health facilities to above 75 percent by the end of this decade. This admirable yet vague intention needs to be converted into concrete action by means of strong and sustained pressure from various sections of civil society, coupled with concrete proposals to functionalise universal access to health care.

In this context, ensuring health care for all is not an unrealistic scenario. It is a practical possibility and an imperative for a nation which, as the 'world's largest democracy', claims to accord certain basic rights to its citizens, including the right to life in its broadest sense.



## **Ways ahead – Creating a consensus on the right to health care**

Some of the possible areas of activity of a potential broad coalition which could support a campaign on right to health care are suggested below:

### **Involving diverse social sectors in a dialogue**

While some health activists and groups have mooted the concept of the right to health care, it is an idea which is yet to be widely discussed and accepted in our country. One of the key tasks in the immediate future is to generate discussion at the broadest possible level about this right. Groups to be involved in such a debate include health policy makers, medical and public health academics, private medical professionals, various segments of the NGO sector including both health related and non-health NGOs, trade unions of health care personnel and people's organisations. It is obvious that the viewpoints of various social groups and actors may be greatly divergent on this issue. However, the very process of discussing and debating the issue gives it a primary legitimacy, which then needs to be built upon. This becomes a basis for generating a continuously widening consensus about the basic justification, content and implementation model for the right to health care.

### **Collating international experience**

There is valuable international experience available about mandating the right to health or health care. These experiences need to be collated and analysed with the Indian context in mind. Especially legislation and provisions made in developing countries are of value in this respect.

Twelve different countries of Latin America, which have civil law provisions, include the right to health or state duties to protect health in their constitutions. While Chile was the first country to make such a provision, Argentina, Brazil, and Mexico are also included among these. Cuba, with a socialist Constitution, grants the right to health to its citizens, according it a status equivalent to civil and political rights.

South Africa, after the overthrow of apartheid, has specified certain provisions relevant to this right in Article 27 of its Constitution. This includes mandating the right to access to health care services, specifying that the State must take reasonable legislative measures to achieve realisation of this right, and declaring that no one may be refused emergency medical treatment. From another end, we have a new system of universal health care access in Thailand whose features need to be studied and discussed as relevant to the Indian context.

Similarly, there has been an entire process of developing the concept of right to health and health care in the international human rights discourse. Various United Nations health rights instruments refer to health related rights. The UN International covenant on Economic, Social and Cultural Rights (ICESCR), UN Convention on Rights of the Child (CRC) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are some such significant conventions, in which India is a signatory.

Given this background, one of the critical tasks ahead of us is to make an in-depth study of these experiences and utilise this for developing the judicial form and implementation-related content of the right to health care in the Indian situation.

### **Organising state and national conventions**

One way of developing such a consensus is to organise a series of conventions on the issue of right to health care, first at state level and ultimately at the national level. Each convention could bring together representatives of key stakeholders outlined above, and could result in a clearer conceptualisation of the core content and processes related to making this right functional. The national convention could also culminate in a dialogue with the health minister, promoting the idea of recognising and implementing this right.

### **Discussing detailed proposals to implement the right to health care**

One of the crucial issues in furthering this campaign is the development of a model for implementing this right. This needs to be done keeping in mind the specificities of the Indian health care system, judicial framework (including the fact that health is a state subject), socio-economic situation (including major class, caste and gender disparities) and recent processes such as the 93<sup>rd</sup> Constitutional amendment. Considerable groundwork and consultation is required to develop a model, which would take into account the positions of various stakeholders and form the basis for practical implementation of this right.

### **Forming a multi-sector independent monitory body**

Finally, there is need for a multi-sectoral body with representation from various social sectors to monitor the processes of establishment and implementation of the right to health care. Such a body would have the social legitimacy, diverse experience and capacity to continuously assess the movement towards realisation of this right, and help usher in a new phase in the development of the health system and establishment of socio-economic rights in this country.

*(This note was prepared by Dr Abhay Shukla of CEHAT (Centre For Enquiry Into Health And Allied Themes), for the Seminar on 'Right to Health Care' organised on January 03-04, 2003 during the Asian Social Forum at Hyderabad. Several sections of this article are adapted from Dr Shukla's article 'Right to Health Care' published in Health Action, May 2001)*



## ENTITLEMENTS OF HUNGER

Sachin Kumar Jain

**C**hronic hunger and malnutrition are a reality for a very large section of Indian population, with numbers of people living under conditions of extreme poverty rising sharply over the years. Forced to respond to this miserable state of affairs under pressure from civil society and the apex court, the Government of India (GoI) is working on the enactment of a law to prevent people from hunger and starvation. An empowered group of ministers (eGoM) has been set up by Congress-led United Progressive Alliance (UPA) government to draft the National Food Security Act. This draft has now been forwarded to the cabinet for approval and further action to enact the legislation.

On the surface, the efforts of the Centre may appear pious, but the reality is otherwise. As in the past, the State's callous attitude towards poverty and hunger is evident in the draft papers of the Bill. The government once again looks adamant to shrug off its constitutional duties. Article 47 of the Indian Constitution mentions: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties." But the eGoM entirely rules out this responsibility as its draft for the Food Security Act reads "the definition of food security should be limited to the specific issue of foodgrains security (wheat and rice) and be delinked from the larger issue of nutritional security."

### **The larger picture**

The draft says that the benefit of the Act would be provided to only those whom the Government of India would describe on certain indicators as "poor". We know quite well that identification of poor and statistics related to poverty are quite discrepant. The government data shows 60 million families residing in the country as poor, while the state governments that undertake census survey to identify poor and implement schemes at the ground level, assert that the total number is much higher with around 110 million families remaining deprived of the benefits over the years. Even then, the government has shown no willingness in filling up this huge gap in poverty statistics because this will raise questions on their liberal and neo-capitalist development policies. Food security is a State subject, so state governments should have the decisive stake in defining and identifying poverty. However, state governments would have no say in the process of drafting the NFSA. They will just have to follow the discriminatory and flawed poverty indices; There would be no place for the poor additionally identified by the state governments in the central law. Thus about 45 million families would be absolutely deprived of the benefit of food security-related laws.

It is not just an imaginative debate. According to Arjun Sengupta Committee report on unorganised sector, about 77 percent (850 million) people in the country have to survive on Rs 20 a day, while according to Prof Utsa Patnaik, 76 percent families (840 million people) in India do not get the required calorie intake, which is 2,100 kcalories for urban and 2,400 kcalories for rural areas. In a sense they don't get enough food for survival on a daily basis. When the situation is so grim and clear (that about 75-80 percent people are facing starvation) what is the justification of limiting the proposed law to an imaginary standard of below poverty line (BPL), which believes that only 28 percent people are poor in India? It is being said that the Gandhi bastion is trying to use the proposed Food Security Act as the third strategic intervention after the National Rural Employment Guarantee Act and the Right to Information Act, to make its political ancestry very subterranean and stalwart. But in its present form, the draft Bill could very well push the Congress into a cavernous chasm.

## **Perverse law**

Because of this perverse law, hunger would remain inextricably coupled with 400 million people of the country. It seems that the government intends to break the relation between nutrition and food security. In reality, providing minimum food rights would result into developing and keeping alive the problem of food insecurity. Those who are out of the BPL list and still need cheap food grain to survive should have the right to get it. Universal right to food is the only way to ensure total food security in the country. How the State has dealt with poverty is an issue of political economy. The definition of poverty line in India was based on per capita per month consumption expenditure of Rs 49 and Rs 57 for rural and urban areas respectively at 1973-74 prices to meet per capita daily intake of 2,400 and 2,100 calories. Dr NC Saxena, who headed the committee for poverty identification set up by the ministry of rural development mentions “for the 2004-05 survey the line was approximately Rs 360 and Rs 540 for rural and urban areas respectively but to meet the same calorie requirements in the same fiscal, the poverty line should have been Rs 650 and Rs 1000 per month per capita”. This discrepancy causes chronic hunger at a large level in India, where 79.8 percent and 63.9 percent families in rural and urban areas respectively are bound to live below the existing calorie norms (mentioned above). In this case, the poverty line must address 75.8 percent population in the country.

The right to define poverty and its indicators is under the discretion of the Government of India, especially that of the Planning Commission. The state governments are left with a role to only execute a census survey to list out the names. State governments would not have the right to change the figures even if they find increasing numbers during or after the BPL census. There are gigantic discrepancies between figures presented by union and state governments. If this issue is not resolved, people will continue to pay the price of this huge difference in the count of poor. According to Gol estimates, 4.12 million families are poor in Madhya Pradesh, whereas the state government has identified 6.6 million families as poor. In such a scenario, the central government has declined to increase PDS allocations in any condition. Madhya Pradesh government has time and again raised this issue that estimates of poverty have been delivered by the experts sitting in the national capital, whereas the state government’s estimates are from the field.

Use of BPL card as entitlement criteria will exclude large section of the society from legal food entitlements. It is commonly acknowledged that 46 percent of children in India are malnourished – double than those in Sub-Saharan African countries. It is appalling that maternal mortality rate is very high in India and one of the main reasons is malnourishment amongst women. Apart from universalisation of public distribution system, no other measure can help the state of affairs.

While the populace, particularly undernourished children and women are struggling hard with rising food prices, and growing hunger and inequality, the eGoM has clearly stated that the definition of food security would be limited to wheat and rice and under no circumstances could it be linked to nutritional security under the proposed law.

## **Slanted priorities**

The second significant drawback is that the draft Food Security Act only provides for 25 kg of foodgrains per family while an average family of five members including two children requires about 56 kg foodgrains, 5 kg pulses and 4 litres of edible oil per month. In India, one of the major reasons for increased malnutrition is dearth of fats and protein in the diet. By keeping the quota of grains low and not ensuring entitlement of pulses (for protein) and edible oil (for fat), we cannot reduce or eliminate malnutrition. This is a point that the pro-market government must comprehend.

Every adult in the country should be eligible for 14 kg of grains (including nutritious coarse grains like jwar, bajra and jaudhari) at the rate of Rs 2 per kg, 1.5 kg pulses at the rate of Rs 20 per kg and edible oil at the rate of Rs 35 per kg. It should be ensured that children get half of the above-mentioned ration. The ration card should be made in the name of the female head of family. In fact, the proposed provision of 25 kg grain is far less than the quota of 35 kg per family fixed by the Supreme Court in

its January 10, 2008 order. If the proposed entitlement is legalised, this will demean the verdict of the apex court.

The path treaded by political entities shows no compassion towards providing food security to deprived sections of the society, including aged, single women, widows, disabled, children, destitute and pregnant women. India records the highest infant mortality, child mortality and maternal mortality and 40 percent of the population living in the country is starvation-hit. Given such state of affairs, making efforts for limiting the legal food entitlements is an outrage to the Constitution and a testimony that the present structure of the state corresponds to profit mongers and neo-capitalists rather than to those suffering from chronic hunger, exclusion and social insecurity.

During the last decade when the GDP of the country grew fastest at 8-9 percent, the rate of starvation-hit people too rose drastically. Ignoring the fact that situations like drought, flood, typhoons and climate change have led to food scarcity. Other factors, such as change in agriculture patterns and crop priorities and diversion of agriculture land for industrial purposes, have led the world to a food crisis. In this detrimental situation, will the structural causes of hunger be addressed through the proposed legislation or not. Will only distribution of limited food grain and conditional cash transfers in near future will suffice the State's duty, is a fundamental question? Continual statements by the prime minister, agriculture and finance ministers show the failure of the world's fastest growing economy to control prices, and also prove that development priorities are controlled by market forces.

The State is not even hesitating in violating the Supreme Court's order on Right to Food, which has significantly linked it with the fundamental Right to Life. Since 2001, the apex court has been hearing public interest litigations on hunger, malnutrition, social insecurity and employment-related rights issues and has passed 65 such significant orders that bind the government to hold its accountability and force the agencies to allocate more budget in these areas. Now the government is trying to bring in a law to save itself from the wrath of the Supreme Court and its real intent is not the eradication of hunger. The mid-day meal scheme and the *anganwadis* are also centres for ensuring food security, but the government is trying its best to keep these social units out of the ambit of legal rights so that private players could be given a leeway into these sectors. In a perspective, the Government of India is trying to de-link the relationships of life and food defined by the judiciary by restraining it to BPL families.

The Supreme Court has already, through its directives at regular intervals, ensured multifarious entitlements to food, such as provision of 35 kg ration per family, subsidised ration for the poor families under the Antyodaya Anna Yojana, supplementary nutritious food and care for infants and young children under the age of six years through integrated child development services (ICDS), schemes for pregnant and lactating women under the national maternity benefit scheme and janani suraksha yojana, mid-day meals at schools and national old age pension scheme along with provisions for destitute, urban poor, homeless kids, single women and widows. The eGoM has worked out a draft proposing deficient rights to be delivered through a collapsed public distribution system and promoting boycott of some social sectors at a time when the Justice Wadhwa Commission has submitted its report to the Supreme Court, recommending widening the ambit of food rights and reforms in the PDS. This leads to suspicion that the group of ministers is making a strategic move to systematically demolish the intervention being designed in the court for ensuring every citizen's right to food. The present PDS is on the brink of being totally dismantled as 40-60 percent of foodgrains rot in absence of vigilance and accountability.

The Union cabinet has fixed two responsibilities for the central government while the state governments have eight responsibilities. A cobweb of politics of hunger and trade of starvation is being woven around the proposed Food Security Act by pushing a very weak concept — strong enough to strangulate the democratic system. It seems some in the bureaucratic corridors, or may be all, are working hard to fabricate a political rhyme out of this law.

The draft Act does not allow freedom to any of the state governments to honour decisions as per

needs of its statehood, extension of rights to the poor and making efforts at giving better food security. This would only add to the pressure on the state economies to give more out of its limited resources. In Chhattisgarh, the state government spends Rs 18,000 million per year just to provide foodgrains to the beneficiaries. If the Centre does not fulfil its responsibilities, the state will have to pay out Rs 230 billion from its own purse if all poor families are to be made entitled for food.

The government has also dictated that no special authority or special courts would be set up to look into violations of rights and entitlements under the proposed Food Security Act. It means that in case of abuse of rights, the victims would have a recourse only to the present judiciary system, which neither represents a social justice system nor is easily accessible to the poor and marginalised, and where 1.4 million cases are still pending. Not only an increase in hunger-related deaths would be imminent while waiting for verdicts, even families would disappear.

Another surprising factor is that the government is only talking of distribution of foodgrains, but is silent on issues like production of grains, security to farmers and preventing the diversion of agriculture land, forest and water for corporate interests. This indicates a groundwork preparation for import of foodgrains in near future so that the multinational giants can make inroads into the Indian agriculture sector. Efforts are also being made to employ a policy of conditional cash transfers in place of foodgrains to the beneficiaries so that the government does not have to procure grains and thus save on the subsidy capital. Whether this step will lead to saving subsidy would only become clear in the future, but what would happen to the farmers? Has the government given any thought to this question? The open market is anyway already preparing to eat up farmers' crops and land without any hitch.

*—The writer is a development journalist and researcher,  
associated with the Right to Food Movement in India  
Combat Law, July-August 2010*

## HUMAN RIGHTS DEFENDER

### **AUNG SAN SUU KYI**

**A**ung San Suu Kyi was born on June 19, 1945 as daughter of Burma's independence hero, Aung San. He was assassinated when she was only two years old. Ang San Sui Kyi grew up with her diplomat mother and was exposed to international travel and politics.

In 1960 her mother was appointed Burmese ambassador to India and Nepal and Aung San joined Delhi University where she studied politics. Subsequently she went to the UK to study philosophy and politics at Oxford. There she met and married Michael Aris; later they had two sons and they settled down to an academic life.

She returned to Burma in 1988 when her mother fell ill and was at the end of her life. At that time Burma was in the grip of a harsh military regime and a popular uprising for democracy was developing. At the heart of this was the newly formed National League for Democracy (NLD). Aung Sung joined the movement and began speeches calling for freedom and democracy. Peaceful demonstrations were staged but the military regime responded with brute force, killing up to 5,000 demonstrators.

Under international pressure a general election was called in 1990. During the election campaign Aung San Suu Kyi and many other NLD supporters were detained by the regime. Despite this, the NLD went on to win 82% of the seats in parliament. However, the regime refused to recognize the results and continued to suppress all opposition.

Aung San Suu Kyi remained under house arrest from 1989-1995, and re-arrested and detained again on and off from 2000-2002. In May 2003 the Depayin massacre took place during which up to 100 of her supporters were beaten to death by the regime's militia and again Aung San Suu Kyi was arrested. She remains under house arrest to date. Her phone line has been cut, her post is intercepted and NLD volunteers providing security at her compound were removed.

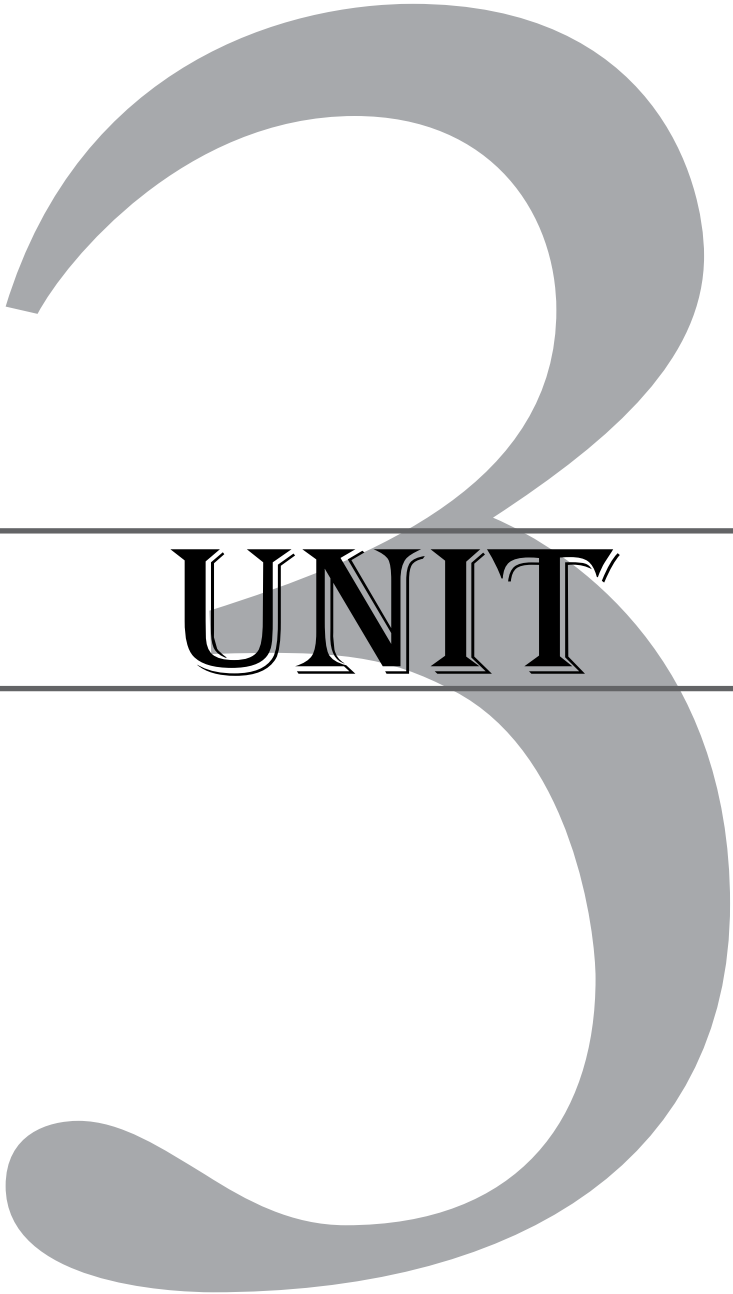
In a misguided effort to demonstrate his support, an American, John Yettaw, broke into her house. Although she had had nothing to do with the stunt Aung San Suu Kyi was charged with and found guilty of breaking the terms of her house arrest and on 11 August 2009 she was sentenced to another 18 months. As someone with a criminal conviction she was then banned from taking part in elections and in May 2010 the National League for Democracy party was banned.

The UN Working Group on Arbitrary Detention declared that the ongoing detention of Aung San Suu Kyi is illegal and in violation of both Burmese and international law. She has called on people around the world to join Burma in their struggle, saying "Please use your liberty to promote ours".

On 4 November 2010, after a twenty year gap, the regime held another general election, which the NLD boycotted on the grounds that election laws were unfair. Under the new laws were forced to disband as a political party. The resulting choreographed landslide victory for the pro-military USDP party was described as described as "neither free nor fair" by US President Barack Obama.

However, within days of the result Aung San Suu Kyi was released from detention to a jubilant reception by supporters around the world.

Although freedom for Aung San is not to be under estimated this is a hollow victory for her and for the democracy movement in Burma as, having held an election and achieved a result in their favour, the military are now possibly in a stronger position than earlier.

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**UNIT**

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## **Early Sanskrit writings in India**

Responsibility  
of rulers for the  
welfare of people:  
“No one should  
be allowed to suf-  
fer... either be-  
cause of poverty  
or of any deliber-  
ate actions on the  
part of others.”

## UNIT-3 SESSION-I

# EQUAL RIGHTS AND PROTECTION FROM DISCRIMINATION

**H**uman rights are inalienable; they cannot be awarded or taken away. They are attributed to all humans simply by virtue of them being human. Furthermore, all humans are equal in their entitlement to enjoy their rights and for their rights to be respected and recognised. Article 1 and 2 of UDHR and Articles 2 and 3 of both ICCPR and ICESCR are clear and unequivocal about equality and non-discrimination as principles fundamental to human rights. The principle of equality means equal outcomes and not necessarily the same treatment. Indeed in order to achieve equal outcomes different treatment is necessary in many cases. Non-discrimination means that people cannot be excluded on any of the grounds identified.

In addition to these guarantees seven core treaties have been developed to safeguard and promote the interests of specific groups. Conventions on race, women, migrant workers, disabled people and children have been added to the international instruments since the 1960s. Several other protocols and agreements take account of other groups and situations. This positive action approach is taken in recognition that some groups are at greater risk of rights violations than others. This could be due to their physical vulnerability as children or disabled people, due to their social status as migrant workers or prisoners or due to attitudes in society in relation to sex and race or other factors.

<b>ICCERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination	21 Dec 1965
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	18 Dec 1979
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984
<b>CRC</b>	Convention on the Rights of the Child	20 Nov 1989
<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990
<b>CPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance	20 Dec 2006
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities	13 Dec 2006

The term 'eliminate' used in the conventions on race and sex discrimination is particularly important as it signifies that merely reducing discrimination is not sufficient. Discrimination is not to be tolerated at any level or to any extent. States must be encouraged to do more than refrain from active and conscious discrimination but must take steps to identify and then implement measures to eliminate it in all its forms.

### **Race discrimination**

Race discrimination describes exclusion or rejection on the basis of skin colour, country of origin, ethnic group or nationality. It encompasses direct discrimination (when a policy or practice overtly excludes certain groups), indirect discrimination (when conditions or criteria, are imposed which are more likely to exclude certain racial groups) and institutional discrimination whereby an organisation has practices or policies that affect the way certain groups are treated or experience that organisation.

In India the term racial discrimination tends to be less applied internally than externally. For example,

racial discrimination against Indians in Australia was widely reported but there is little attention given to racist practices within the country such as valuing lighter skin above dark skin, and harassment of people from the north-east of India. Furthermore, caste discrimination could be regarded as a form of racial discrimination as it certainly bears some of the characteristics of racism.

**Direct Discrimination:** Where some groups are overtly or implied to be preferred or favoured over another, or particular groups are excluded or marginalised, or when assumptions and stereotypes that disadvantage certain groups are applied. For example, security guards refusing entry to men wearing traditional Muslim attire but allowing entry to every other group

**Indirect Discrimination:** When irrelevant criteria or conditions are applied that make access more difficult for certain groups. For example, a requirement for women to wear skirts as uniform that might exclude certain cultures or religious groups

**Institutional Discrimination:** When an organisation or institution has in place policies and practices that perpetuate and reinforce negative stereotypes and assumptions about certain groups. For example police making routine stop and search checks on young Dalits as a crime prevention measure

### **Caste as race**

The argument against regarding caste as race is that all Hindus are Indian and therefore, the same racial group. However, this is not quite the whole story. There is no scientific definition for race. There are certain physical characteristics concerning skin, eye and hair colour, height and body shape that are more likely to occur in some groups than others but the differences within any given 'race' are equally prevalent and marked. Country of origin was a marker in the past of different groups but migration and inter-marriage has meant that only the most remote indigenous people in some countries are likely to have common genes of their ancestors. Race is a socially constructed phenomenon.

The same could be said of caste. There are no particular physical characteristics that distinguish one caste from another; But, like race and ethnic group, the family you are born into determines which caste you belong to. As with race, there is no scientific explanation for this distinction but the existence of caste enables dominant minorities to maintain their superior position. This manifests itself in exclusion and rejection similar to the treatment of the majority black population under apartheid in South Africa in 1966 which gave rise to the ICCRED.

Although the Indian government originally accepted caste as a category of racial discrimination (when the ICCRED was drawn up), at the last world Conference Against Racism (Durban 2001) the government retracted this position and unfortunately succeeded in keeping caste out through a resolution on racism passed in the Durban Conference of that year.

A recommendation made in 2002 by the UN Committee on the Elimination of Racial Discrimination (CERD) stated that all member states of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), including India and the UK, should enact domestic legislation declaring that descent-based discrimination encompassed caste and "analogous systems of inherited status". Based on this, in 2010, the House of Lords passed the Equality Bill empowering the UK government to include caste as an aspect of race.

### **Discrimination against Scheduled Castes and Scheduled Tribes**

Dalits and Adivasis, who together make up about a quarter of India's population, face a degrading system of institutionalised discrimination in their everyday lives. Although the Constitution and multiple subsequent legislation, provide for strong safeguards to prevent discrimination based on caste for Dalits and to ameliorate the disabilities arising from millennia of discrimination against both Dalits and Adivasis, actual enforcement of the laws and compensatory policies is very weak.

The practice of 'untouchability' is prohibited in Article 17 of the Constitution of India but despite this

discrimination against Dalits has actually increased in the last decade. Dalit children are routinely treated like outcasts in schools, sometimes forced to sweep and undertake other menial tasks before or after lessons; Families are prevented from using village wells, or using the same cups in tea shops. In some areas the practice of requiring Dalits to wash the feet without payment, persists. Jobs that should not be undertaken by any human, such as manually collecting human waste and entering sewers to clear blockages, continue to be the only occupations open to some Dalits.

Dalits and Adivasis face a high level of violence in their lives. Sexual abuse and punishment beatings by people from higher castes are common. Yet when such atrocities are committed the victims rarely get justice. Law enforcement and administrative structures are either hostile or indifferent to Dalits and Adivasis, and they rarely have the socio-economic power to enforce their rights. Various independent sources estimate that in the last decade, the number of cases of caste-discrimination and various forms of violence arising from such discrimination has averaged around 50,000 annually. However, cases registered by the police average only 15,000 each year and of these less than 5,000 cases moved beyond the initial complaint stage to a charge-sheet being filed. Of these, a small number went to trial and less than 3% resulted in convictions.

## Reservation

Article 15 of the Indian Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. It also makes provision for affirmative action to uplift disadvantaged groups in the areas of public education, employment and political representation.

The provision is implemented in the form of 'reservations' of a certain number of places for women, Scheduled Castes (Dalits or SCs), Scheduled Tribes (Adivasis or STs) and other economically backward castes (OBCs). Reservation has had a controversial journey since first devised on India achieving independence. Despite sixty two years of reservation the State has failed to fulfil its constitutional obligations towards Dalit and Adivasi communities, including its failure to increase access for these communities to employment and education. Government's own statistics reveal that the number of Dalits and Adivasis who are employed by the public sector at all levels or have gained access to education, is far below the constitutionally mandated requirement of 15% for Dalits and 7-1/2 % for Adivasis.

### Points for discussion

1. Is it justifiable that some people live and work in worse conditions than others just because they are used to it or were brought up to it?
2. What is the likely impact on children and young people when they grow up seeing their parents and other people they respect in their own community being shunned and abused?
3. How well do you think racism against Indians in other countries has been dealt with?

## Institutional racism

In April 1993 an eighteen year old A-level student was fatally stabbed in an unprovoked attack as he waited at a South London bus stop. His friend, who was also attacked but managed to escape gave full description of the assailants to the police.

The murdered man and his friend were black, the four accused were white. No one was ever convicted of the murder. Amid charges of bungling incompetence an official inquiry headed by Lord Macpherson was launched. The resulting report in 1999 made seventy specific recommendations for improving the attitudes of police towards ethnic minorities.

Macpherson stated that although no single police officer could be accused of racism, the institution as a whole was riddled with policies and practices based on assumptions that black people, especially young black people, were trouble makers. Stephen's murder was not properly investigated because the police wasted so much time on trying to find a motive for the crime, i.e. that somehow

the young man was to blame for what happened to him.

The Macpherson report has fundamentally changed the way racial discrimination and equality law in general is looked at in the UK. The term, institutional racism, has entered the vocabulary and is written into all equality legislation produced or amended since 2002.

—Lecture 3 of 'All Human Rights are Fundamental Rights' by Justice H. Suresh, 2010

WHY **DO** THEY  
**NEED**

3 LTR **WATER** TO MAKE  
1 LTR **COKE?**



Stop The Ignorance Join The Movement

website: [www.hrln.org/shr](http://www.hrln.org/shr)



## UNIT-3 SESSION-II

### CERD

#### UN Convention on the elimination of Racial discrimination

#### Elimination of racial discrimination

¶ The definition of racial discrimination includes any discrimination on the basis of race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying the recognition, enjoyment or exercise, on an equal footing in any or all fields of life. Article 1(1) CERD

#### States may not engage in racial discrimination and must take active measure to combat the effects of such discrimination. Article 2 CERD

¶ Each State Party shall take effective measures to review governmental national and local policies and to mend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. Art. 2(1) CERD

¶ State shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination. Articles 4(c) CERD

¶ States shall take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights including those listed in the ICCPR, ICSCER, Articles 2(2) 5

#### States must take active measure to combat racial discrimination by private actors in their jurisdiction Art.2 CERD

¶ States must not defend, sponsor or support any organisations or persons engaging in racial discrimination and must take active measures, including legislation to stop discriminatory practices. Articles (2)(b) 1(d) CERD

¶ States must declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racist activities. Articles 4(a) CERD

## UNIT-3 SESSION-III

### Dalit personalities



Sant Ravi Das



Dr BR Ambedkar



Jagjivan Ram



Mahatma Phule



Dr KR Narayan



Kanshi Ram



Justice Balakrishnan



Meera Kumar



Mayawati

- Over one-sixth of India's population, some 170 million people, live a precarious existence, shunned by much of Indian society because of their rank as "untouchables" or Dalits, literally meaning "broken" people, at the bottom of India's caste system

- The word 'Dalit' comes from the Marathi language and means 'ground', 'suppressed', 'crushed' or 'broken to pieces'. It was first used by Jyotirao Phule in the nineteenth century in the context of the caste oppression faced by the erstwhile untouchable castes from the 'twice-born' Hindus castes

- The terms 'Scheduled castes and scheduled tribes' (SCs/STs) are the official terms used in government documents to identify former un-touchables and tribes



#### We are human!

I search for God, whom  
should I hear?  
I made stone temples,  
carved God out of stone  
But priests are like stone,  
They imprison God.  
Whom shall I hear?  
We were born Untouchables  
Because of our deeds.

### Safeguards in the Indian Constitution for Dalits

#### Directive principles of State Policy

##### Article 46

"The State shall 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 shall protect them from social injustice and all forms of exploitation".

#### Social safeguards

##### Article 17.

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

##### Article 23.

Prohibits traffic in human beings and begar and other similar forms of forced labour and provides that any contravention of this provision shall be an offence punishable in accordance with law. It does not specifically mention SCs & STs but since the majority of bonded labour belong to SCs/STs this Article has a special significance for SCs and STs.



## UNIT-3 SESSION-III

### Social safeguards

#### Article 24

Provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. There are Central and State laws to prevent child labour. This article too is significant for SCs and STs as a substantial portion, if not the majority, of child labour engaged in hazardous employment belong to SCs and STs.

#### Article 25(2)(b)

Provides that Hindu religious institutions of a public character shall be thrown open to all classes and sections of Hindus. This provision is relevant as some sects of Hindus used to claim that only members of the concerned sects had a right to enter their temples. This was only a subterfuge to prevent entry of SC persons in such temples. For the purpose of this provision the term Hindu includes Sikh, Jaina and Buddhist.

### Educational and political safeguards

#### Article 15(4)

Empowers the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for SC and ST. This provision has enabled the State to reserve seats for SCs and STs in educational institutions including technical, engineering and medical colleges and in Scientific & Specialised Courses.

#### Article 330

Provides for reservation of seats for SCs/STs in the Lok Sabha.

#### Article 332

Provides for reservation of seats for SCs/STs in the State Vidhan Sabhas (Legislative Assemblies).

### Employment safeguards

#### Article 16(4)

Empowers the State to make "any provision for the reservation in 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 under the State". The term 'backward classes' is used as a generic term and comprises various categories of backward classes, viz., Scheduled Castes, Scheduled Tribes, Other Backward Classes, Denotified Communities (Vimukta Jatiyan) and Nomadic/Seminomadic communities.

#### Article 16(4A).

Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State".

### Employment safeguards

#### Article 335.

"The claims of the members of the Scheduled Castes and the 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 connection with the affairs of the Union or of a State".

#### Article 320(4)

Provides that nothing shall require Public Service Commission to be consulted as respects the manner in which any provision under Article 16(4) & 16(4)A may be made or the manner in which effect may be given to the provisions of Article 335.

### Statutes & legislations

- 1 The Protection of Civil Rights Act, 1955.
- 1 The Bonded Labour System (Abolition) Act, 1976.
- 1 The Child Labour (Prohibition and Regulation) Act, 1986.
- 1 The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- 1 Acts and regulations in force in different States to prevent alienation of land belonging to SCs/STs. In some States such provision exists in the Land Revenue Code.
- 1 Acts in different States for restoration of alienated land to SCs/STs.



- 1 Total job reservation for Dalits is 22.5% but only 2.1% in case of class-I (Dalits serving in public commission, civil services, chief executives in major companies)
- 1 Only 9% in the case of class-II (this includes Dalits serving as college lecturers, bank managers, in government, etc.)



## UNIT-3 SESSION-III

### And...where do we stand

"ALL HUMAN BEINGS ARE NOT BORN EQUAL."

- ▮ More than 62,000 human rights violations are recorded annually
- ▮ On average, two Dalits are assaulted every hour
- ▮ Two Dalits are murdered, and at least two Dalits are tortured or burned every day
- ▮ Estimated 115 millions SC/ST children working in slavery
- ▮ 80-90% are Dalits who work as bonded labour in order to pay off debt
- ▮ According to government statistics, an estimated 800,000 Dalits are manual scavengers

### And...where do we stand

"NO ONE PRACTICES UNTOUCHABILITY WHEN IT COMES TO SEX."

- ▮ Dalit women in India face the triple burden of caste, class and gender
- ▮ Every day three Dalit women and children are raped
- ▮ Approximately 50,000 Dalits girls in India today are forced to practice a Hindu religious practice of child prostitution, called Devdasi
- ▮ Dalit girls are forced to have sex with the village landlord
- ▮ Landlords and the police use sexual abuse and other forms of violence against women to inflict political "lessons" and crush dissent within the community

### They are free...

- ▮ Less than 2.31% of crimes against Dalits result in convictions
  - ▮ The number of acquittal is 6 times higher than the number of convictions
  - ▮ More than 70 % of cases are still pending
  - ▮ The problem is not the law but its implementation
- 15% of the population of India controls 85% of the wealth, power, justice system, police this elite is invariably drawn from the higher castes

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

- ▮ The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent atrocities against Scheduled castes and scheduled tribes
- ▮ The Act was also intended to promote social inclusion of Dalits
- ▮ After two decades of non-implementation the Act has failed to live up to expectations

### Special courts

- ▮ There is a provision to set special courts for speedy trial of offences committed under the Act but this has not been implemented fully
- ▮ Even where special courts exist they cannot take direct complaints. They must first go to regular courts and be referred to the special courts
- ▮ Gangula vs Sate of AP: Ruled that Special courts can take cognizance of an offence only when a case is communicated by a magistrate
- ▮ Laws and legal processes are not self executing

### Investigation

- ▮ Investigation of offences committed under this Act must be investigated by an officer not below the rank of Deputy Superintendent of Police (DSP)
- ▮ D. Ramlinga Reddy vs Sate of AP: An investigation carried out and charge sheet filed by an incompetent officer is liable to be quashed
- ▮ 15% IPS post are vacant. There is only one IPS officer to 77,000 SC/STs persons. (MOHA)

## UNIT-3 SESSION-III

### Rehabilitation

- ▮ The Act fails to deal with the problem of rehabilitation and restitution
- ▮ There is mention of rehabilitation under S. 21 (2) (iii), but no provision for addressing the issue
- ▮ The National Commission for the Review and Working of Constitution stated that victims of atrocities and their families should be provided with full financial and other support in order to make them economical self-reliant without their having to seek wage employment from the persons or groups guilty of of perpetrating crimes against them

### Effectiveness

- ▮ The majority of the those who should benefit from the Act are either unaware or unwilling to enforce it
- ▮ Police, prosecutors and judicial officers are unaware of this Act. (MC Prasannan vs State of West Bengal)
- ▮ Some atrocities are not covered under the Act e.g. Social and economic boycott (e.g. being forced out of business), exclusion (being prevented from using the well) and blackmail (threatening to disclose the caste in order to extract benefits or payment)
- ▮ Under section 18 anticipatory bail cannot be granted to accused persons, but this is often ignored

# WHY IS WATER SOLD?

Water has always been on our planet, we instinctively knew that this liquid substance would keep us alive. First we had water, than we had a product called water. When the tap was introduced we suddenly had to pay for our water, but was anybody questioning this fact? We're paying for the services the water companies told us, but didn't we just pay the water by litre? Water is a product, water cleaning is a service, buying expensive water is a lifestyle and polluting our waters is our second nature. So stop thinking, water is only your basic human right. Just stand and say: "Water isn't a product, but a common good, given by nature. Nobody owns the water so water should be free." We the people should be able to demand free water, it's a basic human right.



SHR has since its inception in 2008 worked with students in th states of Goa, Assam, West Bengal, Madhya Pradesh, Tamil Nadu, Kerala, Maharashtra, and Delhi. By the year 2011, SHR hopes to establish its chapters in all states of India along with special units focussing on a spectrum of rights of social movements.

Stop The Ignorance Join The Movement



## UNIT-3 SESSION-IV

### **EXERCISE: HOW TO MAKE MONEY**

The objective of this exercise is to show how one group falls behind and how poverty and wealth both become self-perpetuating. It demonstrates how positive action policies (or reservation) can even out the playing field.

1. Split the group into at least three equal sized groups (or multiples of three if the whole group is very large)
2. Each group has four A4 sheets of paper
3. Group 1 has a ruler
4. Group 2 has a pair of scissors
5. Group 3 has a green pen

Each group must use the equipment provided to make bank notes. Each bank note is worth one unit of currency but to be valid it must measure 5 x 3 inches and it must have a green water mark; one inch from the right hand edge.

#### Round 1: 10 minutes

Each group must make as many bank notes as they can. They are free to trade equipment with each other.

The group with the maximum money at the end of round one makes the rules to determine the characteristics of the next set of bank notes.

#### Round 2: 10 minutes

Each group must make as many bank notes as they can. They are free to trade equipment with each other.

The group with the maximum money at the end of this round must swap equipment with the group with the least money. The characteristics of the bank notes are the ones set for round two.

#### Round 3: 10 minutes

Each group must make as many bank notes as they can. They are free to trade equipment with each other.

#### Debrief: at least 30 minutes

Which group has the maximum money at the end of round three. Has the poorest caught up with the richest? What gave each group advantages or disadvantages? What would happen if round two continued for several hundred years? How long would it take for the poorest group to catch up?

## **A SUMMARY OF THE STEPHEN LAWRENCE INQUIRY**

**Report of Inquiry by Sir William Macpherson of Cluny Presented to  
Parliament by Secretary of State for the Home Department  
in February 1999 (Cm 4262-1)**

### **The murder**

Stephen Lawrence was stabbed to death on April 22, 1993. The incident which led to his murder lasted no longer than fifteen to twenty seconds. It was undoubtedly racially motivated and involved five or six white male youths. Nobody was convicted of the crime. Three of the prime suspects were taken to trial in a private prosecution in 1996, which resulted in acquittal due to lack of evidence. Two other suspects were released at committal for the same reason. These five men continued to be suspects, but could not be retried under the present system of British law. General publicity and comment about their guilt would prejudice any further trial.

### **The inquiry**

The Police Complaints Authority (PCA) engaged the Kent Police to investigate a complaint by the parents of Stephen Lawrence that the first investigation by the Metropolitan Police Service (MPS) had been botched. The Kent report confirmed that many aspects of the MPS work could be criticised.

On July 31, Home Secretary Jack Straw asked Sir William Macpherson to chair an inquiry into matters arising from the death of Stephen Lawrence, in order particularly, to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes. Three Advisers were appointed by the home secretary to advise and support the chairman – Mr Tom Cook, retired deputy chief constable for West Yorkshire; the Right Reverend Dr John Sentamu, the Bishop for Stepney; and Dr Richard Stone, chair of the Jewish Council for Racial Equality. The Report sets out their unanimous views, based on the material and evidence put before them during the course of the inquiry.

Part I of the inquiry looked specifically at the Lawrence case; Part II was aimed at the second part of the inquiry terms of reference i.e. looking more generally at the ‘investigation and prosecution of racially motivated crimes’.

### **The police investigation**

The police investigation following the crime was found to be ‘a sequence of disasters and disappointments’. The MPS was roundly criticised in both the Kent and Macpherson Reports, and they accepted that their investigation of the murder was palpably flawed.

During the inquiry Mr Neville Lawrence, father of Stephen, concluded his statements by saying, “When a policeman puts his uniform on, he should forget all his prejudices. If he cannot do that, then he should not be doing the job because that means that one part of the population is not protected from the likes of those who murdered Stephen.” The underlying cause of the police failure was found by Macpherson to be, not purely incompetence, but institutionalised racism. Witnesses, including those who were also victims such as Stephen Lawrence’s friend, as well as his parents, were found to have been treated badly due to stereotyped assumptions about them and their character based on skin colour.

“We believe that the immediate impact of the inquiry, as it developed, has brought forcibly before the

public the justifiable complaints of Mr & Mrs Lawrence, and the hitherto underplayed dissatisfaction and unhappiness of minority ethnic communities, both locally and all over the country, in connection with this and other cases, as to their treatment by police.”<sup>1</sup>

### **Institutionalised racism**

“The inquiry was not of course an inquiry into the general relationship between police and minority ethnic communities, and detailed examination of other individual cases would have been misplaced. Inevitably the Inquiry has heard many sounds and echoes concerning, for example, stop and search and the wide perceptions of minority ethnic communities that their cases are improperly investigated and that racist crime and harassment are inadequately regarded and pursued.”<sup>2</sup>

“The Inquiry found that ‘unwitting racism can arise because of lack of understanding, ignorance or mistaken beliefs. It can arise from well intentioned but patronising words or actions. It can arise from unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities. It can arise from racist stereotyping of black people as potential criminals or troublemakers. Often this arises out of uncritical self-understanding born out of an inflexible police ethos of the “traditional” way of doing things. Furthermore such attitudes can thrive in a tightly knit community, so that there can be a collective failure to detect and to outlaw this breed of racism. The police canteen can too easily be its breeding ground.”<sup>3</sup>

Sir Paul Condon, then the police commissioner, stated, “I recognise that individual officers can be, and are, overtly racist. I acknowledge that officers stereotype, and differential outcomes occur for Londoners. Racism in the police is much more than ‘bad apples’ . Racism, as you have pointed out, can occur through a lack of care and lack of understanding. The debate about defining this evil, promoted by the inquiry, is cathartic in leading us to recognise that it can occur almost unknowingly, as a matter of neglect, in an institution. I acknowledge the danger of institutionalisation of racism. However, labels can cause more problems than they solve.” Sir Paul did not accept that there is institutional racism within his force, as the inquiry found.

### **Institutionalised racism defined**

The inquiry struggled to find a definition for ‘institutionalised racism’ and, while they arrived at one workable for the purposes of the inquiry, they cautioned that it should not be treated as cast in stone:

“The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.”<sup>4</sup>

“It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.”<sup>5</sup>

“The inquiry also acknowledged that ‘racism, institutional or otherwise, is not the prerogative of the Police service. It is clear that other agencies including for example those dealing with housing and education also suffer from the disease. If racism is to be eradicated there must be specific and co-ordinated action both within the agencies themselves and by society at large, particularly through the educational system, from pre-primary school upwards and onwards.’<sup>6</sup>

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1. Macpherson Report, para. 2.15

2. Ibid., para. 2.16

3. Ibid., para. 6.17

4. Ibid., para. 6.34

5. Ibid., para. 6.35

6. Ibid., para. 6.54

## Part II of the inquiry

“Wherever we went we were met with inescapable evidence which highlighted the lack of trust which exists between the police and the minority ethnic communities. At every location there was a striking difference between the positive descriptions of policy initiatives by senior police officers, and the negative expressions of the minority communities, who clearly felt themselves to be discriminated against by the police and others. We were left in no doubt that the contrast between these views and expressions reflected a central problem which needs to be addressed.”<sup>7</sup>

One universal area of complaint was to do with the use of police powers of ‘stop and search’. Statistics for 1997/98 showed that “black people were, on average, five times more likely to be stopped and searched by the police than white people. The use of these powers for Asians and other ethnic groups varied widely.” Black people are also “more likely to be arrested than white or other ethnic groups”. The inquiry concluded that “It is pointless for the police service to try to justify the disparity in these figures purely or mainly in terms of the other factors which are identified. The majority of police officers who testified before us accepted that an element of the disparity was the result of discrimination. This must be the focus of their efforts for the future. Attempts to justify the disparities through the identification of other factors, whilst not being seen vigorously to address the discrimination which is evident, simply exacerbates the climate of distrust.”<sup>8</sup>

Collective experience was found to be that while senior police officers adopt sound policies and use fine words, there was rampant indifference on the ground at junior officer level to racist incidents. There was also a weight of opinion that the national curriculum does not adequately reflect or value a diverse multicultural and multiethnic society, and that school exclusions are disproportionately imposed on ethnic minority pupils. Other submissions during Part II asserted that the working definition of ‘racial incident’ was inadequate; that there was a need for more multi-agency partnerships to combat racism; and that the police complaints system was unsatisfactory and not sufficiently independent.

## Conclusions

The main conclusions reached by the inquiry were:

- “There is no doubt but that there were fundamental errors. The investigation was marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers. A flawed MPS review failed to expose these inadequacies. The second investigation could not salvage the faults of the first investigation.” (para. 46.1)
- “There can be no excuses for such a series of errors, failures, and lack of direction and control. Each failure was compounded. Failure to acknowledge and to detect errors resulted in them being effectively concealed. Only now at this Inquiry have they been laid bare.” (para. 46.23)
- “Mr Panton, the barrister acting for Greenwich Council, argued that if the colour of the victim and the attackers was reversed the police would have acted differently. ‘We understand why this view is held. We have examined with anxiety and care all the evidence and have heeded all the arguments both ways. We do believe, that institutional racism is apparent in those areas described. But we do not accept that it was universally the cause of the failure of this investigation, any more than we accept that a finding of institutional racism within the police service means that all officers are racist. We all agree that institutional racism affects the MPS, and Police Services elsewhere. Furthermore our conclusions as to Police Services should not lead to complacency in other institutions and organisations. Collective failure is apparent in many of them, including the criminal justice system. It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.’” (paras. 46.26-27)

7. Ibid., para. 45.6

8. Ibid., para. 45.10

- “First and foremost and fundamentally we believe that there must be a change so that there is genuine partnership between the police and all sections of the community. This cannot be achieved by the police alone. The onus is upon them to start the process. All other agencies, particularly those in the field of education and housing must be involved. Co-operation must be genuine and vigorous. Strategies to be delivered under the new Crime & Disorder Act will provide an opportunity in this respect. Training will play its part. The active involvement of people from diverse ethnic groups is essential. Otherwise there will be no acceptance of change, and policing by consent may be the victim.” (para. 46.40)

## Recommendations

These are contained in Chapter 47 of the report and include:

1. A ministerial priority be established for all Police Services to increase trust and confidence in policing amongst minority ethnic communities, using performance indicators, the overall aim being the elimination of racist prejudice and disadvantage and the demonstration of fairness in all aspects of policing.
2. The definition of ‘racist incident’ should be: “Any incident which is perceived to be racist by the victim or any other person.” Reporting and recording of racist incidents and crimes should be improved by a new and comprehensive system.
3. The Association of Chief Police Officers (ACPO) should review its Good Practice Guide for Police Response to Racial Incidents and other policies, and that the MPS review their procedures generally.
4. All Police Services should have locally available designated and trained Family Liaison Officers.
5. The Home Office and Police Services should develop guidelines for the handling of victims and witnesses.
6. All ‘public contact’ police officers should receive ongoing training in first aid, racial awareness, and the valuing of cultural diversity.
7. Changes to police disciplinary and complaints procedures proposed by the home secretary should be fully implemented and closely and publicly monitored as to their effectiveness.
8. The home secretary, in consultation with Police Services, should ensure that a record is made by police officers of all “stops” and “stops and searches” made under any legislative provision (not just the Police and Criminal Evidence Act). Non-statutory or so called “voluntary” stops must also be recorded. The record should include the reason for the stop, the outcome, and the self-defined ethnic identity of the person stopped. A copy of the record shall be given to the person stopped.
9. The Home Office and Police Services should facilitate the development of initiatives to increase the number of qualified minority ethnic recruits.
10. Consideration should be given to amendment of the national curriculum aimed at valuing cultural diversity and preventing racism, in order better to reflect the needs of a diverse society.

*–Summary compiled by Rachel Morris  
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## EQUAL RIGHTS AND PROTECTION FROM DISCRIMINATION

**Pragna Patel**

**T**his presentation will focus on the phenomenon of multiple or intersectional forms of discrimination and subordination faced by many women worldwide-based on their gender and race or ethnicity. The combined effects of racism and gender discrimination, in particular on migrant, immigrant, indigenous, minority and marginalised women around the world, have had devastating consequences for their full enjoyment of equality and fundamental human rights in both the public and private spheres.

Intersectional discrimination has only recently been recognised, at least in international forums, as a serious obstacle to the achievement of equality for many marginalised women. Historically, at the international and national levels, racism or racial discrimination on the one hand and gender discrimination on the other, have always proceeded in official thinking and policy along mutually exclusive lines. However, the notion of intersectional discrimination has now been acknowledged in a series of UN conferences on women. See for example the Beijing Platform for Action document and the subsequent 'Outcome Document' – the report of the twenty-third special session of the General Assembly (Beijing+5 in 2000). Both documents draw attention to the need to understand the co-existence of multiple forms of discrimination and their impact on women. But neither document has given deeper attention to the complexities and the ways in which such forms of discrimination structure the disadvantaged position that many marginalised women occupy in relation to other groups of men and women in their societies.

In a separate but parallel development at the fifty-sixth session in March 2000, the Committee on the Elimination of Racial Discrimination adopted a general recommendation on gender-related dimensions of racial discrimination (CERD/C/56/Misc.21/Rev.3)

Such recognition however, is severely lacking at national levels. In the UK, for instance, there is no official policy statement or document which gives any serious attention to the ways in which black or minority women face gender and racial discrimination simultaneously. An in-depth analysis of the combined effects of racial and gender discrimination and the implications for all legislation, policies and strategies on the elimination of racial and gender inequality has yet to take place. The result is that black and minority women are ignored in official strategies to combat gender inequality and racial discrimination, and they are vulnerable to further discrimination.

But there is a more serious consequence of the failure to recognise the existence of intersectional discrimination. Many so called progressive initiatives, policies and strategies aimed at eliminating racial or gender discrimination actually serve only to reinforce multiple levels of discrimination experienced by minority women, based on the flawed view that discrimination is one-dimensional and affects all women or all minority communities in the same way.

Although a number of NGOs and researchers have devoted considerable time and resources in understanding and addressing the effect of multiple forms of discrimination, much work remains to be done, especially at the national and local government level. There is an urgent need to ensure full recognition and integration of the intersectional perspective in all national programmes, policies, legislation and initiatives on all forms of discrimination. A more holistic approach to discrimination that recognises the simultaneous nature of women's experiences of various forms of discrimination is necessary, if we are to ensure that human rights are a reality for all women.



This presentation will focus particularly on the ways in which the combined effects of racial and gender discrimination place obstacles to black and minority women's struggle for equality and social justice. More specifically, I will focus on women's experiences of domestic violence, immigration laws, the criminal justice system and the multicultural approach, to show how these sites of intersectional discrimination create and perpetuate the multiple disadvantages that these women face. More importantly I wish to highlight the fact that gender and racial discrimination intersect simultaneously to the detriment of such women.

Whilst this presentation is concerned with the combined effects of racial and gender discrimination on women, it is acknowledged that other factors relating to women's social identities – such as ethnicity, class, religion, caste national origin, disability and sexuality – can also intersect and therefore, compound gender discrimination.

The presentation also draws on the discussions and findings of the expert group meeting on gender and racial discrimination, organised by the UN Division for the Advancement of Women in collaboration with the Office of the High Commissioner for Human Rights and UN Development Fund for Women in November 2000 in Zagreb, Croatia. The paper will, therefore, end with some broad based suggestions and recommendations made by the expert group meeting in which I was also a participant.

### **Background and conceptual aspects of intersectional discrimination**

Globalisation has brought with it an unprecedented flow of unfettered capital and mass migration of labour, especially from the developing countries and the transitional economies of Eastern Europe to Western Europe, North America and Australia. Such large-scale movement of labour has increased the scope for worldwide racist activity and discrimination based on race, religion and ethnicity. The operation of restrictive immigration and asylum policies is one manifestation of such racial and related forms of discrimination in the more industrialised nations. At the same time we are witness to the unprecedented movement of women from the South to the North, constituting cheap and unorganised labour force, particularly as domestics and in the sex and entertainment industries of the industrialised countries. But the migration of such women means that they are also vulnerable to multiple forms of discrimination. It is therefore against the backdrop of the global economy that the intersection of racial and gender discrimination must be understood.”

**Conceptualising intersectional discrimination:** “The idea of intersectionality seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.” (Page 9, Expert Group Report)

**The traffic intersection metaphor:** “The notion of intersectional discrimination is best understood by way of a metaphor relating to a traffic intersection. The metaphor was developed by Professor Kimberle Crenshaw and gives what is considered to be an effective model for the understanding of intersectional or multiple discrimination.

“In this metaphor, race, gender, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that dynamics of disempowerment travel. These thoroughfares are sometimes framed as distinctive and mutually exclusive avenues of power.’ But these thoroughfares often overlap and cross each other, creating complex intersections at which two, three or four of these avenues meet. Marginalised groups of women are located at these intersections by virtue of their specific identities and must negotiate the ‘traffic’ that flows through these intersections to avoid injury and to obtain resources for the normal activities of life. This can be dangerous when the traffic flows simultaneously from many directions. Injuries are sometimes created when the impact from one direction throws victims into the path of

oncoming traffic, while on other occasions, injuries occur from simultaneous collisions. These are the contexts in which intersectional injuries occur - when multiple disadvantages or collisions interact to create a distinct and compound dimension of disempowerment.” (Page 9, Expert Group report)

There are different types of intersectional discrimination or subordination. But the failure of national governments and the international community to adequately analyse all experiences of intersectional discrimination lies in the fact that in traditional conceptions of race and gender discrimination, certain specific problems or forms of discrimination faced by marginalised women are rendered invisible. Crenshaw describes this as the twin problems of ‘over-inclusion’ and ‘under-inclusion’.

For example, the notion of over-inclusion refers to situations where the racial dimension of an experience is subsumed within a gender perspective. The consequence is that only the gender aspect of the discrimination is addressed and the subsumed or racialised aspect of discrimination is ignored. Trafficking of women and young girls is perceived to be an example par excellence of gender subordination. It is commonly held to be only a woman’s problem. So the debates or strategies on trafficking of women and young girls, hardly any attention is paid to the fact that some groups of women and children may actually be selected and targeted for trafficking. In the UK for example, current news refers to a number of missing young West African girls aged 14 plus years, who have gone missing from care homes following their arrival in this country as asylum seekers. These girls were brought to the UK en route Italy where they are coerced by human traffickers to work in the sex industries. It is however notable that the news reports refer to their experiences of forced sexual slavery and prostitution, but little or no attention is paid to the reasons why these women from Africa are particularly selected for trafficking. That the combination of their gender, socio-economic position and their race makes them vulnerable to economic and sexual exploitation is obvious, but it is not addressed. Also, no attention is paid to the unique forms of gendered racial discrimination they experience in the UK as asylum seekers, or in Italy as prostitutes and asylum seekers.

The notion of under-inclusion refers to situations where a gender analysis is underplayed or ignored altogether in what is perceived to be a problem of racial discrimination. So, for example, the forced non-consensual sterilisation of black and other marginalised women has been perceived to be a problem of racial discrimination rather than one of sexual abuse. In the UK, in the 1970s and early 80s, the operation of immigration laws and practice sanctioned the practice of virginity testing of South Asian women. The aim of the practice was to ascertain whether Asian women who came to join their husbands were bona fide fiancées. Underpinning this test was the assumption that Asian women do not have pre-marital sex. If a woman was not virgin then she could not be a genuine bride and therefore ineligible to enter the country. A public outcry and campaign led to the practice being stopped. Those who were appalled by the practice decried it as racist, but few articulated the way in which it also amounted to a violation of Asian women’s bodies.

Apart from the trafficking of women, another well known example of targeted intersectional discrimination is the experiences of rape and sexual abuse of minority women in the context of war and armed conflict in Rwanda and Bosnia. In these cases abuses were specifically targeted at racialised women. Here, conflicts which are essentially motivated by ethnic and racial hatred, also target women from selected communities for particular types of rape, sexual violence and aggression as a way of humiliating and dehumanising the entire ethnic group in question.

Another variation is in the form of structural discrimination. This occurs where policies intersect with underlying structures of inequality to create a compounded burden for particularly vulnerable women. So, women may experience specific forms of gender discrimination where they are vulnerable because of their race or class or ethnicity. On the other hand, marginalised women may be subject to specific forms of racial discrimination simply because of their gendered location within their communities. Thus, the racism they experience may affect them in ways which are different from that experienced by men in their communities. One example of this is the ways in which vulnerable women within racialised groups may be coerced into non-violent crime in support of the criminal activity by

their partners. But their subordinate gender positions within their community which brings about their ready acceptance of the coercion into crime is ignored by the state that may single out the women for harsher sentences. Such women may also be vulnerable to specific forms of gender discrimination in prisons ranging from 'over-policing' to sexual abuse.

Yet another manifestation of structural discrimination is where the policy in question interacts with background structures, thus creating burdens that disproportionately affect marginalised women. Structural adjustment programmes within developing and transitional economies although not specifically targeted at women can lead to increased poverty for marginalised women.

Whatever the type of intersectional discrimination, the consequence is that different forms of discrimination are often experienced simultaneously by marginalised women. But the reality of their lives, shaped as it is by disadvantage and social injustice, is ignored and lies unaddressed within the traditional framework of understanding gender and racial discrimination because of lack of a holistic approach to gender and racial discrimination.

### **The UK experience**

The rest of this presentation will focus on some of the experiences of minority, largely South Asian women, with whom I work at the London based NGO – Southall Black Sisters. In particular, I will focus on aspects of violence against women – one of the critical areas of concern raised in the Beijing Platform for Action document. My aim is to show how, despite official rhetoric, debates and strategies to combat domestic violence the government has paid little attention to black and minority women's experience of domestic violence, which is essentially a story of multiple discrimination.

Despite decades of struggles by black and minority women for recognition of their daily experiences of racial and gender discrimination, the sad reality is that at best their experiences are seen through the lens of a mutually exclusive checklist of discrimination. One danger of this approach lies in the strategies that are adopted to address discrimination, which have the paradoxical effect of reinforcing certain forms of discrimination that remain hidden. Thus, many Asian women are denied the right to protection and redress from abuse experienced at the hands of the state or private actors. Aside from language barriers and cultural constraints that demand their obedience and silence for the sake of upholding family honour; many state policies have the effect of compounding the discrimination they face in their homes and their communities.

### **Domestic violence and immigration policy**

Many Asian and other minority women who arrive in the country as new brides and who find themselves subject to domestic violence, are then denied effective protection by the operation of the so-called 'one year rule' and other welfare rights legislation. The combined legislative framework requires that spouses from abroad remain in a marriage for a probationary period of at least a year without recourse to public funds. Following the completion of the probationary period, if they are still married, they are entitled to seek indefinite leave to remain in the country. If the marriage has ended for whatever reason, then the spouse from abroad is subject to deportation. Many women are thus faced with a stark choice – domestic violence or deportation. Women who are frightened of returning to their countries of origin for fear of destitution, further violence and social persecution as a result of their changed marital status, choose instead to remain within violent relationships.

In recognition of the impact of the immigration rule on domestic violence experienced by minority women, the rule was modified by the introduction of a concession to the latest immigration and asylum legislation. But the modification still does not give effective protection to those minority women who experience domestic violence. The rule states that women who can demonstrate that they were the victims of domestic violence within the probationary period will be entitled to remain in the country on an indefinite basis. The problem, however, lies with the much higher standard of proof that is required of minority women in demonstrating domestic violence. The test which women have to

overcome borders on requiring proof beyond all reasonable doubt. Few women are able to meet the level of proof required. The result is that many women are still entrapped within violent relationships.

The operation of such immigration rules means that the autonomy and right of black and minority women to live free from violence is restricted. Moreover, it has the effect of exacerbating the abuse that occurs in the family since the existence of the immigration rules gives the settled spouse added power to perpetrate the violence with impunity knowing that there will be no social censure. Paradoxically the immigration restriction reinforces patriarchal relations and gender discrimination. Yet this aspect of immigration law and policy is not addressed in official rhetoric and national policy and initiatives on domestic violence aimed at increasing social awareness and decreasing social tolerance of domestic violence. Thus major initiatives on domestic violence do not acknowledge the fact that not all women experience violence or protection from such violence in the same way.

The operation of the rule therefore compounds the violence that black and minority women experience and has a racially discriminatory effect in that minority women with no settled immigration status are denied access to protection and other welfare services that are available to battered women in the majority community.

### **Domestic violence and the criminal justice system**

Many black and minority women are unable to access the criminal justice systems for a number of valid reasons. Their experiences of the criminal justice system have received little official attention since they have largely fallen between two stools. On the one hand, where relations between black and minority communities and the police and other criminal justice agencies have been addressed, including most recently in the wake of the Stephen Lawrence case (The Mcpherson Report 1999), the concept of these black communities has never included a gender analysis. Thus black women's specific experiences of racism have not received appropriate attention. In parallel official studies on women and the criminal justice system over the years, black women's peculiar experiences of racial discrimination intersecting with gender discrimination have only been given a cursory glance.

Black women may be subject to oppressive policing practices and so, share similar experiences of racism to that of men within their communities. For example, when reporting domestic or racial violence, black women may instead be criminalised. My experience shows how women who report incidents of domestic violence are themselves subject to incarceration or questioning and investigation as to their immigration status. In other situations, black women are deterred from reporting instances of violence and abuse in their communities because they carry the burden of not exposing the community to 'overpolicing' or 'extreme state measures'. We have known cases where black men were arrested for domestic violence and subsequently deported, where they do not have a settled immigration status, or dying in police custody. The burden that black women bear is, therefore, multiple. They are under immense pressures not to expose the wider community to institutional racism. Also they are unable to seek redress for abuses that take place against them within their communities.

While black and minority women are 'overpoliced', their experiences of domestic violence are often 'underpoliced'. Historically, domestic violence has always been 'underpoliced'. But in much of the official literature on domestic violence, black women's experiences of domestic violence is seen to be one of gender discrimination and sexist attitudes prevalent throughout the police and prosecutorial system. However, the experiences of South Asian women in particular show that police failure to criminalise domestic violence is more marked. This is largely due to multicultural assumptions about their different cultural backgrounds. Differences of culture and religion are often cited as excuses by the police for their non-interference. The result is that patriarchal power within minority communities, manifest for example in abuses such as domestic violence or forced marriages, is reinforced and goes unchecked. The message is that Asian women have no right to rely on the state for protection or to uphold their human rights. On the other hand, the notion of 'difference' is ignored in official strategies on violence to the extent that language difficulties, racism and other obstacles which prevent

Asian women from reporting instances of violence, are not addressed. On the other hand, differences in culture and religion are invoked in exaggerated and stereotypical forms to justify non-interference in minority families for fear of being perceived to be 'culturally insensitive'. This latter approach amounts to an inverse form of racism since it denies the right to protection available to other women in society and in fact perpetuates patriarchal abuse of power within minority communities.

### **Domestic violence and multiculturalism**

In the UK as in other western democracies, multicultural approach has become the dominant approach to relations between the state and minority communities. With its emphasis on the need to respect and tolerate diversity and difference, it is widely accepted as a more enlightened or progressive approach to the integration of minorities. The multicultural model is all-pervasive in social welfare policy and practice. Whilst the underlying notions of respect and tolerance for minorities are important, the tendency within multicultural discourses is to construct minority communities as homogeneous, with static or fixed cultures and without internal divisions along gender, caste or class lines. The consequent power relations and internal contestations of power that flow from such division are not recognised. Also, the model is undemocratic since relations between the State and minority communities are mediated through unelected and self-appointed community leaders. Mostly there are men, from socially conservative backgrounds with little or no interest in women's rights or social justice. Most are from religious backgrounds and their interests lie in preserving familiar, religious and cultural values. The expectation that women will conform to religious and cultural dictates in order to transmit cultural values from one generation to the next is therefore considered crucial by such leaders.

In reality, community leaders in Britain are given control over the family, women and children, in return for maintenance of the political status quo. At a formal and informal level, state and community leaders enter in a contract where individual autonomy is traded for some degree of communal autonomy. The State and community leaders thus determine between themselves the level of interference within the community. For example with respect to policing issues, the police regularly consults community leaders on how and on what issues the community is to be policed.

Multiculturalism is a site where the intersectionality of race and gender discrimination is perhaps at its most complex as also most insidious. This is partly due to the fact that gender discrimination within minority communities is obscured by the model's liberal underpinnings of tolerance and respect for diversity.

The multicultural model in my view, poses one of the main obstacles to the enjoyment of equality and human rights by South Asian and other minority women in the UK and elsewhere. The consequences of the application of multi-cultural policies are that a relativist approach to human rights is adopted and legitimised by the state in respect of minority women. One example of this is the way in which the government has recently, in its first ever report on forced marriages, conceded that the process of mediation (which in practice involves reconciling victims with their oppressors without further state scrutiny) is, in the name of recognising cultural difference, a legitimate option to pursue. Yet at the same time, it is acknowledged in state policies on domestic violence and abuse of women in the majority community, that mediation should not be pursued, since it does not guarantee protection from such violence and abuse. The multi-cultural approach therefore, not only accommodates but also reinforces certain abuses against women and girl children within minority communities, denying them the protection that they need in view of their enhanced vulnerability as women and members of a minority community.

### **Recommendations for action**

Urgent action needs to take place at both the national (governmental) and international (United Nations) levels, to raise awareness of the multiple nature of discrimination experienced by marginalised

women, and to mainstream an intersectional or more holistic approach to the question of racial and gender discrimination. It is both the intersectional and the simultaneous nature of multiple discrimination that needs to be understood at a theoretical level and addressed at a practical level.

Many of the recommendations for addressing intersectional discrimination are outlined in the Expert Group report. Since much of my presentation is particularly concerned with failure at the national level to acknowledge intersectional discrimination, the recommendations highlighted below are aimed at forcing governments to take positive action to identify and address how multiple discrimination affects marginalised women who experience violence in the family.

### **To the UN system and governments**

Develop methodologies to identify intersectional discrimination and its effects on women and girls who experience domestic violence and other forms of familial abuse including honour crimes, forced marriages, crimes related to the giving and taking of dowry and sexual abuse in private and public life. Investigations into intersectional discrimination should begin with analysis experiences of marginalised women in all their complexities. A series of questions need to be asked as to what dimensions of discrimination converge to affect and shape their lives.

### **To Governments**

- Carry out an urgent review of all governmental policies and laws, including those on violence against women, citizenship, nationality, immigration and asylum, for the discriminatory impact on marginalised women affecting their enjoyment of gender and racial equality.
- A careful audit of governmental policies on the elimination of racial discrimination, including multicultural and other so-called progressive 'anti-racist' policies, for their impact on gender equality with reference to minority women.
- Establish and/or strengthen legislation and regulations against all forms of racism, including its gender-specific manifestations.
- Noting the difficulties women face in challenging multiple or compound discrimination, review national mechanisms to ensure that women can seek protection and remedies against intersectional discrimination based on race and gender.
- Review and repeal all legislation and policies on immigration and asylum that result in any form of discrimination against marginalised women.
- Provide immigrant women – and women who have no legal immigration status – with full and equal access to all the resources and preventative measures against violence, as available to other women in the community, as well as access to appropriate interpretation and support facilities.
- Provide full access to women within minority communities to transparent effective and prosecutorial machinery to seek redress for violations of international human rights.
- Develop policies and programmes, including quotas, to increase participation of immigrant women in decision-making, particularly at the local level.
- Ensure priority and adequate funding for NGOs that work specifically with marginalised women.
- Make funding and the provision of resources to groups addressing any form of discrimination experienced by marginalised groups conditional on the need to integrate an intersectional approach to their work.
- Provide financial and other resources for anti-racist training, to agencies across the civil and criminal justice systems and statutory welfare services, which integrates an awareness of the gender-related dimensions to racial discrimination in such training and vice versa. To provide resources for gender-sensitive training which incorporates race discrimination where it intersects



with gender discrimination.

- Develop training and awareness programmes for legal, welfare, health, education and other statutory bodies designed to address specific problems created by the multicultural approach to domestic violence and other forms of gender-related abuse experienced by minority or marginalised women.

### To the UN system

With respect to recommendations for action to the UN system, intergovernmental bodies, UN human rights treaties and bodies, and special mechanisms, please refer to the comprehensive list of recommendations made in the Expert Group report. There is an urgent need to mainstream an intersectional analysis into the investigation of all forms of discrimination, by the various UN constituent bodies. This includes mainstreaming an intersectional analysis of gender and race discrimination into the work of all mechanisms of the human rights system, including treaty bodies, commissions and the activities of the thematic and country-specific rapporteurs and working groups.



## HUMAN RIGHTS DEFENDER

### Jayaben Desai

Jayaben Desai was born in Gujarat, India, from where she moved first to Tanzania, East Africa, and then, in 1969, to Britain. In 1974 she took a job at the Grunwick photo-processing factory in North West London, where the workforce was predominantly newly arrived East-African Asian women. Amid awful working conditions, racism, low pay, long hours and overtime that workers were forced to do, there was no union recognition. The white management controlled the workers with threats, insults and harassment. On August 20, 1976, following a rude instruction to do overtime, Mrs Desai, together with her son, Sunil, walked out. Her parting words to the manager were, "What you are running here is not a factory, it is a zoo. But in a zoo there are many types of animals. Some are monkeys who dance on your finger-tips, others are lions who can bite your head off. We are those lions, Mr Manager."

Outside she joined up with four other workers who had also left earlier that day in protest at conditions at Grunwick. Together the six workers joined the APEX union, and with support from local black political groups and local union backing, they started picketing the factory. Soon there were 137 workers on strike, protesting about the conditions at Grunwick and calling for union recognition. Up to 8,000 workers from across the country joined the picket. When the union movement did not offer the support the strikers wanted, the organisers began a hunger strike outside Trade Union Congress headquarters, and won their demands.

At a time when the public perception of Asian women was dominated by notions of a passive, subservient group, Mrs Desai and her colleagues forcefully challenged stereotype. The trade union movement had a very bad record when it came to supporting black workers striking against racist exploitation. But in 1976 the Labour government were in the process of passing a new race relations law – this time with trade union backing. The unions were keen to be seen supporting black workers and so, for the first time, the trade union leaders gave full support to black strikers. But they tended to play down the racial dimension of the struggle and concentrate only on issues which affected all trade unionists – white and black.

Mrs Desai became a national figure on TV speaking to hundreds of miners, postal workers, car workers and others in front of the Grunwick factory.

The law was used to stop mass pickets. Dozens of people were arrested during the mass pickets as riot police cleared a path to the factory gates. The union leaders started to lose their nerve and the strikers found themselves up against the Grunwick management, the law and the union leaders. Though the strike was not officially ended for another six months, it was effectively over by the beginning of 1978. The strikers had lost. But black workers like Mrs Desai had shown themselves as the toughest fighters for trade union rights and against racism.



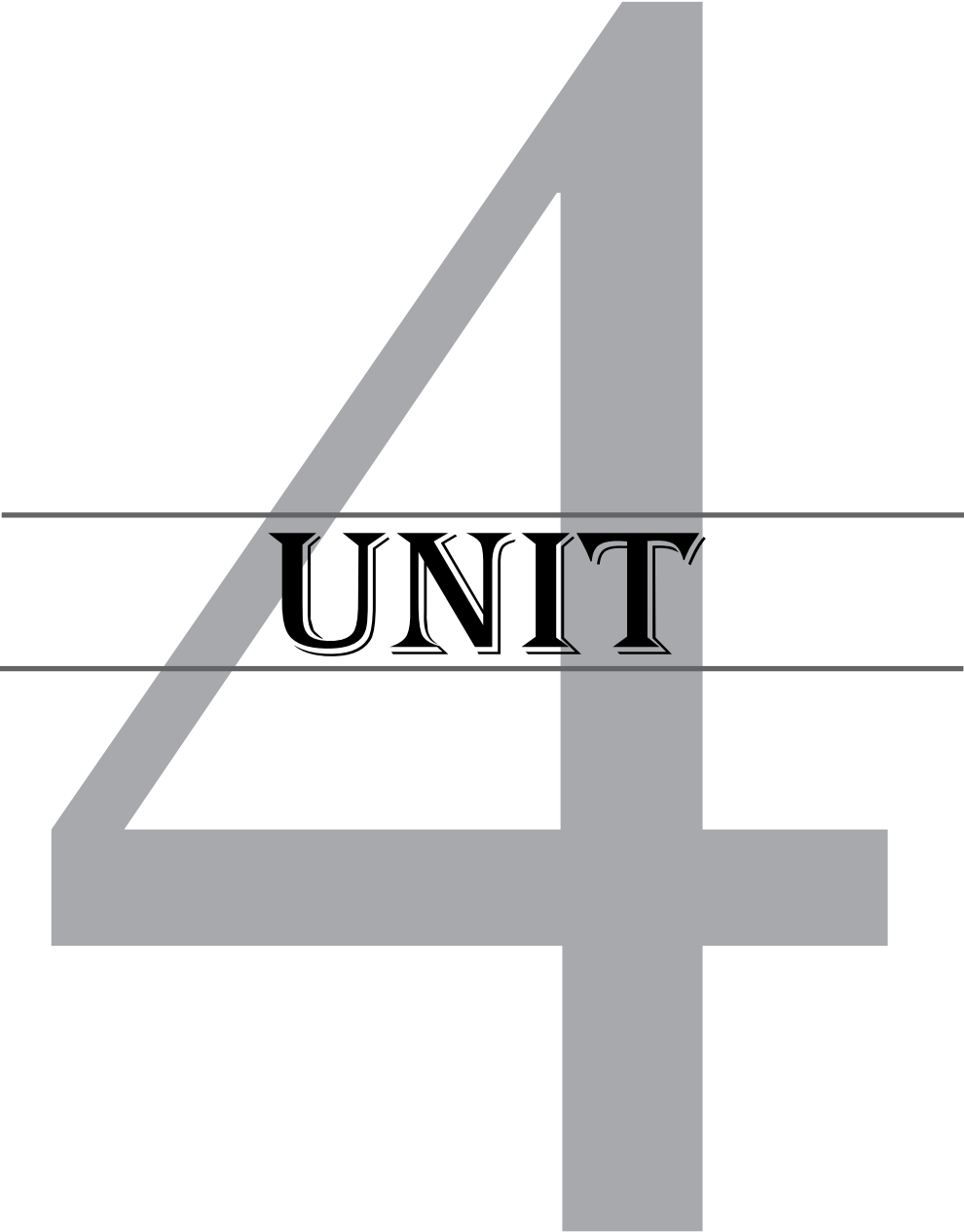


SAVE  
DEMOCRACY

201  
LET  
PREVENT  
RESPECT  
ESPA

SAVE LIVES  
SAVE DEMOCRACY  
STOP ATROCITIES  
INNOCENT PEOPLE

DOWN! DOWN!  
COLONIAL  
LONG L  
DEMOCR

A large, bold, gray number '4' is centered on the page. Inside the upper loop of the '4', the word 'UNIT' is written in a black, serif, all-caps font. Two thin, horizontal black lines are positioned above and below the word 'UNIT', framing it within the upper loop of the number.

UNIT

## **Ashoka**

**300 BCE**

Enshrined freedom of worship and respect for religious rights of his subjects; exhorted other leaders to promote impartial justice and social equality and declared that no castes should exist since “all are from one tree.”

## UNIT-4 SESSION-I

### FROM CONVENTION TO LAW

**A** UN Convention carries more weight and overrides all other forms of legislation. By ratifying a UN Convention a State is committed to integrating the norms into national law. The procedure for developing a Convention is that a text is drawn up in consultation with member States. When the wording is agreed by the maximum possible consensus it is put before the General Assembly for approval. Following that member States start the process of ratification. This consists of signing the Convention and developing or adapting national laws to comply with its commitments. A Convention enters into force when a given number of countries have ratified it.

**The structure:** A UN Convention is a preamble that includes the context and considerations that gave rise to the Convention, followed by the articles which set out the general principles and specific duties concerning that particular issue. The national and international monitoring arrangements, the procedure for bringing the Convention into force, the establishment and regulation of international bodies and the system for amendment form the last section. Some Conventions include optional protocols if some of the obligations were not agreed to by the majority of countries.

#### **How it is monitored**

The Office of the (United Nations) High Commissioner for Human Rights (OHCHR) is a department of the UN secretariat, which exists to protect and promote the realisation of human rights all over the world. It is also the lead body for ensuring that human rights are integrated into all other UN activities.

Most of the Conventions have attached to them a 'treaty body', which is an independent committee that monitors their application. These bodies receive periodic reports from the ratifying States on how the Convention has been implemented. The Human Right Council and the International Court of Justice are the international enforcement and judicial bodies. Additional regional and national level bodies such as the Council of Europe and the European Court of Human Rights also monitor human rights Conventions.

#### **Convention on the Rights of Persons with Disabilities (CRPD)**

The essential value of a UN Convention is the social and political recognition that it brings. The fact that the Convention focuses on a particular population group can put the concerns of that group onto the global agenda and ensures that their rights are specifically taken account of in government policy and legislation. The CRPD is an important example of this. One in ten persons is disabled but there is little evidence that the interests of disabled people were taken account of in the enactment of general human rights policies.

Poverty is both a cause and an effect of disability. Almost half the world's poor are disabled and 80% of these live in developing countries. The hazardous lifestyles lived by the poor cause a high incidence of disabling illness and accidents. Poor nutrition and antenatal care leads to disabilities at birth and in the growing child. The cost of medical treatment can mean that relatively minor ailments are left untreated and lead to severe and chronic conditions. This is compounded by the fact that disabled people are likely to face exclusion and discrimination in education, employment and access to benefits. They are more easily exploited and often ill-treated by society, meaning that they find themselves in a vortex of poverty which is impossible to escape.

#### **The Social Model of Disability**

The definition of disability is a long-term limiting illness or condition that seriously impairs a person's ability to perform or participate in the activities of ordinary life. This definition includes physical,

sensory, mental and intellectual impairments and progressive conditions such as HIV and multiple sclerosis. A large proportion of disabled persons have multiple impairments. Disabled people may also face multiple layers of discrimination. A poor, disabled, girl child born in a rural area in India is likely to be the least valued and least protected member of society. It is very possible that she will be left to die within her first few days. A disabled boy child born to a wealthy family in a modern city is far less likely to suffer the same fate.

The understanding of disability from a rights-based approach recognises that the extent to which impairment interferes with a person's ability to perform or participate in the activities of ordinary life not only depends on where they live but also on social factors such as gender, race, age, economic status and caste.

This underlines the fact that the most disabling obstacles in the way of living a full and active life are prejudice, stigma and ostracism but most of all being ignored by wider society. Where aids are provided and adaptations made to environments, it is possible for the majority of disabled people to participate in education, most occupations, social activities and the cultural life of the community. But changing attitudes is a bigger challenge. Most legislations in the past had considered the welfare and protection of disabled people rather than their autonomy and dignity. Fundamental decisions regarding private and family life including relationships, marriage and childbearing are denied disabled people. There are underlying assumptions that disabled people should not or could not have the same drives and priorities as able people. The fact that the Guardianship Act is one of the most significant pieces of legislation for disabled people in India says a great deal about how disabled people have been viewed.

The UN Convention on the Rights of Disabled Persons (UNCRDP), which India has ratified, has the potential to radically alter this approach. Already inroads have been made with recommendations for amendments to both disability specific legislation and general law to take account of the UNCRDP. A specific disability discrimination law has been proposed which, if adopted, will further strengthen human rights promotion for disabled people.

**Medical model of disability:** Illness or condition that seriously impairs the ability to perform activities associated with ordinary life (person with disability). The disability defines the person.

**Social model of disability** is not a personal condition but the relationship between a characteristic and the society in which a person lives. So disability depends on social conditions including, culture, environment and economic circumstance. Other factors such as age and gender also influence the way a person is perceived and treated by society. What disables a person in one environment or society might not do so in another.

### **Reasonable accommodation for equality and non-discrimination**

The CRDP requires that ratifying nations make reasonable accommodation, "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". It promotes the concept of Universal design, meaning that all activities and policies should be developed with the aim of including everyone without the need for adaptations or adjustments. What counts as reasonable depends on the circumstances of each State but sets a minimum standard of giving disabled people equal opportunities with the rest of the population.

The Convention addresses discrimination by promoting the right of disabled people to live, work, receive education and healthcare alongside others in their community without segregation. It requires that disabled people must be provided with support to make choices about their lives and then supported to realise the choices they have made. For example, a person who suffers bouts of depression might find it impossible to look after a child during those times, but with timely support is perfectly

capable of being a good parent. This provision supports a person's right to parenthood and requires that the state makes it possible. Disabled people have the right to enjoy the full range of rights and it is the duty of Governments to protect and promote those rights.

#### **Points for discussion**

- What practical measures should society take to give disabled people access to the full range of services and opportunities available to everyone else?
- How can we ensure that people with intellectual impairments are empowered to realise their rights?
- Should there be any limitations to rights for disabled people?

### **HIV/AIDS and disability discrimination**

Unlike people with other chronic conditions or ill health, people living with HIV/AIDS (PLHA) are stigmatised and face significant discrimination. This not only hinders effective detection, treatment and prevention measures but also affects their access to human rights, including their right to social and cultural freedom, education, employment and access to healthcare. This adds up to a denial of the person's right to life.

There is widespread misinformation, misunderstanding and moral judgements applied to HIV/AIDS. Known in the West in its early days as 'the gay disease' homophobic attitudes led to the idea that HIV was some form of retribution for 'unnatural' sexual behaviour. It is also associated with sex workers and so carries that additional stigma. Gay men and sex workers of both sexes have been identified as 'high risk' groups but in reality it is now most likely to be transmitted through heterosexual acts and very often from one marriage partner to the other and then to newborn infants via breast milk. In any case, moralising about how someone contracted a life-threatening disease is not only to ignore the human rights aspect but is also counterproductive. The most high risk behaviour with regard to HIV/AIDS is denial and concealment but it is hardly surprising that people are reluctant to disclose their HIV status given the attitudes of society.

Discrimination against those living with HIV/AIDS has been found in various public and private sectors in India. This includes dismissing employees from service as soon as the employer knows about a person's HIV positive status, even though they can live a normal and physically active life for an indefinite period.

There are also practical and financial difficulties associated with HIV/AIDS prevention and treatment in a country such as India. For example, access to treatment and testing facilities in any State with only one or two antiretroviral (ARV) treatment centres may require people to travel many days to reach one of them. The cost of accessing treatment often means that the choice often comes down to one between treatment and food, even where the drugs themselves are free. Furthermore, providing treatment is further hampered by unfavourable legislative provisions. For example, section 377 of the Indian Penal Code criminalising sodomy makes reaching out to men who have sex with men (MSM) more difficult. Similarly, certain provisions in the Immoral Trafficking (Prevention) Act, 1956 create barriers in reaching out to commercial sex workers.

In UK law, Disability Discrimination Act 1996 (Amended 2006), known as DDA, covers long-term limiting illnesses, chronic conditions and progressive conditions that do not yet cause any functional impairment. The reason for this is that people with certain conditions were being systematically excluded from participating in some aspects of life. On hearing that a person had been diagnosed with multiple sclerosis or diabetes an employer might be less inclined to promote that person assuming that in future they would take more time off work than other employees. DDA makes it unlawful to discriminate against a person on such grounds. It also makes it unlawful to disclose a person's condition without their consent or to insist on work that would cause undue hardship in relation to the condition or make it impossible for them to continue in their job.

HIV/AIDS is included in the Act as a progressive disabling condition in much the same way as multiple sclerosis. This means that PLHA are entitled to the same protections and 'reasonable adjustments' as other disabled people. However, in India this is not the case and there is at present no pressure to consider HIV/AIDS as a disability.

**Points for discussion**

- What is 'disability'?
- What reasons might there be for considering HIV/AIDS a disability?
- What reasons might there be for not considering HIV/AIDS a disability?



**Development (n) de-vel-op-ment: The manner in which the rich gets richer and the poor gets poorer.**

website: [www.hrln.org/shr](http://www.hrln.org/shr)



**Ambaniji has so many bedrooms I, don't even have a room...**

website: [www.hrln.org/shr](http://www.hrln.org/shr)



## UNIT-4 SESSION-II

### **United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol**

10 % of the world's population have a disability of one form or another

They are united in one common experience:

Being exposed to various forms of Discrimination and Social Exclusion

#### **Status**

- Adopted by UN on 13 December 2006
- Opened for signature on 30 March 2007
- Fastest negotiated International instrument
- 3rd April 2008 - 20th country- Ecuador ratified the UNCRPD
- Came into force as an International Law on 3rd May 2008

#### **Status in India**

- Signed on 30th March 2007
- Ratified on 1st October 2007
- India has also adopted the UNCRPD which means:
  - Obligation to implement the provisions of the Convention
  - Abolishing / Amending local laws inconsistent with the Convention

#### **General overview**

- The Convention consists of 50 Articles
- Primary Objectives are:
  - to ensure an environment for the fullest enjoyment of all human rights, without discrimination
  - to foster international cooperation, and
  - to establish international and national monitoring

#### **...General overview**

- The Convention includes Articles on:
  - awareness raising
  - accessibility
  - situations of risk & emergencies
  - access to justice
  - personal mobility
  - habilitation and rehabilitation
  - statistics and data collection



## UNIT-4 SESSION-II

### ...General overview

Convention reckons persons with disabilities as subjects of rights instead of objects of charity

### Purpose

#### Article 1

“to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity”

### Definition of disability

- Not explicitly defined in Convention
- Preamble of Convention states:
  - Disability is an evolving concept
  - Disability results from the interaction between persons with impairments
  - Attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others

### ...Definition of disability

#### Article 1

“persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”

### General principles (Article 3)

- respect for inherent dignity, individual autonomy and independence
- non-discrimination, equality of opportunity and equality between men and women
- participation and inclusion
- respect for difference and acceptance of human diversity
- accessibility
- respect for the evolving capacities of children

### General obligations... (Article 4)

#### The obligation to respect

- refrain from engaging in any act or practice that is inconsistent with the Convention
- modify or abolish existing discriminatory laws, customs and practices
- consult and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the Convention

## UNIT-4 SESSION-II

### ...General obligations (Article 4)

#### The obligation to protect

States shall take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise

### ...General obligations (Article 4)

#### The obligation to fulfill

–adopt legislative, administrative, policy, programme to implement the rights of PwDs

–undertake or promote research and development of relevant goods and services

–provide accessible information to PwDs on relevant technology and other assistance, services and facilities

–promote training of professionals and staff working with PwDs

### Rights in the Convention

Convention does not recognise any new rights rather define with greater clarity the application of existing rights

– those are:

### ...Rights in the Convention

- Equality before the law without discrimination (Art 5)
- Right to life, liberty and security (Arts 10 & 14)
- Equal recognition before the law and legal capacity (Art 12)
- Freedom from torture (Art 15)
- Freedom from exploitation, violence and abuse (Art 16)
- Right to respect for physical and mental integrity (Art 17)
- Freedom of movement and nationality (Art 18)
- Right to live in the community (Art 19)

### ...Rights in the Convention

- Freedom of expression and opinion (Art 21)
- Respect for privacy (Art 22)
- Respect for home and the family (Art 23)
- Right to education (Art 24)
- Right to health (Art 25)
- Right to work (Art 27)
- Right to adequate standard of living (Art 28)
- Right to participate in political and public life (Art 29)
- Right to participation in cultural life (Art 30)

### ...Rights in the Convention

- Equal recognition before the law
  - The Convention reaffirms that PwDs have the right to recognition everywhere as persons before the law and that they enjoy legal capacity on an equal basis with others

## UNIT-4 SESSION-II

### ...Rights in the Convention

- **The right to vote:**

- The Convention guarantees political rights of PwDs and States parties must ensure the right and opportunity for PwDs to

- vote and be elected (ensuring voting procedures)

- facilities and materials are appropriate, accessible and easy to understand and use

### ...Rights in the Convention

- **The right to education:**

- State parties must ensure

- an inclusive education system at all levels

- life-long learning

- reasonable accommodation for the individual learner's needs

### Convention bodies

- **Conference of States Parties**

- meets in order to consider matters with regard to the implementation of the Convention

- **Committee on the rights of persons with disabilities**

- a body of independent experts serving in their personal capacity

- tasked with reviewing States' implementation of the Convention

- initially comprises 12 independent experts

### Optional Protocol

- **Additional functions for the committee:**

- Individual communications: Committee considers communications from individuals or group of individuals alleging violation of the provisions of the Convention by a State Party to the Protocol

- Inquiries: Committee member may conduct an inquiry on a State Party, following information received indicating grave or systemic violations of the Convention

### Monitoring & implementation

- **National level**

- National Human Rights Institutions (NHRC) to play an important role

- National focal points & coordination mechanisms within governments

- Multi-sectoral involvement of all government ministries

- Outreach to other national stakeholders (civil society organisations, academic/scientific institutions, private sector)

### Implementation within UN

- **Inter-Agency Support Group (IASG)**

- United Nations Inter-Agency Support Group established

- First meeting was held in December 2007

- Through IASG, United Nations will support the States Parties

- IASG will also

- ensure that the programmes and policies of the UN are inclusive of PwDs

- work to strengthen recognition of and respect for the Convention

## UNIT-4 SESSION-II

### Special rapporteur

- Monitor the implementation of the Standard Rules
- Advocate the equalisation of opportunities & full enjoyment of all human rights by PwDs
- Create awareness of the Convention, including for its wider signature and ratification
- Promote international and technical cooperation on disability issues for capacity-building of Member States
- Collaborate with all relevant stakeholders including organisations of PwDs
- Reports yearly to the Commission for Social Development

### Effect on the Indian laws

- **Mental Health Act**
  - Necessitates either limited or complete guardianship
  - Without legal capacity, rights guaranteed under the Convention will not be achieved
  - PwDs need continuous protection is a common belief which is incorrect
  - India thus needs to recognise and introduce the concept of legal capacity (Art 12)

### ...Effect on the Indian laws

- **Persons with Disabilities Act**
  - Definition of 'Person with Disabilities', requires more than 40 % disabilities and thus needs to be repealed
  - Comprehensive and Inclusive Educational Schemes instead of Special and Non-Formal education
  - Provisions for training of General Teachers for meeting the needs of Children with disabilities

### ...Effect on the Indian laws

- **Persons with Disabilities Act**
  - Non-discrimination in employment needs to be added
  - No need to established special/ separate institutions for PwDs — thus Chapter X to be deleted in whole
  - Reasonable requirement/universal design to be included within definition

### ...Effect on the Indian laws

- **Rehabilitation Council of India Act**
  - Need to substitute 'special education' with 'education of persons with disability' in the preamble
  - The definition 'handicapped' needs to be deleted immediately
  - Reasonable accommodation to be added within definition

### What we can do?

- Proper implementation and success of the Convention is a challenge to us
- Act as a pressure group to make India sign and ratify the Optional Protocol
- Immediately demand repeal of the inconsistent provisions
- Demand adoption of the principles within the existing Indian laws
- Remember - financial incapacities of a Member State cannot delay implementation

### Remember !

- Nothing about us without us
- Involve us in all developmental and/or policy making activities
- We need to seize our rights if any of the same are denied

## UNIT-4 SESSION-III

# **EXERCISE: MULTIPLE DISADVANTAGE AND AUTONOMY**

### **Case notes - Chandigarh Administration Vs Nemo**

#### **Facilitator's notes**

This can be staged as a tribunal with a panel of jurors and the rest of the course participants as a public gallery who remain silent throughout but can ask questions at the end. Notes on the case including the medical reports are attached and should be presented as evidence.

#### **Participants should be encouraged to consider**

1. What human rights violations might have taken place?
2. What legal cases could ensue from this example?
3. What multiple disadvantages does the victim face? Does this affect the way you answer questions 1 and 2?

#### **YOU, THE JURY**

The purpose of this exercise is for participants to explore the rights at stake in this case. It should include consideration of—

- Questions of capacity and evolving capacity of mentally disabled people
- Reproductive rights of women in general and disabled women in particular
- The rights of disabled people to be born
- The issue of rape as automatic grounds for pregnancy termination
- Provision of supported decision-making

Two volunteers or facilitators make depositions before the jurors explaining the case and setting out their position.

1. Puts the case for a late termination based on factors such as—
  - The subjects vulnerability and inability to manage independently
  - The fact that she was raped
  - The welfare of, and her capacity to care for, the child
  - The risk to her health and the risk to the child of inherited disability
2. Puts the case for the victim keeping the child based on—
  - A disabled person's right to have a child
  - The fact that she has not asked for or consented to a termination
  - The right to life of the unborn

The jury must now discuss the case and arrive at a majority decision.

## **THE RIGHT TO ABORT VERSUS THE RIGHT TO GIVE BIRTH**

**(Chandigarh Administration versus Nemo)**

**Colin Gonsalves**

**T**his note is being circulated so that you may have a look at the facts before the High Court in this case so as to make an informed decision on the merits of the case. Every woman in India has the fundamental right to abort or to continue with the pregnancy. Her decision is paramount. This is no less true in the case of mentally challenged women. To emphasise, her decision is final. No guardian and no court can take a decision on her behalf contrary to her decision.

The problem lies in determining her point of view. The law requires that she be supported and assisted in every way possible so that ultimately she may make an informed decision one way or the other. If the woman's point of view is not possible to determine then the guardian or the court must take a decision in the best interest of the woman.

In the Nari Niketan case the legal issues became very complex as consent could not be taken as the woman was not given any support or assistance. Therefore, the Chandigarh Administration as well as the Punjab & Haryana High Court proceeded on the basis of rough justice by appointing medical committees to make an assessment of the point of view of the woman as well as her ability to cope with the pregnancy and childbirth. The facts of this case are as given below.

A 19-year old mentally challenged woman kept at Nari Niketan, Chandigarh, which is a government institution for destitute women, was raped sometime in March 2009 on the premises by the security guards and conceived. In May 2009 the pregnancy was detected. The rape was widely reported in the media. Despite that no institution or individual came forward to assist or support the woman. In the same month the director of the Government Medical College and Hospital constituted a three-member board consisting of a psychiatrist, a clinical psychologist and a special educator to evaluate the mental status of the woman. Their report did not suggest anything out of the ordinary except for the observation that "she also cries almost daily". The board found that her mental age came out to be nine years and that she fell in the category of mild mental retardation. A few days later, a four doctor multi-disciplinary medical board was constituted which included a psychiatrist and the board submitted a report recommending medical termination of pregnancy in the following terms:

- “2. There is no doubt that this pregnancy is an outcome of the rape. In spite of being upset over mentally challenged, she has earlier communicated to her examiners about being upset over this incident and has lost interest in certain activities which were enjoyable earlier indicating that she might be mentally upset about this incident.
3. She has undergone a major spinal surgery during her childhood, as she was not able to walk. Although she is not able to elaborate the details further. The cause of mental retardation in presence of bony abnormalities can have a genetic basis and can be inherited by the baby.
4. Continuation of pregnancy in this case can be associated with certain complications considering her age, mental status and previous surgery. There are increased chances of abortions, anaemia, hypertension, prematurity, low birth weight babies, foetal distress and more chances of operative delivery including anaesthetic complications. Babies who are premature and low birth weight may have organs that are not fully developed.

This can lead to breathing problems, such as respiratory distress syndrome, bleeding in the brain, vision loss and serious intestinal problems.

5. Being mildly mentally retarded, she is unable to look after herself and can not fend for herself if left to her own devices. She was aware that there is a child inside her, although she had absolutely no idea how it came to be there. She cannot mother a child. Motherhood is not only holding the child but it is a complex relationship which is beyond her capability and comprehension.
6. Child of a rape victim who doesn't have family support can have social and emotional problems which can jeopardize his complete physical, mental and social well-being later.
7. There is clear-cut humanitarian ground as per the MTP Act as pregnancy is a result of rape on the basis of which MTP can be done. The board would like to highlight that MTP can also be associated with some complications which are dependent on the duration of pregnancy, expertise of the doctor performing the MTP and the method used for MTP. Immediate complications included haemorrhage and cervical injuries. Delayed complications include post-abortal bleeding, incomplete abortion; pelvic infection, peritonitis, and septicemia. The incidence of these complications is reported in 2.9% of cases, although the incidence of severe complications is very rare. The complications can still be minimised by doing a timely abortion under expert doctor. Considering all the above points, the board is of the opinion that she will not be able to cope with the continuation of pregnancy which in this case is detrimental for her and the child's health, and so recommends medical termination of pregnancy [MTP].”

For some reason, the High Court decided to appoint yet another committee consisting of three doctors including a psychiatrist and appointed a judge to be the co-ordinator of the committee.

This board answered the questions of the Court in the following manner:

(i) The mental condition of the retardee—	She suffers from mild to moderate mental retardation.
(ii) her mental and physical condition and ability for self-sustenance—	A case of mild to moderate mental retardation; Pregnant: Single live foetus corresponding to 13 weeks 3 days +/- 2 weeks, post-operative scars for spinal surgery, HbsAG positive; Her mental status affects her ability for independent socio-occupational functioning and self-sustenance. She would need supervision and assistance.
(iii) Her understanding about the distinction between the child born out of and outside the wedlock as well as the social connotations attached thereto—	As per her mental status, she is incapable of making the distinctions between a child born before or after marriage or outside the wedlock and is unable to understand the social connotations attached thereto.
(iv) Her capability to acknowledge the present and consequences of her own future and that of the child she is bearing—	She knows that she is bearing a child and is keen to have one. However, she is unable to appreciate and understand the consequences of her own future and that of the child she is bearing.

(v) Her mental and physical capacity to bear and raise a child–	She is a young primigravida with abnormalities of gait and spinal deformity and Hepatitis B surface antigen positive status. However, she has adequate physical capacity to bear and raise a child. She is a case of mild to moderate mental retardation which often limits the mental capacity to bear and raise a child in the absence of adequate social support and supervision.
(vi) Her perception about bringing up a child and the role of an ideal mother–	She has grossly limited perception about bringing up a child and the role of an ideal mother.
(vii) Does she believe that she has been impregnated through un-volunteered sex?	She has a limited understanding of the sexual act and relationship and even the concept of getting pregnant. She did not volunteer for sex and did not like the sexual act.
(viii) Is she upset and/or anguished on account of the pregnancy alleged to have been caused by way of rape/un-willing sex?	She has no particular emotions on account of the pregnancy alleged to have been caused by way of rape/un-willing sex. She is happy with the idea that she has a baby inside her and looks forward to seeing the same.
(ix) Is there any risk of injury to the physical or mental health of the victim on account of her present foreseeable environment?	Her mental environment of pregnancy does not pose any particular risk of injury to the physical health of the victim. Her mental health can be further affected by the stress of bearing and raising a child.  Her external environment in terms of her place of stay and the support available thereof is difficult to comment because of our lack of familiarity with the same. She definitely needs a congenial and supportive environment for her as well as for the safety of the pregnancy.
(x) Is there any possibility of exerting undue influence through any means on the decision-making capability of the victim?	Her mental state indicates high suggestibility because of her reliance on rote memory and imitative behaviour for learning. Being highly suggestible her decision-making can be easily influenced.
(xi) Do the over-all surroundings provide reasonable space to the victim to indulge in independent thinking process and take firm decisions on the issues vital to her life prospectus?	We are not familiar with her overall surroundings, hence unable to comment.



<p>(xii) What is the possible nature of the major spinal surgery alleged to have been undergone by the victim during her childhood? Does it directly or indirectly relate to the bony abnormalities of the victim? Can such abnormalities have a genetic basis to be inherited by the baby?</p>	<p>As per the neurosurgeon, spinal surgery during childhood could have been due to neural tube defect or spinal cord tumour. This could have been confirmed by MRI tests, but the same could not be carried through as those were considered to be potentially hazardous for the foetus. There is no history/records available for the spinal surgery, hence the safety profile issues relevant for the patient undergoing MRI like the possibility of use of any metal screws to fix the spine wherein MRI can be hazardous cannot be definitely commented upon in this case. The neural tube defect in the patient can lead to an increased chance of neural tube defect in the baby. However, these defects can be detected by blood tests of the mother and ultrasound. Presence of neural tube defect in the parent is not an indication for termination of pregnancy. It is not possible to comment on the inheritance of spinal cord tumours without knowing the exact nature of the tumour.</p>
<p>(xiii) Is there a genuine possibility of certain complications like chances of abortion, anaemia, hyper-tension, prematurity, low birth weight baby, foetal distress, including chances of anaesthetic complications, if the victim in the present case, is permitted to carry on the pregnancy?</p>	<p>The possibility of complications like abortion, hyper-tension, prematurity, low birth weight baby and foetal distress are similar to any pregnancy in a woman of this age group.</p> <p>Due to the spinal abnormality and gait defect she has a higher chance of operative delivery and associated anaesthetic complications. Spinal and gait abnormalities are not an indication for termination of pregnancy.</p> <p>Pregnancy in women with hepatitis B surface antigen positive status is usually uneventful. The prenatal transmission from mother to infant can be prevented by giving immunoprophylaxis to the neonate. Acute or chronic hepatitis B infection during pregnancy is not an indication for termination of pregnancy.</p>
<p>(xiv) What can be the most prudent course to be followed in the best interest of the victim?</p>	<p>Her physical status poses no major physical contraindications to continue the pregnancy. The health of foetus can be monitored for any major congenital defects. Her mental state indicates limited mental capacity (intellectual, social, adaptive and emotional capacity) to bear and raise the child. Social support and care for both the mother and the child is another crucial component. Therefore, any decision that is taken keeping her best interests as well as her unborn child has to be based on the holistic assessment of physical, psychological and social parameters.</p>

The board however, was not able to take a decision and placed the onus on the Court.

The Court relied upon the report of the psychiatrist which is, inter alia, as under:

“She could identify the place but could not convey what is meant by a hostel, hotel or a hospital. She could name doctor but had no conceptual understanding of the roles and functions of a doctor. She acknowledged that she had a child inside her but had no idea of how conception takes place, the development of pregnancy or even the duration of pregnancy, age of child inside her, how will it come into the real world, chances of any harm to or abnormality to her unborn child, what is expected of her in child rearing, how to provide succor and sustenance to child. To the extent that in her unborn child she saw the possibility of having a brother to her. She even had no clear idea of female and male, sexual act and its attendant emotions, concept of marriage, her role as a wife except that she would cook for the “bhaiya” (refers to matrimonial partner as a bhaiya or possible to every man as a bhaiya). She had poor idea of her sexual role and expectations in marriage. Her simple mental operations are reflected by her anguish at a preferred suit being torn during what she narrates attempt to undress her rather than an unwilling sexual encounter and its consequences thereof.”

Conclusion: Clinically, she meets the psychiatric diagnosis of mild to moderate mental retardation.

In addition to this, were the observation of a social worker who interacted with the woman and who found that the desire to have a child was articulated in a manner like a child wanting a toy or brother to play with. Looking at the physical condition of the mother including the spinal deformity and the neural tube defect, then considering the mental capacity of the mother, the social conditions and surrounding environment, the financial conditions of the woman, the lack of family or social support and the fact that the woman would be once again at the mercy of the dismal government institutions – on the basis of the preponderance of evidence the Court said that “the victim cannot be said to have consented for retention of the pregnancy” and that she “deserves to be liberated from this agonising responsibility which has been forced upon her”. In conclusion the Court said “we have no reason to doubt that the continuation of the pregnancy shall constitute a grave injury and may lead to more deterioration in the mental health of the victim”. Accordingly, medical termination of pregnancy was ordered.

Article 6 requires a state to take measures to ensure that women with disabilities enjoy all human rights and fundamental freedoms, and take appropriate measures to ensure the full development, advancement and empowerment of women. Article 12 of the UN Convention on the Rights of Persons with Disabilities, recognises that persons with disabilities enjoy legal capacity on equal basis with others in all aspects of life, and requires the state to take appropriate measures to provided access by persons with disabilities to the support they may require in exercising their legal capacity. Article 23 recognises the rights of the persons with disabilities to decide freely regarding children. The Article also recognises that a child should not be separated from her parents against her will and that the state is required to provide alternative care in circumstances where the woman is unable to care for the child. State is also required to vendor assistance to persons with disabilities in the performance of their child-rearing responsibilities.

Despite these provisions, even after the rape was reported widely in the media and the case proceeded on a day-to-day basis, no institution came to the assistance of the woman. She was provided no assistance, whatsoever. She was given no support at any time.

A mentally challenged woman under the UNCRPD has a right to a multiple choice. She has a right to abort. She has a right to continue with pregnancy. In taking this decision she has to be supported and assisted by the State. That support and assistance must come much prior to the 20-week cut-off date beyond which abortions are not legal, save in situations where the life of the mother is in

jeopardy. That support and assistance not being given, it is hazardous to guess what her intention really was. In the tragic facts of this case nobody really knows. If properly assisted and supported and properly counselled as to the continuance of the pregnancy and the meaning of child-birth and the rearing of a child with State support, the woman may have been able to take an informed decision to abort or to continue with the pregnancy.

The Punjab and Haryana High Court ultimately went on the basis of the reports of the numerous committees which concluded that “the continuation of pregnancy in this case can be associated with certain complications considering her age, mental status and previous surgery. There are increased chances of abortion... pre-maturity... foetal distress... and more chances of operative delivery including anaesthetic complications.” The committees concluded that “she has adequate physical capacity to bear and raise the child but that her mental health can be further affected by the stress of bearing and raising her child.”

This case, thus raised fundamental issues relating to consent and to the support required while assessing consent. Eventually, most mentally challenged women will, if properly supported and assisted, be able to indicate consent to either abort or to proceed with the pregnancy.



## UNIT-4 SESSION-IV

### Disability rights

#### Provisions under Indian laws

#### UNCRPD

What next?

#### Constitutional provisions

- Article 14: Equality before the law and equal protection of the law
- Article 15: Prohibition of discrimination.
- Article 16: reservation in government jobs
- Article 21: Protection of life and personal liberty

#### Indian legislations

- Mental Health Act 1987
- RCI Act 1992
- Persons with Disabilities Act 1995
- National Trust Act 1999

#### Mental Health Act 1987

- Law governing treatment, care and protection of persons with mental illness

#### Objects of MH Act

- Regulation of admission
- To protect society from mentally ill who are a danger
- Provide legal aid at state expense
- Guardianships
- Establishment of Central and State authorities for MH services
- Regulation of licensing procedures

#### Protection of human rights under this Act

- Mentally ill person not to be subject to indignity and cruelty
- Not to be used as a subject for research without consent
- No communication to be intercepted, detained or destroyed

## UNIT-4 SESSION-IV

### **Rehabilitation Council of India Act 1992**

- An Act for regulating the training of rehabilitation professionals and the maintenance of Central rehabilitation register

### **PWD ACT 1995**

- Social welfare legislation aimed at:
  - Integration of disabled
  - To provide equal opportunities  
For full participation

### **Disabilities under the Act**

- blindness
- low vision
- leprosy-cured
- hearing impairment
- mental retardation
- Locomotor disability
- mental illness

### **Entitlement of rights**

- To access rights under the Act only 40 percent and more certified disabled can avail benefits
- Certification by duly constituted medical authorities

### **Provisions of the Act**

- Central/ state coordination and executive committees
- Prevention and early detection
- Education
- Employment
- Affirmative action
- Non-discrimination
- Research and manpower development
- The chief commissioner and commissioners for persons with disabilities
- Social security

### **Prevention and early detection**

- surveys, investigations and research
- promote methods of preventing disabilities
- screen children at least once in a year
- training staff at the PHC
- sponsor awareness campaigns and disseminate information for hygiene, health, sanitation
- pre-natal, peri-natal and post-natal care
- educate the public through the schools, PHC, village workers and anganwadi workers
- create awareness amongst the masses through mass media

## UNIT-4 SESSION-IV

### Education

- Free education in appropriate environment till 18 yrs, integration in normal schools, special schools
- Non-formal education
- Research for assistive devices, teaching aids
- Setting up of teachers training institutes for trained manpower
- Comprehensive education scheme
- All government educational institutions and institutions receiving aid from government, to reserve not less than 3% seats for disabled

### Employment

- Identification of posts
- Review and update list every 3 yrs
- 3% reservation in identified jobs
- Special employment exchange
- Vacancies not filled up to be carried forward
- Employers to maintain records
- Schemes for ensuring employment of persons with disabilities to contain training and welfare, relaxation of upper age limit, health, safety, non handicapping environment
- Vacancies to be reserved in poverty alleviation schemes to the extent of 3 percent
- Incentives to employers who ensure five percent of the work force is disabled

### Affirmative action

- Schemes to provide Aids and appliances
- Schemes for the preferential allotment of land at concessional rates
- For— house, setting up business, special recreational centers, special schools, establishment of research centers, factories by entrepreneurs

### Non-discrimination

- Non-discrimination in transport
- Non-discrimination on the road
- Non-discrimination in the built environment
- Non-discrimination in government employments

### Social security

- Government to frame insurance schemes
- Unemployment allowance

### Grievance redressal

- Chief commissioner disability
- State commissioner disability

## UNIT-4 SESSION-IV

### National Trust Act

- An Act for welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities

### Objects of NT Act

- To enable and empower persons to live independently and within the community
- To strengthen facilities for persons to live within their own families
- Support to organizations to provide need based services during crisis
- To deal with problems of people who do not have family support
- To promote measures for care and protection in event of death of parents or guardians

### Schemes and Programmes of NT

- Schemes and programmes to promote independent living
- Local level committees
- Guardianships

### International laws

- ICESCR
- ICCPR
- CEDAW
- CRC
- CERD
- CAT
- CMW

### Soft laws on disability

- Standard rules for equalisation of opportunities
- World programme of action concerning disabled persons
- Declaration on rights of MR
- Declaration on rights of disabled persons
- Principles for protection of MI and improvement of mental health care
- BIWAKO
- Tallin Guidelines for action on human resource development in field of disability

### The UNCRPD

- Adopted by UN General assembly on 13 December 2006
- Signed by India on 30 March 2007
- Ratified by India on 2 October 2007
- International law on 3 May 2008

## UNIT-4 SESSION-IV

### The UNCRPD

- Clarifies, amplifies and strengthens human rights and fundamental freedoms of disabled
- Powerful tool which empowers the disabled to negotiate with the state and civil society
- By ratifying this treaty India has agreed to ensure that all its domestic laws and policies are compatible with the convention

### Some general obligations

- Adopt legislative and administrative measures for the implementation of rights in the Convention
- Modify or abolish existing laws, regulations, customs and practices that are discriminatory
- Protect and promote human rights of persons with disabilities in all policies and programmes
- Ensure Public authorities and Institutions Act in conformity with the Convention
- Eliminate discrimination by any person, organisation or private enterprise
- Consult and involve persons with disabilities in the development and implementation of legislation and policies

### Indian disability code

- Mental Health Act 1987
- PWD Act 1995
- National Trust Act 1999
- RCI Act 1992
- Disability related provisions in general laws
- General legislations relating to rights guaranteed by UNCRPD
- Rules and regulations

### Perspective of Indian disability code

- Offers protective measures
- Welfare packaged as rights
- Focuses on what a PWD cannot do
- Selectively inclusive

### How does UNCRPD strengthen disability regime?

- Inclusive disability regime
- Sensitivity to double discrimination
- Interrogates disqualifying regime
- Envisages a regime of civil and political rights

### How will changes happen?

- By modifying existing laws
- By seeking altered judicial interpretation
- By lobbying with executive to change rules and regulations



## UNIT-4 SESSION-IV

### **Where can we bring about changes?**

- In disability specific laws
- Changes in general laws

### **Changes in PWD Act**

- Inclusion of rights mentioned in UN-CRPD and not mentioned in PWD Act
- Modifying rights in light of UNCRPD

### **Changes in National Trust Act**

- Distinction between substituted and supported guardianship
- Standards for support safeguards against abuse

### **Changes in Mental Health Act**

- Compulsory institutionalisation
- Experimental treatment
- Informed consent
- Property management rights
- Right to legal aid

### **Changes in disability provisions in other Acts**

- Disqualification to enter into contracts, marry, etc

### **General legislation on rights guaranteed in UNCRPD**

- Right to vote
- Right to marry
- Right to adopt
- Right to access justice
- Laws relating to emergencies

## UNIT-4 SESSION-V

### Human rights & HIV/AIDS

Now more than ever

#### Key human rights

- Non-discrimination and Equality before the Law (Employment, Education and Housing)
- Right to Life and Health
- Privacy
- Education and Information

#### Key human rights

- Right to Asylum
- Right to Marry
- Right to Property
- Autonomy, Liberty and Security
- Freedom of Expression, Assembly and Association

#### Constitutional provisions

- Article 14 of the Constitution guarantees equality to all persons within the territory of India
- Article 15 of the Constitution prohibits the State from discriminating on grounds of sex, caste, creed etc
- Article 16 of the Constitution provides for equality of opportunity in public employment

#### Constitutional provisions

- Article 19 of the Constitution of India guarantees the right to freedom of movement
- Article 21 of the Constitution guarantees right to life, right to health, right to livelihood, right to live with dignity
- Article 21-A of the Constitution guarantees the right to education of all children up to 14 years old

Human rights are fundamental to any response to HIV/AIDS. The promotion and protection of human rights are necessary to empower individuals and communities to respond to HIV/AIDS, to reduce vulnerability to HIV infection and to reduce the adverse impact of HIV/AIDS on those affected

## UNIT-4 SESSION-V

### **10 Reasons why human rights should occupy the centre of the global struggle against HIV**

- At the United Nations High Level Meeting on HIV/AIDS in 2006, world leaders reaffirmed that “the full realization of all human rights and fundamental freedoms for all is an essential element in the global response to the HIV/AIDS pandemic”
- Yet, 25 years into the AIDS epidemic, this “essential element” remains the missing piece in the fight against HIV

### **1. Universal access will never be achieved without human rights**

- Women and girls face widespread discrimination and gender-based violence, including within marriage, that fuels their HIV risk and impedes their access to information and services
- Children and youth lack access to HIV information, sexual and life-skills education, and pediatric formulation of HIV medicines
- In every regional and national consultation on universal access, obstacles such as these have been cited as major barriers to achieving the goal of universal access

### **2. Gender Inequality makes women more vulnerable to HIV, with women and girls now having the highest rates of infection in heavily affected countries**

- Women now account for half of all HIV infections worldwide
- Women suffer inequality in access to education, credit, employment and divorce. Legal and social inequality renders women economically dependent on men
- Violence against women fuels high rates of HIV infection among women (rape, forced prostitution)

### **3. The rights and needs of children and young people are largely ignored in the response to HIV, even though they are the hardest hit in many places**

- Children orphaned or affected by HIV are denied their basic rights to social protection
- Despite proven methods of preventing HIV transmission during pregnancy and childbirth fewer than 10% of pregnant women in the developing world are offered services to prevent the spread of HIV to their children
- 1,500 children are newly infected with HIV everyday
- HIV-affected children drop out of school at higher rates than their peers, representing a form of systemic discrimination in access to education
- Orphans and children living in HIV-affected families routinely face abuse, exploitation, discrimination, and property-grabbing by relatives, rather than receiving the care and protection they deserve

### **4. The worst affected receive the least attention in the national response to HIV**

- Many of those at highest risk of HIV have one thing in common: their status is effectively criminalized by law
- Police officers charged with enforcing anti-drug, anti-prostitution, and anti-sodomy laws routinely extort bribes and confessions from defenseless people
- Punitive approaches to drug use, sex work, and homosexuality fuel stigma and hatred against socially marginalized groups, punishing them further into hiding and away from services to prevent, treat and mitigate the impact of HIV

### **5. Effective HIV prevention, treatment and care programmes are under attack**

- In the last 25 years, it has been shown time and again that HIV programmes are more effective when based on people's voluntary, informed, and open engagement with evidence-based health services
- Such services should inform and educate people about HIV, support them to adopt healthy behaviors, and offer them a variety of proven prevention and care options that acknowledge the realities of their lives and allow them to choose what is most effective

## UNIT-4 SESSION-V

### **6. Aids activists risk their safety by demanding governments provide greater access to HIV and Aids services**

- In many countries, activists who demand access to HIV and AIDS services face the threat of censorship, defamation, violence, imprisonment, and other recriminations by their governments
- Nepali transgender people trying to distribute HIV information and condoms; or people who use drugs in Thailand opposing their country's violent 'war on drugs' and peaceful demonstrations by AIDS activists have been met with intimidation and violent dispersal
- Laws placing restrictions on the establishment of non-governmental organizations make it even harder for civil society to develop an independent voice for sound and effective HIV policies in their countries

### **7. The protection of human rights is the way to protect the public's health**

- The protection of a full range of human rights is the key to protecting public health
- Building on this reality, human rights activists have achieved great gains in the fight against HIV and AIDS: the right to nondiscrimination on the basis of HIV status; the right to treatment as part of essential healthcare; and the right of people living with HIV and AIDS to participate in the development of HIV policies and programs
- In fact, human rights are essential to public health and to a successful response to HIV

### **8. Aids poses unique challenges and requires an exceptional response**

- More than any other modern epidemic, AIDS challenges governments' responsibility and accountability
- Deep fears and prejudices surrounding sex, blood, disease, and death – as well as the perception that HIV is related to "deviant" or "immoral" behaviors such as sex outside marriage, sex between men, and drug use – cause political leaders to shy away from addressing the epidemic
- Controversial issues such as gender equality and adolescent sexuality are neglected in the global response to AIDS

### **9. 'Rights-based' responses to HIV are practical, and they work**

- Human rights approaches to HIV are not abstract, but real, practical, and cost-effective. Countries, such as Brazil, that have placed human rights at the center of their HIV response have seen epidemics averted or slowed

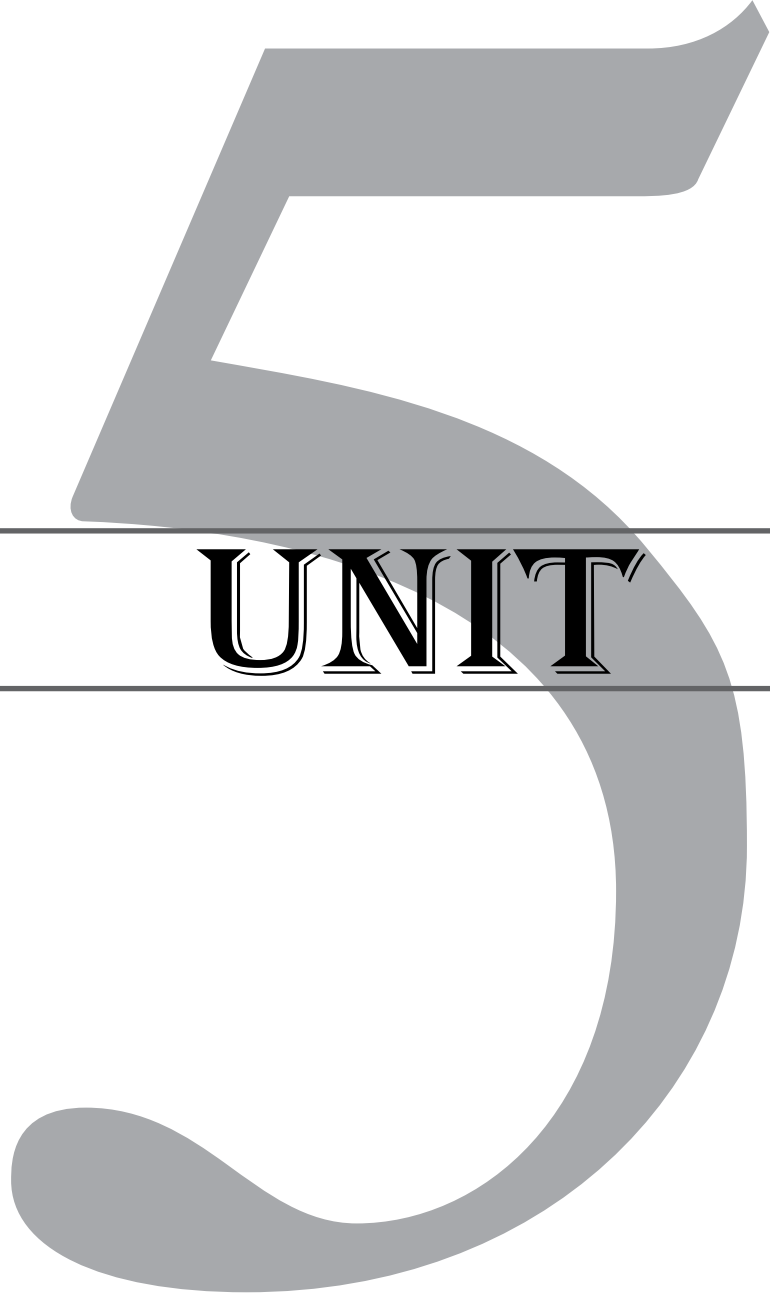
### **10. Despite much rhetoric, real action on HIV/Aids and human rights remains lacking**

- On paper, the place of human rights in the response to HIV is well established
- However, in practice, there have been few efforts to cost, budget and implement national programs that would secure legal and human rights protection for people living with, affected by or vulnerable to HIV and AIDS

### **Source**

Open Society Institute 2007





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**UNIT**

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**Chaitanya, 16th  
century Indian  
philosopher**

“There is only  
one caste —  
humanity.”

## UNIT-5 SESSION-I

# UNIVERSALITY AND SEX DISCRIMINATION

**T**he principle of universality in UDHR is that human rights are to be enjoyed equally by everyone. Despite this CEDAW makes special provision for the rights of women. Women and girls make up half the population of the world so why do we need a separate convention to protect their rights? Furthermore, how does universality sit with positive action/discrimination as recommended in the Convention?

### **Positive discrimination, reservation, positive action & quotas**

Affirmative action is any strategy used by governments to reduce historical disadvantages and restore a balance of power to disadvantaged groups. This can take the form of:

- Reserving a percentage of places in public office, government jobs, education establishments
- Positive discrimination by applying special rules to enable disadvantaged groups to qualify for benefits more easily (e.g. lower entry requirements for jobs or university places)
- Positive action such as providing additional training or resources to enable disadvantaged groups to participate on an equal basis with others (e.g. free school meals for poor children, training programmes with free crèche places for women students, shorter working hours for disabled employees)
- Quotas for the number of people from each group that must be represented in juries or committees

The purpose of affirmative action is to redress past and continuing injustices. In some cases the beneficiary might not have been individually discriminated against but just by belonging to a certain group is likely to have a greater struggle to achieve success than people from other groups. This includes ethnic minorities, people belonging to lower castes, disabled people and minority religious groups. Women are also regarded as a minority group for the purposes of affirmative action.

### **Sex discrimination**

There is a distinction between sex and gender which is that biological characteristics determine the sex of person while gender refers to the roles ascribed to the sexes by society. The terms are often used interchangeably but sex discrimination occurs when a person is harassed, persecuted or treated less favourably on the basis of their sex. This includes verbal or physical sexual harassment, assault and rape, discrimination against pregnant women, or interference with a woman's reproductive rights. It also takes the form of less favourable treatment in public life such as politics, employment, education, receiving services, buying goods, obtaining credit, entering public places and enjoying public facilities.

### **Gender roles**

Gender roles are based on simplistic notions of sex determining other characteristics such as intellectual ability, emotional strength or weakness, sex drive, caring skills and life choices and preferences. While physical differences require men and women in general to be treated differently in some situations, concepts of feminine intuition, the gentler sex and masculine pride are stereotypes imposed and absorbed by centuries of conditioning.

These stereotypes are deeply entrenched and ignore that women, men, homosexual or heterosexual are not homogeneous groups. Culture, religion, race, class, caste, language, education, economic status all play a part in determining a persons role and position in society and the extent to which



their human rights are either met or violated.

Gender stereotyping is harmful to both men and women as it denies them the right as humans to freely express their emotions and aspirations. In most cases, women are characterised in stereotypes in such a way as to deny them more freedom and power than men but it would be wrong to suggest that only women are harmed. Conflict situations provide the most a striking illustration of how this gendered view of society underlies abuses of human rights of both sexes. In most countries women are officially barred from taking part in armed combat but men can be forced to participate. Women and girls are at their most vulnerable to sexual assault and rape at the hands of occupying forces while men and boys are imprisoned, tortured and killed as potential combatants.

However, it is on the ordinary, day to day battlefield of domestic life that the women of the world are most at risk. While drafting a national strategy on domestic abuse the Scottish government “recognised that violence against women is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Violence against women is not only a consequence of gender inequality, it also perpetuates it. Tackling violence against women is therefore a key activity when trying to reduce the inequality between women and men.”<sup>1</sup>

### **Patriarchy, power and property**

While stereotypes ascribe certain conditions and characteristics to either sex, it is the ideology of patriarchy that puts a value on those characteristics. The feminine role as nurturer and carer, the male role of protector and provider has dictated the shape and form of the family unit. It is portrayed as a natural order in which the mother gives birth, feeds and cares for her family while the father provides for and protects them. The woman’s role is in the safety of the home while men face the harsh realities of the outside world. The question of choice is not considered in this scenario as it is implied that all ‘normal’ men and women would choose to live in this way. According to this model the male and perceived provider of the family wealth, is also regarded as the owner. Although some societies have matriarchal lineage, the vast majority are based on an interpretation of patriarchy whereby accession to property travels through the male line. This means that sons are more valuable than daughters and husbands hold economic power over wives. This is so acute in some societies that women are literally the property of their male family members. This allows the men to abuse, dispose of, disown or disinherit the females. Female foeticide, infanticide, “honour” killing, dowry system, domestic violence, forced marriage, rape and trafficking are all consequences of this ideology.

If poverty underlies most human rights abuses patriarchy ensures that women will bear the brunt of the worst of them. In every strata of society, in every country in the world, women are poorer than men. In the UK, thirty years after the Convention on the elimination of all forms of Discrimination Against Women (CEDAW) the Equal Opportunities Commission estimated that, at the current rate of progress, it would take women in Britain another three hundred years to achieve parity with men. In many societies the situation is moving in the reverse direction.

### **Sexual harassment**

There are many definitions of sexual harassment but most commonly it is defined as behaviour that is overly sexual or has sexual overtones that intentionally or otherwise hurts, threatens, humiliates, intimidates, causes distress or creates an atmosphere of hostility or fear. This can be in the form of unwanted physical contact, comments, jokes, display of images and messages by text, email or notes. It is far more common for women to be victims of male harassment and violence because of the gender roles ascribed to each but it is important to recognise that any person can be vulnerable to sexual harassment. It is possible for both men and women to be raped, sexually assaulted or harassed by persons of the same or opposite sex. Torture often involves sexual humiliation or injury to the

1. Scottish Government 2009 GES

organs of either men or women. Lesbian, gay and transgender people are vulnerable to sexual attacks by heterosexuals due to social intolerance. Sexual harassment as an act of violence perpetrated to reinforce power and to terrorise the victim and not a manifestation of sexual attraction.

### **Domestic violence**

Domestic abuse is grossly under-reported as a crime. Typically women endure several years of abuse and report it to the police only when it either requires medical attention, when her children are at risk, or when, for whatever reason, she becomes less dependent on the perpetrator. Victims of domestic abuse often feel partly responsible and even shame for the attacks. Emotional ties, loyalty to the family and economic dependence all have a part to play in this hidden epidemic but women from every race, community and social class are victims.

Domestic violence can take the form of physical, sexual, verbal, emotional and economic abuse. It can range from verbal intimidation or humiliation to extreme physical punishment. It might be carried out in private by one person against another or with the collusion or involvement of several members of the family.

In Indian law, the term 'domestic violence' applies only to an act carried out by a male relative, including a co-habiting male partner, against a woman although a court in Delhi recently held that a woman could be accused under the Domestic Violence Act. This recognised that a woman can be a perpetrator but also that a male relative could instigate abuse to be committed by a female relative against his wife safe in the knowledge that she could not be penalised for the crime.

In some countries the legal provision against domestic violence includes abuse carried out by partners in same sex relationships and harm or neglect of children and vulnerable people in the home. This wider definition, however, cannot conceal the fact that overwhelmingly violence in the home is carried out by husbands, fathers, sons and brothers against female members of the same family. It is the most common cause of injury to women in India and is still commonly accepted as a family matter and, even when serious injuries occur too often the man is excused as having been provoked. Globally, domestic violence kills more women than cancer.

### **CEDAW**

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) recognises the institutionalised discrimination against women in general and requires specific laws and policies that favour the advancement of women. The emphasis thus shifts from equal treatment to equal outcomes.

By ratifying CEDAW States commit themselves to incorporating sex equality into political and legal systems so that women can participate on an equal basis with men. In some countries this has enabled reservation of positions of public office to achieve equality at a faster pace. It requires abolition of discriminatory laws so that women have equal access to justice and cannot be punished for crimes that men would not be punished for and the adoption of laws prohibiting discrimination against women.

The Convention covers discrimination against women by 'persons, organisations or enterprises' and thereby protects women in the family, in political and public life, education, health, and welfare and in employment or while conducting business. CEDAW specifies culture and tradition as factors in shaping and perpetuating gender roles and contributing to sex discrimination. It also includes specific mentions of exploitation of women by trafficking and the reproductive rights of women.

### **Human rights and sexual minorities**

Sexuality minorities include lesbians, homosexuals (people who are attracted to and/or have sex with persons of the same sex), bisexuals (people who are attracted to or have sex with persons of either sex) transsexuals (people who have undergone or are in the process of sex change), and transgender

(people of one sex who adopt the clothes and characteristics of the other sex). It is only recently that sexual orientation has been considered as an issue of rights. Today the most Indian cities provide support and services to sexual minorities in the shape of help lines, social spaces and health resources but there is still insufficient protection from harassment and discrimination and service provision away from urban centres is virtually non-existent. Sexual minorities are discriminated against in law, by State organisations and by the community.

The Indian Penal Code, Section 377, criminalises homosexuality and classes it under 'Unnatural offences' The Section states: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine."

Section 377 makes no distinction between the voluntary acts of consenting adults and coercive sex. The Section has the scope to be used to prosecute those engaging in consensual homosexual sex as 'male' rapists. One of the arguments for retaining it is that without 377 there would be no means to prosecute child abusers. This draws an unsubstantiated and discriminatory parallel between homosexuality and child sex abuse and could be easily overcome by amending the Section to outlaw all non-consensual sex including sex acts involving a minor.

There have been very few cases brought under 377 in the higher courts and most of those have been for coercive sodomy, including the sexual assault of minors. In practice, the Section is mostly used to intimidate sexual minorities, to extort money and blackmail.

On 2nd July 2009, the High Court of Delhi in the case of Naz Foundation vs Government of NCT of Delhi and Others (2009) decriminalised homosexuality, holding that the law violated Articles 14, 15 and 21 of the Constitution. Following this judgment, a challenge was mounted on 20th July 2009 but the Supreme Court of India refused to stay the Delhi High Court's ruling.

In response to the judgment, many religious leaders have mounted opposition to the ruling and reiterated their condemnation of homosexuality but the response of the general public has been muted if not generally positive. The present situation is that homosexual sex has been decriminalised within the jurisdiction of New Delhi. Most believe that the rest of the country will eventually follow. However, even with the decriminalisation of Section 377, sexual minorities still face discrimination as a result of other laws, all of which must be repealed or narrowed if they are to preclude discrimination against sexual minorities:

- Sections 292 and 294 of the Indian Penal Code relating to obscenity permits 'moral turpitude' as a ground for removal from public service. There are also provisions in the State Police Act to prosecute same-sex activities.
- Section 46 of the Army Act permits removal from service of "any person subject to this act who (a) is guilty of disgraceful conduct of a cruel, indecent or unnatural kind". There are similar provisions in the Navy Act.
- There is no legal recognition of SM rights extended to heterosexual couples. For instance, there is no legal recognition of same-sex unions, thereby also denying homosexuals any of the benefits of heterosexual marriage.

In 2001 the Lucknow police invaded offices of the local AIDS prevention organisations to arrest their staff for promoting homosexuality.

In 1992, police arrested 18 men from a park in New Delhi on the suspicion that they were homosexuals. They were only released from the police custody after protests from international human rights groups.

Over twenty years ago, in a small village in Gujarat state, a local woman underwent a female-to-male sex change operation and became Mr Tarun Kumar. He later married, in 1989, a local woman but the girl's father filed a petition in the provincial High Court stating that, as a lesbian relationship, the marriage was null and void and calling for criminal action under 377.

In January 2006, police arrested four men, again in Lucknow, and accused them of operating an on-line homosexual “racket” and engaging in unnatural sex. The arrests were condemned by the human rights and HIV/AIDS communities.

**Points for discussion**

- To what extent it is justified for societies’ outrage sufficient to make an act unlawful?
- Should judges be the guardians of society’s morals and the upholders of norms concerning sexual behaviour?



## UNIT-5 SESSION-II

### **CEDAW**

UN Convention for the elimination of all forms of Discrimination Against Women

### **Definition of discrimination against women**

Discrimination Against Women is any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights. Art.1 CEDAW.

### **Responsibilities of signatory States**

- States must adopt all appropriate measures ensuring the legal and actual equality of men and women. Art.2. CEDAW
- States shall take measures to ensure the equality of women in various political, economic and social areas.
- States may take special measures to protect women as well as temporary special measures to accelerate de facto equality with men. Art 4(1)

### **Rights guaranteed**

- Right to participate in political life to vote, to be elected to public office and to join NGOs concerned with public and political life. Art 7(a)-(c) CEDAW
- Equal Right to acquire change or retain their nationality including equal rights with respect to their children. Art. 9(1) (2) CEDAW

### **...Rights guaranteed**

- Equality in the field of education including educational opportunities and resources. Art. 10 CEDAW
- Equal opportunity in the field of employment and equal treatment in the workplace. Art 11, CEDAW
- Equal access to social benefits and services such as healthcare. Art. 12 CEDAW
- Equality in family life including family rights and marriage rights. Art. 16 CEDAW
- Equality in family life including family rights and marriage rights. Art. 16 CEDAW

## UNIT-5 SESSION-III

### Domestic Violence Act 2005

#### Facts

- If you are beaten up, threatened or harassed in your home by a person with whom you reside in the same house, then you are facing domestic violence
- Domestic violence is a major problem in India, both in the states and union territories
- Domestic violence is the most common but least reported crime in India and number one case of women's injuries
- Each year millions of women seek medical assistance for injuries caused by domestic violence
- Domestic violence occurs amongst all racial, ethnic, religious, and socio-economic groups
- Domestic violence is considered as a family matter, so seldom comes out of the four walls of the home

#### Definition of violence under this Act: Section 3

- Any act or conduct of a man, is considered domestic violence:
- If he harms, injures or endangers the health, safety, limb or well-being, whether mental or physical, of the victim, or tends to do so
- It includes physical abuse, sexual abuse, mental and emotional abuse, and economic abuse
- It includes committing any act of harassment or, harm or injury to the woman, or any of her relatives, to meet unlawful dowry demand

#### Types of violence

- Sexual abuse
- Physical abuse
- Verbal abuse
- Emotional abuse
- Economic abuse

#### Sexual abuse

- Which means any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman

##### Examples:

forced sexual intercourse, forcing you to watch pornography, child sexual abuse, etc

#### Physical abuse

- Which means any act or conduct of such nature which causes bodily pain, harm or danger to life, limb or health or impairs the health or development of the aggrieved woman

##### Examples:

beating, biting, shoving, slapping, pushing, hitting, causing bodily pain that includes criminal intimidation and criminal force

## UNIT-5 SESSION-III

### Verbal abuse

- Which means using such words which cause mental agony

#### Examples:

insults, name calling, ridicule, taunting for not having male child, humiliating, taunting for dowry, etc

### Emotional abuse

- Which means repeated threats to cause physical pain to any person in whom the aggrieved woman is interested

#### Examples:

preventing you and your child from getting education, not letting you take up a job, preventing you from meeting any person, forcing you to marry a person against your will, preventing you from marrying, threatening you to commit suicide, etc

### Economic abuse

- Which means deprivation of all or any financial resources to which aggrieved person is entitled under law or custom

#### Examples:

depriving you of your entitlement under law, custom, court order or otherwise, using your stridhan, depriving you of joint ownership, disposing of household assets, depriving aggrieved women and children of household necessities, alienating moveable or immovable property in which you and your children have an interest entitled by way of relationship

### Against whom this law can be used

- Father
- Brother
- Son
- Husband
- Father-in-law
- Live-in partner
- Any other relative with whom the woman is living in a domestic relationship in the nature of marriage

### Where to complain

- Where the victim resides/works/does her business
- Where the act of violence has been committed
- Or, where the accused resides

### Who can file a complaint

- The victim herself
- The protection officer
- Any other relative
- Service provider (NGOs)

## UNIT-5 SESSION-III

### To whom to complaint

- Protection Officer
- Service Provider (NGOs)
- Magistrate
- Police

### Time allotted for disposal of application

- First hearing shall not be beyond 3 days of the date of receipt of complaint to the magistrate
- The case should be disposed off within a period of 60 days from the date of its first hearing

### Remedies

- Right to reside: Section 17
- Every woman in a domestic relationship shall have the right to reside in the shared household
- Any aggrieved person shall not be evicted or excluded from the shared household or any part of it

### Definition of Home

Any dwelling place where a woman and a man reside in a domestic setup

A home includes:

- Father-in-law's property
- Company-owned property
- Government-allotted property
- Shared property
- Father/brother/son's property
- Male friend's property (live-in relationship)
- Self-owned property
- Any other female relative's property

### Protection order: Section18

- A protection order prohibits the accused from:
  1. Committing any act of domestic violence
  2. Aiding or abetting an act of domestic violence
  3. Entering the place of employment or school of an aggrieved person
  4. Attempting to communicate in any form, with the aggrieved person, including personally, orally, in writing, by phone or electronically
  5. Alienating any asset, operating bank accounts, jointly or singly operated by the victim
  6. Restraining the victim from accessing her stridhan

### ...Protection order: Section18

- Causing violence to the dependent's relatives or any person who helps the woman to protect herself from domestic violence
- Committing any other act as is specified in the protection order



## UNIT-5 SESSION-III

### Residence Orders Sec-19

- A Residence order can provide for:
- Right to residence in the shared household
- Restraining the respondent from entering the portion of the shared household where the complainant resides
- Not to alienate the share in the shared household by the respondent or other property
- Arranging for separate accommodation for the complainant

### Monetary relief: Section 20

- The court should order the accused to pay monetary relief to meet the expenses suffered by the aggrieved person as a result of domestic violence
- The relief may include:
  1. The loss of earnings
  2. Medical expenses
  3. The loss caused due to destruction, damage or removal of any property
  4. Maintenance for the aggrieved person, as well as for her children

### Other provisions

- Appeal can be made to the sessions court within 30 days from the order of concerned magistrate
- Imprisonment up to 1 year or a fine up to Rs.20,000 or both for breach of protection order by the opposite party
- Protection officer can be prosecuted up to 1 year imprisonment or with a fine up to Rs.20,000 or both, for failure of his duties

### Women living with HIV/ AIDS and Relevance to Domestic Violence Act

### Stigma and discrimination

- **Stigma and discrimination in relation to HIV/AIDS** (and all STIs): much stronger against women who risk violence, abandonment, neglect (of health and material needs), destitution, ostracism from family and community. Furthermore, women are often blamed for spread of disease, always seen as the “vector” even though the majority have been infected by partner/husband
- For women throughout the world, safety (that is freedom from physical sexual verbal, psychological, and other forms of violence) is an issue that dominates all others in their lives
- It is this lack of safety that endangers her and increases her vulnerability to HIV – both by being infected and affected by HIV/AIDS

### HIV/AIDS Infected or Affected women mostly suffer from

- Dispossession from residence
- Mental and Physical violence
- Deprivation from property

## UNIT-5 SESSION-IV

### EXERCISE

*“When I am asked why a woman doesn’t leave her abuser I say: Women stay because the fear of leaving is greater than the fear of staying. They will leave when the fear of staying is greater than the fear of leaving.”*

–Rebecca J Burns

#### **Facilitator’s notes:**

**Step 1** Provide participants with the text of CEDAW and the press article attached.

**Step 2** Divide participants into groups small enough to enable discussions to take place.

**Step 3** In their groups participants identify the elements of human rights abuse present when violence between partners and close relations takes place. Write these up on a chart. Discuss the following questions.

- Why don’t victims report domestic abuse?
- Why do some women justify domestic violence?
- What impact does economic and social status have on domestic abuse and how is it dealt with?
- What role does the law play in eliminating domestic abuse?
- Why are CEDAW and domestic abuse laws specific to women?

## VICTIMS OF DOMESTIC VIOLENCE

Posted online: Thursday, October 13, 2005 at 1405 hours IST

**United Nations, (Press Trust of India):** Around two-third of married women in India were victims of domestic violence and one incident of violence translates into women losing seven working days in the country, a United Nations report said.

As many as 70 per cent of married women in India between the age of 15 and 49 are victims of beating, rape or coerced sex, the United Nation Population Fund report said.

The report claims violence against women was putting a huge strain on a nation's social and legal services and leads to heavy loss of productivity. "In India, one incident of violence translates into the women losing seven working days. In the United States total loss adds up to 12.6 billion dollars annually and Australia loses 6.3 billion dollars per year," it said.

Noting that women with tangible economic assets were less likely to be victims of domestic violence than those who lack them, the report cited Kerala as an example.

"In Kerala, a survey found that 49 per cent women without property reported domestic violence compared with only seven per cent who owned property."

The report also commended family counselling centres set up by Madhya Pradesh police department and supported by United Nations Population Fund (UNFPA), which provide legal services in cases violence related to dowry, harassment by in-laws, child marriage and rape.

The report said one in five women will be victims of rape or attempted rape in her lifetime; one in three would have been beaten, coerced into sex or otherwise abused usually by a family member or an acquaintance.

Despite efforts by governments and campaigns carried out by international organisations, violence against women continued on a wide scale in both developed and developing countries.

The report said women in several countries justify wife-beating for one reason or another. The reasons include neglecting children, going out without telling partner, arguing with partner, refusing to have sex, not preparing food properly or on time and talking with other men.

Several governments have started taking action and are enacting laws to fight the menace but their effect is limited because of deep-rooted social mores in several societies.

Violence kills and disables as many women between the ages of 15 and 44 as cancer and it's toll on women's health surpasses that of traffic accidents and malaria combined. The consequences of gender-based violence are devastating, including life-long emotional distress, mental health issues and poor reproductive health. "Abused women are also at a higher risk of acquiring HIV", the report said adding that it puts burden on the healthcare system, as they become long-term users of health services.

Besides, the effect might extend to future generation as children who see violence, or were victims themselves, often suffer a lasting psychological damage, it added.

## HUMAN RIGHTS DEFENDER

### **Savitribai Phule**

Savitribai Phule was born on January 3, 1831 in Naigaum village of Satara district in Maharashtra. She was married at the age of nine to poet and social reformer Jyoti Rao Phule. He was responsible for ensuring that she achieved her full potential by enabling her to receive education. This was a radical step in the 1800s as education was a privilege usually reserved for boys. He also supported her in her later activism despite violent opposition and pressures on both of them to conform to the social norms of the time. Together they led several social reforms but far from being under the influence of her husband several campaigns and struggles were initiated by Savitribai herself.

She challenged male domination and female suppression in several areas, most notably in education of women and lower castes. She led campaigns supporting widows, opposing untouchability, for prevention of infanticide, adult education and famine relief. In 1848, she opened India's first girls' school and enrolled girls of different castes.

Outraged at the way that widows were shunned by society, compelled to wear plain, unadorned clothes, to have their heads shaved and forbidden to remarry, Savitribai and her husband challenged the practice. They persuaded barbers not to shave the heads of widows and organised a strike of barbers in protest. This was the first strike of its kind.

In 1868, they further outraged upper caste society by opening up their own reservoir of water in the precincts of their house to the untouchables who were denied access to village wells.

Later they opened a delivery home for unmarried pregnant women, many of whom had been raped and sexually exploited. Women in this situation otherwise had no option but suicide or infanticide. To draw attention to this injustice Savitribai and Jyoti put boards on streets and informed people about the existence of the home and the issue.

After Jyoti's death Savitribai worked relentlessly for the victims of plague, where she organised camps for poor children. It is said that she used to feed two thousand children every day during the epidemic. She herself was struck by the disease and died on March 10, 1897.

Two books of Savitribai's poetry were published *Kavya Phule* in 1934 and *Bavan Kashi Subodh Ratnakar* in 1982. Recently, Maharashtra government constituted an award in her name for women who work for social causes.

## UNIT-5 ADDITIONAL MATERIAL-I

# **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)**

### **UNOFFICIAL SUMMARY**

#### **Article 1**

Definition of discrimination against women: Any distinction, exclusion or restriction, made on the basis of sex, with the purpose or effect of impairing the enjoyment by women of political, economic, social, cultural, or civil human rights on equal footing with men.

#### **Article 2**

States Parties condemn discrimination against women and undertake to pursue a policy of eliminating it in all its forms. States Parties undertake to: Include the principles of equality of men and women in national Constitutions; adopt legislation prohibiting all discrimination against women; ensure legal protection and effective remedy against discrimination; refrain from any act of discrimination against women and ensure that no public authorities or institutions engage in discrimination; take measures to eliminate discrimination against women by any person, organisation or enterprise; take measures to modify or abolish existing laws, customs and practices that constitute discrimination against women.

#### **Article 3**

States Parties shall take all appropriate measures, especially in the political, social, economic and cultural fields, to ensure the full development and advancement of women, for the purpose of guaranteeing them enjoyment of human rights on equal footing with men.

#### **Article 4**

Affirmative action measures shall not be considered discrimination. Special measures protecting pregnancy shall not be considered discriminatory.

#### **Article 5**

States Parties shall take all appropriate measures: To modify social and cultural patterns of conduct of men and women which are based on ideas of inferiority or superiority or on stereotyped roles for men and women; to ensure that family education includes the recognition of the common responsibility of men and women in raising children.

#### **Article 6**

States Parties shall take all appropriate measures to suppress traffic in women and exploitation of prostitution.

### **Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in political and public life and shall ensure equal rights to vote and be eligible for election; to participate in forming government policy and to hold public office; to participate in NGOs.

### **Article 8**

States Parties shall take all appropriate measures to ensure a woman's equal right to represent her government at the international level and participate in the work of international organisations.

### **Article 9**

States Parties shall grant women equal rights to a nationality. Neither marriage nor change of nationality by the husband during marriage shall automatically change the nationality of the wife. Women shall have equal rights with men with respect to their children's nationality.

### **Article 10**

States Parties shall ensure to women – equal rights in the field of education, same conditions for career guidance, access to studies, the same teaching staff and equipment. Stereotyped roles of men and women are to be eliminated in all forms of education. States Parties shall ensure that women have the same opportunities to benefit from scholarships and the same access to continuing education. States Parties shall ensure the reduction of female drop-out rates and shall ensure that women have access to educational information to help ensure health and well-being of families, including information on family planning.

### **Article 11**

States Parties shall take all appropriate measures to eliminate discrimination against women in employment and shall ensure, on the basis of equality of men and women, the same rights to work, to the same employment opportunities, to free choice of employment, to promotion, benefits, vocational training, equal remuneration, equal treatment in respect of work of equal value, the right to social security, unemployment, protection of health. States Parties shall prohibit dismissal on the grounds of pregnancy and discrimination in dismissals on the basis of marital status. States Parties shall take measures to introduce maternity leave with pay or social benefits.

### **Article 12**

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care and shall ensure women equal access to health care services and appropriate services in connection with pregnancy.

### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life and shall ensure the same rights to family benefits, to bank loans, mortgages and other forms of credit.

### **Article 14**

States Parties shall take into account the special problems of rural women and the significant roles they play in the economic survival of their families and shall ensure to them all rights in this

Convention. States Parties shall ensure equal rights of men and women to participate in and benefit from rural development and shall ensure to rural women the rights to: participate in development planning; have access to adequate health care facilities and family planning; benefit from social security programs; receive training and education; have access to agricultural credit and loans, marketing and appropriate technology; receive equal treatment in land reform; and have adequate living conditions, particularly in relation to housing, sanitation, electricity, water supply, transport and communications.

#### **Article 15**

Women shall have equality with men before the law. Women and men shall have the same rights regarding movement of persons and freedom to choose residence.

#### **Article 16**

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure equal rights to enter marriage, to choose a spouse, to enter marriage only with full consent, the same rights and responsibilities within marriage and in divorce, the same rights and responsibilities as parents, the same rights to decide on the number and spacing of children, the same rights with regard to ownership of property. A minimum age shall be set for marriage.

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## UNIT-5 SESSION-V

### **Legal Statutes related to maternal health and maternal mortality**

Adv Kamayani Bali Mahabal  
Women's Health Rights Advoca-  
cacy Partnership- South Asia  
www.arrow.org.my  
Dec 22 2008

### **Maternal mortality facts**

- In India, one woman dies every five minutes from a pregnancy-related cause.
- 15 percent of deaths of women in the reproductive age in India are maternal deaths.
- In India, 50 percent of maternal deaths of girls in the 15-19 years age group are due to unsafe complications arising out of unsafe abortion

### **Abortion in India**

- Over 6 million estimated number of abortions occur annually
- Over 3 million are illegal abortions
- 9% of maternal mortality is due to unsafe abortions

### **The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994)**

- The PCPNDT Act prohibits the use of pre-natal diagnostic techniques for the purpose of sex determination, and prohibits sex-selective abortions

### **Medical Termination of Pregnancy (MTP) Act**

#### **Grounds on which abortion is permitted:**

To save the life of the woman	Yes
Rape or incest	Yes
Foetal impairment	Yes
Contraceptive Failure	Yes
Available on request	No

### **Additional requirements**

- Unless a medical emergency exists, a legal abortion must be performed during the first 20 weeks of gestation by a registered physician in a hospital established or maintained by the government or in a facility approved by specific legislation
- A second opinion is required in cases where the duration of the pregnancy is between 12 and 20 weeks, except in urgent cases
- In general, the consent of the pregnant woman is required before the performance of an abortion, while written consent of her guardian must be obtained for a minor (defined as under age 18) or a mentally retarded woman



## UNIT-5 SESSION-V

### Abortion can be provided by

- Specialist doctors (obstetrician or gynecologists) and general practitioners who have undergone training as per government guidelines.
- Abortions can be provided only at sites established or maintained by the government or a place approved by the government
- The drug controller of India approved the mifepristone- Misoprostol regime in April 2002, for pregnancy termination up to 49 days

In May 2003, the rules and regulations governing the MTP Act were amended to specify that medical method of abortion (MMA) could be provided by certified providers even in unregistered facilities as long as they had access to a registered facility for backup services

### Suggestions for amendments

- Legal for age of 16
- Expansion of Provider base to include nurses
- On request before 12 weeks
- Increase 20 -24 weeks

### Clause requiring declaration by the women that the MTP is not following sex detection

- Strong reservations about this clause being included in the Act. Having any such clause only puts the onus on the woman and absolves the service provider from all responsibilities. There is an apprehension that this will shift the culpability from the persons carrying out sex determination to the woman undergoing sex detection
- The MPT and PCPNDT were two separate acts and they should be kept that way
- It was recommended that this being removed from the Act as well as the consent form

### Employee State Insurance Act 1948

- Maternity Benefit is payable to an Insured Woman in the following cases subject to contributory conditions:
- Confinement-payable for a period of 12 weeks (84 days)
- Miscarriage or Medical Termination of Pregnancy (MTP)-payable for 6 weeks (42 days) from the date following miscarriage-on the basis of Form 20 and 23

- Sickness arising out of Pregnancy, Confinement, Premature birth-payable for a period not exceeding one month-on the basis of Forms 8, 10 and 9
- In the event of the death of the insured woman during confinement leaving behind a child, Maternity benefit is payable to her nominee
- Maternity benefit rate is double the standard benefit rate, or roughly equal to the average daily wage

## UNIT-5 SESSION-V

### **Maternity Benefit (Amendment) Act 2007**

- **Object:** The Maternity Benefit Act regulates the employment of women in factories, circus, industry, plantation and shops or establishments employing ten or more persons excepting those covered under the Employees State Insurance (ESI)

### **Eligibility**

- Women can receive medical bonus of 1,000 rupees if no pre or post natal care is provided by the employer
- The Centre will have power to enhance the benefit up to 20,000 rupees
- A women shall be entitled to maternity benefit only if she has actually worked in an establishment of the employer for a period of not less then eighty days in the twelve months immediately proceeding the date of her expected delivery (section-5[2])

### **Maximun period of maternity benefit:**

Maximum twelve weeks of which not more then six weeks shall proceed the date of her expected delivery (section- 5[5])

### **Other benefits:**

- leave for miscarriage
- leave for illness arising out of pregnancy or delivery, premature birth of child
- miscarriage and nursing breaks for nursing the child until the child attained the age of 15 months (section-9,10 & 11)

**Dismissal or deduction of wages is not allowed.** (section –12&13)

## MATRIMONIAL PROPERTY RIGHTS

**Amy McArdle**

**W**ith Goa as an exception where matrimonial property rights are afforded under the Portuguese Civil Code of 1867, there is no legislative provision in India to ensure just and equitable division of property and assets upon marital separation, divorce or desertion. Women's rights groups argue that an equal right of both spouses to matrimonial property does exist since the principles of equality (Article 14) and non-discrimination (Article 15) are enshrined as fundamental rights under the Indian Constitution. However, in the absence of legislation thereon, Indian courts follow the common law "separation of property" regime whereby ownership is governed by title. Therefore, if at the time of marital breakdown property is not registered in the woman's name, as is so often the case, it is almost impossible for her to exert a legal claim over it.

The failure of the law to recognise women's matrimonial property rights is emblematic of India's patriarchal social structure. Indeed, it is very difficult to reconcile the abovementioned constitutional guarantees with the reality that many women are left empty hands and completely dependent on their natal family when their marriage ends.

### **A stand-alone law**

Supreme Court advocate and the legal convener of the All India Democratic Women's Association (AIDWA), Kirti Singh has been at the forefront of the campaign for matrimonial property rights in India, seeking a fresh legislation recognising the equal rights of women to the property and assets, both moveable and immoveable, that were acquired during the time the parties were married or co-habiting, including those that came to fruition after the breakdown of the relationship, such as insurance policies and pension benefits. In the envisaged legislation on matrimonial property rights, however, property that was acquired by either party before marriage, through individual gifts or inheritances, is unlikely to fall under the scope of "matrimonial property". Singh explains that the rationale behind the equal division of property would rest on the legal recognition of the woman's contribution within the home which, according to the survey conducted by the Indian Central Statistical Organisation (1998-1999), is enormous and multi-faceted.

Women are responsible for the running and maintenance of the family home and are the primary caregivers. The nature of the contribution differs between classes; poor and working-class women engage in more labour intensive activities -- they cook, clean, rear children and care for the elderly, while wealthier women, who may have recourse to domestic help, are still ultimately responsible for the supervision and organisation of the household. The contribution is also different in the urban/rural context. For the rural women, household chores will often include collecting water and firewood for the family, plastering walls, tending to livestock and other agricultural work. By working within the home women divest the opportunity to earn money, get promoted, and receive a pension, while facilitating their husband or partner to do so. Women who work outside the home carry a double burden as they are still the ones responsible for caring for the family and household and the money they earn is often used for household expenses whereas the man's earnings are more likely to be invested into assets in his name. Many foreign jurisdictions recognise such "contributions in kind" as having a commensurate monetary value and/or accruing a beneficial interest in the ownership of property. Ireland, for example, has in recent decades moved away from the doctrine that ownership is determined by legal title in favour of a fair division of property according to the contribution of both parties whether they be financial or domestic in nature. Another example can be seen in Section 4(7)

of the Family Law Act (1990), which governs the division of matrimonial property in Ontario, Canada, and specifically provides: “The purpose of this section is to recognise that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalisation of the net family properties...” Similarly, under Section 79(4) of the Australian Family Law Act (1975), courts must take into consideration the non-financial contributions made to the property and the welfare of the family through unpaid work at home and care of the children.

While any new law governing the division of matrimonial property in India should take cognizance of what is being done in other countries, Kirti Singh stresses the importance of drafting a law that recognises the historical discrimination and prevailing vulnerability of women in the Indian context. She, therefore, advocates for a law that is gender-specific to women, applicable to women from all religious communities on the basis of economic rights rather than personal laws, which automatically confers upon them an equal right to property and assets, and where judicial discretion is limited in favour of women and children, especially in relation to rights over the family home. The new law would also need a special clause to protect against the malafide transfer of assets and property in an effort to deny a woman her rights.

Advocate Singh is hopeful that a draft matrimonial property law will be ready by the end of year 2010 and all women’s rights and human rights groups will be invited into discussions and efforts to lobby the government. The importance of a standalone law on the division of matrimonial property becomes even more apparent when consideration is given to the wholly inadequate entitlements and deficient protection currently afforded to women under Indian law. Some of their salient features are summarised below.

### ***Stridhan*, dowry and inheritance**

The Supreme Court of India held in *Pratibha Rani vs Suraj Kumar* (1985) that: “The Hindu married woman is the absolute owner of her *Stridhan* property and can deal with it in any manner she likes.” The Court further enlisted the following exchanges as constituting *Stridhan*:

- (i) Gifts made before the nuptial fire
- (ii) Gifts made at the bridal procession
- (iii) Gifts made by in-laws in token of love
- (iv) Gifts made by the father, mother and brother of the bride

*Stridhan* property is predominantly movable, by way of jewellery, ornaments and clothing but in some cases can include land, property and houses. Theoretically, upon separation, divorce or desertion a woman is entitled to retrieve all of her *Stridhan*. This is rarely the case in reality where women have very little control over their possessions and find it very difficult to prove what was gifted to them, and generally get back used and valueless objects. Women are also legally entitled to their dowry, which generally consists of consumable items and consumer goods of negligible value, which are of little use to her when she separates. Furthermore, despite a recent amendment to the Hindu Succession Act affording a daughter an equal right to inheritance in natal property, the existence of the dowry system -- whereby it is deemed that the daughter’s due was given at the time of marriage through gifts of cash, clothing and other items to the in-laws -- often means she inherits nothing.

It is, therefore, very much unlikely that any of these, ultimately futile, entitlements will provide a woman with sufficient resources to maintain herself and any children where the spousal relationship has broken down and thus a just and equitable share in matrimonial property is the only solution.

### **Right to maintenance**

In the event of separation or desertion, women are entitled to financial relief in the form of “main-

tenance”. However, the laws governing maintenance are structured in such a way as to inherently disadvantage women. For instance, she must satisfy the court that she is unable to maintain herself and prove any assertions concerning her husband’s income, so in reality provide little more than spurious protection.

The Supreme Court and a number of high courts have laid down certain principles governing maintenance. The Delhi High Court, for example, has ruled that the amount awarded should be sufficient to allow the woman and any children to enjoy a parable standard of living to what they had prior to the breakdown of the marriage. This principle is routinely ignored and the reality for many Indian women is a lengthy and difficult struggle to eventually secure a “dole” that is too small to survive on and bears little resemblance to the husband’s income.

As Kirti Singh explains, one of the most problematic features of maintenance law is the provision that “fault”, attributable to the wife, defeats the right to financial relief. Section 125 of the Code of Criminal Procedure, which deals with maintenance for women from all communities, except divorced Muslim women, specifically provides that “no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband...” Further provision is made for an order of maintenance to be cancelled if either of the abovementioned can be established after the case.

### **Right to residence under DVA**

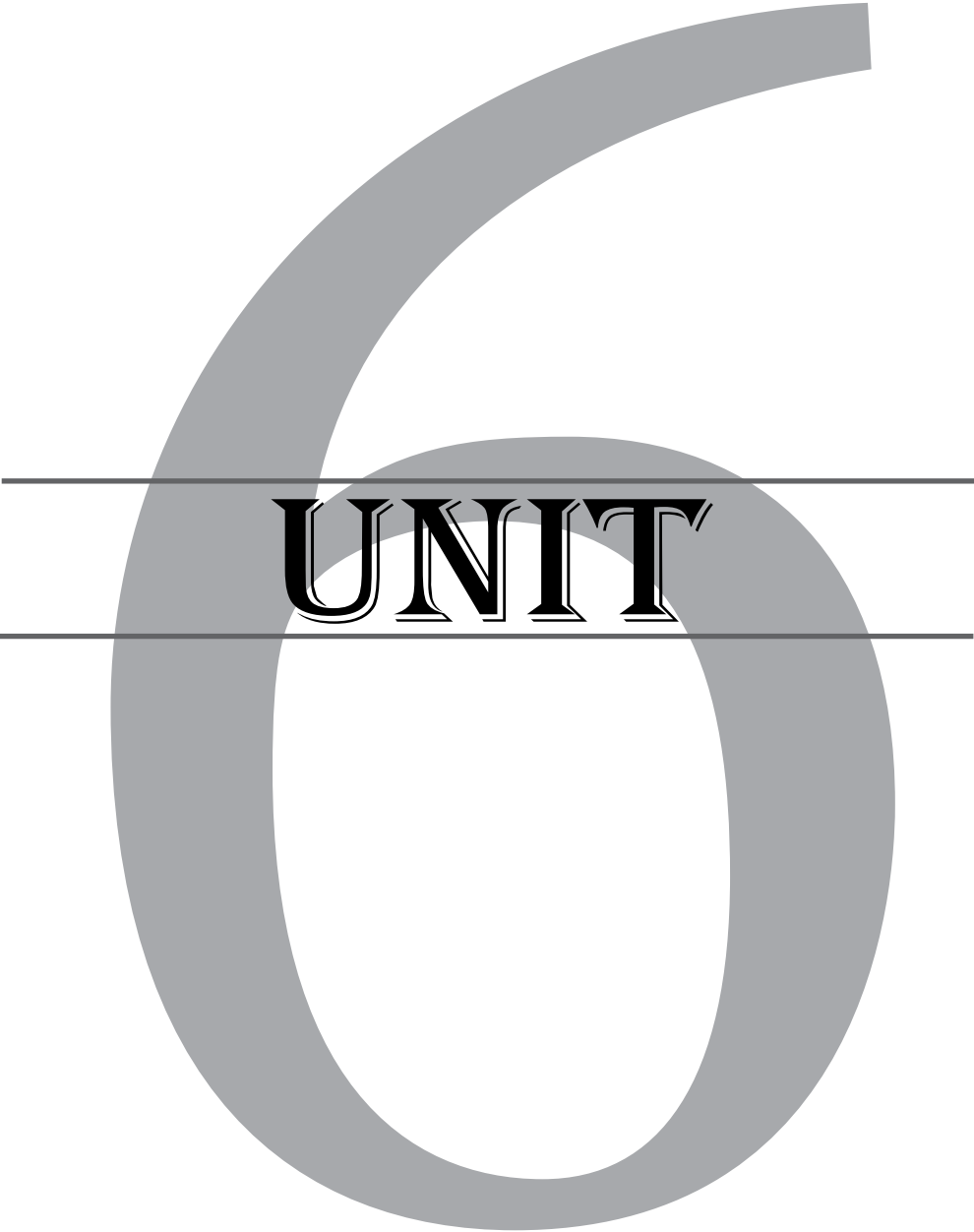
While the PWDVA, 2005, has been credited for introducing the judiciary to thinking more about women’s rights, the “no fault” principle is again the premise underpinning a woman’s right to residence, maintenance, custody, and compensation. The right of a woman to reside in the matrimonial or shared household, or to have alternative accommodation paid for, is contingent on her having been the innocent victim of domestic abuse at the hands of her husband or partner.

### **Need for new legislation**

Advocate Singh begs the fundamental question: Why do rights to residence and maintenance only arise in situations where women are deemed to be “victims” or “blameless”? A woman who leaves her husband or partner, for any reason, should be entitled to just and equitable legal remedies immediately upon separation on the basis of her having accrued a beneficial interest in the property and assets through her contribution, productivity and sacrifice within the home.

The existing laws must be strengthened and a new law on the division of matrimonial property introduced, to protect the interests of wives, partners and children where relationships break down. This should be done not only in the interest of fairness but also to breathe life into the constitutional recognition in Article 15(3) that women and children are particularly vulnerable to discrimination and that special provision can be made for their protection.

*—Based on an interview with Kirti Singh. Amy McArdle  
has been associated with the Reproductive Rights Initiative at HRLN  
Combat Law, May 2010*

A large, light grey number '6' is centered on the page. Inside the middle of the '6', the word 'UNIT' is written in a bold, black, serif font. Two thin, horizontal black lines are positioned above and below the word 'UNIT', framing it.

**UNIT**

**Guru Gobind  
Singh, 10th Sikh  
Guru**

Proclaimed, “rec-  
ognise the entire  
human race as  
one.”

## UNIT-6 SESSION-I

# CHILD RIGHTS: SPECIAL PROTECTION

### **The Convention on the Rights of the Child**

The Convention on the Rights of the Child (CRC) was the first legally binding international instrument to incorporate the full range of human rights. The decision to develop a convention to protect the rights of children was made in recognition of the fact that in general people under eighteen years are less able to support themselves and assert their rights, thus making them especially vulnerable to exploitation and abuse. The convention sets out four guiding principles, which correspond to those of the UNDHR but are adapted to account for the special needs of children.

**No discrimination:** On grounds of sex/gender, disability, race, religion, social or economic status or any other trait

**Survival and development:** Access to resources, skills and services including food, safe water, shelter, primary health care, formal education, leisure and play, cultural activities, information about their rights

**Protection:** From all forms of abuse, neglect and exploitation (two additional protocols to address trafficking, prostitution and involvement in armed conflict)

**Participation:** Freedom to express opinions and a right to have a say in matters affecting them; Specific Articles address the needs of disabled children, child refugees and minorities

By ratifying the Convention national governments commit themselves to upholding child rights and to being held accountable. States must ensure that laws and policies take account of child rights by amending existing ones and creating new ones where necessary. The Convention sets out standards for healthcare, education, social and legal services that children must have access to. The Convention recognises the child as an autonomous individual. This does not counter the concept of children as members of the family and community but challenges the notion of them being either the property of their parents or hapless and helpless objects.

It promotes the principle that rights and responsibilities must evolve with the growth and development of the child. This development process must be supported with appropriate care and guidance. Article 5 (CRC) encourages parents to take account of the evolving capacities of their child, so that the extent to which a child's views are taken into account when important decisions are made, would depend on what a child of that age could reasonably be expected to understand.

The Constitution of India also enshrines child rights as requiring special consideration and additional protective measures stating that nothing in this Article (non-discrimination) shall prevent the State from making any special provision for women and children.

### **Child Rights and the law: What is a child?**

The CRC notes that "a child means any human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Individual countries are given scope to determine at what age childhood ends. In Indian law the definition of a minor varies considerably for different activities and conditions.



Law	Matter	Age
Indian Penal Code (IPC)	Criminal responsibility	Over 7 (section 82) or Over 12 (section 83)*
Indian Penal Code (IPC)	Protection against kidnapping (Male) Protection against kidnapping (Female)	Under 16 Under 18
Child Marriage Restraint Act, 1926	Marriageable age for a male Marriageable age for a female	Over 21 Over 18
Apprentice Act, 1961	To take on an apprenticeship	Over 14
Juvenile Justice (Care) Act, 2000	The provisions of care as a minor	Under 18
Factories Act (1948)	To work in a factory for 4½ hours per day To work full time – with a certificate of fitness	Between 14 - 18 Over 15
Mines (Amendment) Act (1952)		Over 18
Army Headquarters Regulations	Recruitment	Over 16
Indian Contract Act		Over 18
Constitution of India	Free and compulsory education	Between 6 - 14
Indian Majority Act (1875)	Age of majority of persons domiciled in India	18

\* if the child is not able to understand the consequences of their action

### **Rights or welfare – sticking plaster laws**

Not surprisingly, despite international and national legislation, poverty continues to play a major part in the recognition of children's rights. In India despite the guarantee under the constitution and in law of free and compulsory education from the ages of five to fourteen, thirty three million (10%) have never been to school and seventy two million do not have access to a school<sup>11</sup>.

This makes it almost inevitable that poor children will become poor adults, if indeed they live to see adulthood. Nearly ten percent of children born in India do not survive beyond their fifth birthday. Chronic childhood malnutrition currently affects about 50% of children. The figure is almost twice as high in case of girl children.

According to official government figures, seventeen million children in India are employed but according to the international NGO Human Rights Watch, the figure could be as high as fifty five million. Of the approximately eighty million that are not in school most are in agricultural labour (up 70%), many work in home and child rag pickers are a familiar site all across the country. In most of these cases children in these occupations work alongside their parents or at least live with them. But many other children, sometimes as young as five, are sent away from their families to undertake domestic work, or work in shops, factories and construction sites. This often amounts to bonded labour where parents are too poor to feed their children and 'sell' them for the promise that they will be better looked after by employers in the city and will send money back home to repay a family debt. There are approximately two million child sex workers in India – many of them trafficked in this way.

Child labour laws do not sufficiently enable poor parents to choose school over work for their children. The Education Act does not sufficiently support poor children to attend school and there is no specific

1. UNICEF (2005) report on the state of the world's children under the title "Childhood Under Threat"

legislation against trafficking. Children who are rescued from exploitative forms of labour very often wind up back there before long, because they or their parents are afraid that a return home will bring more trouble onto the family.

Even the Child Marriage Restraint Act fails to take account of the underlying causes and factors that reinforce and perpetuate such practices. The cycle of poverty, poor nutrition, lack of education, labour exploitation, and total absence of social, economic or political power continues from one generation to the next. Legislation promising free and compulsory education or prohibiting child labour is meaningless without sufficient recognition and provision to enable all other rights.

Sticking plaster legislation to remedy cultural or social ills such as the low status of the girl child, child labour or child marriage, without addressing the economic factors that cause them, is counter-productive as it at best judges and at worst criminalise poor parents, who have so little control over their own circumstances.

While parents have a special role in safeguarding the rights of their children, it is the duty of all of society, that is the international community, to ensure that human rights abuses of children are addressed sufficiently and appropriately to ensure that they are not repeated. If we live in democratic countries, as duty-bearers, in this respect, we elect governments to safeguard the rights of vulnerable children on our behalf and we have the power to hold them accountable if they fail to do so.

### **The child's voice**

One of the most significant features of the CRC is the inclusion of the child's voice in making decisions about his/her future. The Juvenile Justice Act (2000) also makes this provision. It enables children to have some say in where and how they would like to be cared for. However, choices for children in need of care are extremely limited. Very often the choice between a dysfunctional, possibly abusive family environment or a state run care home leads children to prefer a life fending for themselves on the streets.

Children might have a voice in court in line with the requirements of legislation but there are few examples in India or in the rest of the world where the child's voice is heard on budgetary or policy matters in which decisions are made about how care should be provided or how to avoid the situations arising out of which care outside the family is needed.

The concept of 'evolving capacity' is also problematic in that where laws specify a minimum or maximum age, these cannot account for the wide differences in development between one child and another. While some policies are undoubtedly well intended, they can actually add to the oppression of children and young people.

Parents can legally separate young people from friends that are not of their choice. Many children do not experience school as a happy, social learning environment but a containment pen where children are abused and humiliated. This could account for the high dropout rates far more than forced child labour. These issues are uncomfortable to address because there are no easy answers. Children are inexperienced and cannot be left to make all their decisions for themselves, but likewise adults in charge of them often do not act in the child's best interest. A human rights approach is to give children more autonomy and greater control over their lives but the practicality of doing so has defeated the imaginations of most policy makers around the world.

### **What adults and children say about child labour**

"We are constantly told that we have to stop working and start going to school. But the government does not realise that in our given situation of poverty and deprivation, work is a necessity. Even if we try to explain our situation, we are not taken seriously. If we are migrants, we are sent off to our villages. They do not realise that we left our villages because we had no livelihood there. We, the concerned children, are not at all consulted. Our needs are not taken into consideration. The alternatives forced on us by the government actually make our situations worse than before. Some of us are

not in a position to stop working right now. So we need schools that we can attend at times that are convenient to us.”

**–Madhurai Veeran and Manjula, National Movement of Working Children (NMWC)**

A basic difficulty when campaigning against child labour in developing countries is that governments, employers, workers, the general public, parents, and often child workers themselves are not sufficiently aware of the dangerous effects of child labour, or accept them as an unavoidable consequence of poverty. Many parents, having themselves worked when children, tend to consider the early participation of their children in an economic activity as a way, better than schooling, to provide them with some skills useful for their future as adults, give them a sense of discipline or save them from idleness and perceived related delinquency. This is a most common attitude among uneducated parents. In addition, a number of politicians and other elites do not see child labour as a problem but as a solution to other problems resulting from underdevelopment, such as the absolute poverty in which many families live and the shortcomings of public sector action in the social field, especially in education. Child labour is thus *seen as something good and anyhow the only option for children of the poor.*

**–Document for discussion at the Informal Tripartite Meeting at the Ministerial Level, International Labour Office, Geneva: First published June 1996**

“The restrictive measures advocated by self-styled philanthropists and humanitarians would not only fail to improve conditions, but would also make things a good deal worse. If the parents are too poor to feed their children adequately, prohibition of child labour condemns the children to starvation.”

**–Ludwig Von Mises, Human Action (1940)**

## UNIT-6 SESSION-II

### Central legislations on child rights

#### **The Juvenile Justice (Care and Protection of Children) Act 2000**

- A juvenile is a person below 18 years
- The Act covers juveniles in conflict with law and children in need of care and protection
- Established juvenile justice board to hear proceedings and child welfare committees to ensure the best interests of the child
- No joint proceeding
- Determines a maximum period of stay in 'special homes' as 3 years

#### **Salient features of JJ Act 2000**

- Care and rehabilitation not punishment
- No appeal against acquittal order
- Claim of juvenility-age determination
- Bail is a right
- No stigma attached to juvenile
- No delay in procedure
- Special juvenile police

#### **Amendment 2006 in JJ Act 2000**

##### **1.Insertion of new section 7A –**

Procedure to be followed when claim of juvenility is raised

- When a claim of juvenility is raised before the court and the court is of the opinion that the person was a juvenile at the time of commission of offence it may take such evidence as may be necessary (but not on affidavit) to determine the age of the person

#### **Amendment 2006 in JJ Act 2000**

##### **● Amendment to section 10(1) –**

As soon as a juvenile in conflict with law is apprehended by the police he shall be handed to a special juveniles' police officer and shall be produced before the board within 24 hours excluding the time necessary for the journey

#### **Amendment 2006 in JJ Act 2000**

##### **● Amendment to section 14–**

Sub section 2 is inserted which says that the chief judicial magistrate or chief metropolitan magistrate shall review the pendency of cases after every six months and shall direct the board to increase the frequency of sittings

## UNIT-6 SESSION-II

### Amendment 2006 in JJ Act 2000

- When previously a child could have been kept in a special home until they reach the age of 18 years, now they can be kept no longer than 3 years

### Loopholes in JJ Act

- Lack of clarity on role of members
- Over-dependence on principal magistrate
- Lack of penal provisions
- Dependence on CrPC- no specific procedure code for juveniles
- Ambiguous Clauses in JJ Act

### Challenges/problems

- Pathetic condition of observation homes
- Inordinate delay and over-pendency
- Absence of preventive approach
- Disclosure & attachment of disqualification
- Corruption
- Reintegration into society

### Challenges/problems

- Insensitivity of implementing agencies
- Irregularity of enquiry procedure
- Inadequate infrastructure
- Lack of coordination between stakeholders
- Lack of trained/sensitised personnel

### The Child Labour (Prohibition & Regulation) Act 1986

- The Act prohibits the employment of children below the age of 14 years in 16 occupations and 65 processes that are hazardous to the children's lives and health
- Includes children working in the domestic sector as well as roadside eateries and motels
- In September 2008 the list was extended to include diving and process involving excessive heat (e.g. working near a furnace) and cold and processes involving exposure to hazardous substances or dangerous equipment have been added to the list of prohibited occupations and processes

### The Child Marriages Restraint Act 1929

- Act extends to the whole of India except J & K and to all Indian citizens even if the marriage takes place outside India
- "Child" means a male under twenty-one and a female under eighteen years
- "child marriage" means a marriage to which either of the contracting parties is a child
- Liable for prosecution is a male partner above 18 years and whoever performs, conducts or directs a child marriage
- If a minor contracts the marriage, any person having charge of the minor who promotes, permits or negligently fails to prevent it from being solemnised

## UNIT-6 SESSION-II

### **The Commissions for Protection of Child Rights Act 2005**

This Act provides for the constitution of a National Commission and State Commissions for the Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child rights

### **Functions of commission**

- Examine and review the safeguards provided under any law for the protection of child rights; recommend measures for their effective implementation
- Inquire into violation of child rights and recommend initiation of proceedings
- Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture, exploitation, pornography, prostitution and recommend appropriate remedial measures
- Look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures

### **...Functions of commission**

- Study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation; undertake/promote research in the field of child rights; spread child rights literacy and promote awareness of the safeguards available
- Inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children
- Inquire into complaints and take suo motu notice of matters relating to deprivation and violation of child rights, non-implementation of laws, non-compliance of policy decisions, guidelines or instructions or take up the issues arising out of such matters with appropriate authorities

### **The Right of Children to Free and Compulsory Education Act 2009**

- Provides for free and compulsory education to all children aged 6 to 14 years
- This legislation also envisages that 25 percent of seats in every private school should be allocated for children from disadvantaged groups including disabled children

### **Offences Against Children Bill**

- A Bill has been prepared by NCPCR in this regard and consultation with experts and civil society is under process
- It supplements the Commission for Protection of Child Rights Act, 2005 as Children Courts to be constituted under this Act have to deal with offences against children

## UNIT-6 SESSION-III

### **EXERCISE: CHILD RIGHTS AND AUTONOMY**

#### **When is “old enough”?**

Read the following story in conjunction with the articles of CRC and discuss the questions that follow:

Ekus and Romit met when they sat side by side at primary school. They soon became best friends, but their friendship had a problem. Their families belonged to different social groups that had a long history of distrust. So when Romit asked if Eku could visit, both parents firmly refused. Eku’s family spoke to the teacher and had the friends seated separately.

However, their friendship continued until Eku was sent away to finish secondary school in another town. The friends promised to write, but whenever a letter from Eku arrived, Romit’s parents destroyed it before Romit could even open it. Romit understands his parents’ feelings but also thinks that at sixteen one is old enough to choose one’s own friends and is entitled to have letters kept private.

#### **Discuss:**

- What rights does Romit have according to the Convention on the Rights of the Child?
- How can Romit’s “evolving capacity” be determined?
- What rights do Romit’s parents have?
- Suggest a strategy for how this conflict might be resolved.

1. Allow the discussion to address the issue of honour crimes and the issue of parental control

or

2. Encourage participants to address the wider issues of age and rights. For example, ask them to consider the following–

- The legal age of consent for marriage
- The legal age for employment
- The legal age of criminal responsibility

## UNIT-6 READER-I

# FOR THE CHILDREN, BY THE CHILDREN

**Kavita Ratna**

*“Adults don’t understand the reality of the problems faced by children. We children bear the brunt of the government’s failure to design and implement child-centred policies and programmes. So we need to participate and inform the government of our issues and concerns, to help them to design programmes that are appropriate for us.”*

—**Madhurai Veeran and Manjula**

National Movement of Working Children (NMWC)

Every country that has ratified the UNCRC (United Nations Convention on the Rights of the Child) is required to submit a periodic report - on the steps taken by the government to implement the Convention, to the committee every five years. The Government of India its first periodic report in January 2004. Separately, an alternate reporting process has been instituted by the committee to hear from NGOs and other civil society organisations about the extent of implementation of the UNCRC in design of policies and programmes of the country before that country’s government makes its official presentation. The committee will then seek a response from the government on the issues raised during the alternate reporting process.

The National Movement of Working Children, a national federation of working children’s organisations in India, was a part of the Indian delegation invited to Geneva to present alternate reports. The children of NMWC were the only child participants in the delegation.

The NMWC is comprised of nine member organisations from four states of the country – Tamil Nadu, Andhra Pradesh, Orissa and Karnataka. NMWC has a total membership of over 14, 000 working children – boys and girls less than 18 years of age. Its members are from both urban and rural areas and from different communities, ethnic groups, castes and religions. They work in a wide range of occupations – in both the formal and informal sectors. While all the members are working children, some of them combine work and schooling – either in the government run schools or in NGO programmes. The NMWC was constituted in 1999 to influence policy at the national level, to protect children from exploitation and discrimination and to ensure participation of children at all levels of government and society in all decisions and issues affecting them directly and indirectly.

The alternate report was prepared entirely by children and contained the following:

- Their present situation in the context of the realisation of their rights with regard to their protection, the provision of services and infrastructure and their right to participation
- Their own initiatives that have helped them to improve their lives and to realise their rights
- Their review of the Gol report
- Their suggestions for what needs to be done for the realisation of their Rights

Some of the problems faced by children, and solutions recommended by them, are as follows:

**At home:** At home, their problems relate to alcoholism, abuse and neglect, discrimination faced by girls and children with disabilities and lack of opportunities to participate in decisions concerning them. They recommend the setting up of effective and responsive support systems like children helplines, children Ombudspersons that they could seek help and protection from, in times of need.

*“Toll-free phone lines and stamp-free post cards should be made available for us to contact chil-*



*dren's organisations, children's councils, ombudspersons in times of crises. The existing children's help lines and support structures should be given more publicity and support. They should also work with better co-ordination among themselves."*

**At work:** At work their problems centre around bad working conditions, low wages, abuse and exploitation at the workplace, lack of protection and support systems, migration, lack of representation and participation at work related forums. They recommend that the government provide realistic alternatives to working children: (a) to prevent them from working and (b) to retain them in schools. These alternatives should be designed in consultation with working children themselves, and should reflect the needs and aspirations of the children. In the interim, given that the problem of child labour cannot possibly be solved overnight, they recommend that working children organize themselves, and the government and employers recognize and facilitate these organisations to ensure the participation of children at all levels. They recommend the protection of children in hazardous industries and the setting up of support structures that would shield them from abuse and exploitation.

*"We are constantly told that we have to stop working and start going to school. But the government does not realise that in our given situation of poverty and deprivation, work is a necessity. Even if we try to explain our situation, we are not taken seriously. If we are migrants, we are sent off to our villages. They do not realise that we left our villages because we had no livelihood there. We, the concerned children are not at all consulted. Our needs are not taken into consideration. The alternatives forced on us by the government actually make our situations worse than before. Some of us are not in a position to stop working right now. So we need schools that we can attend at times that are convenient to us."*

**At school:** The children list in great depth their problems relating to the teaching methodology, learning environment, access to schools, facilities in schools as well as discrimination faced by groups like girls, minority, low caste and marginalised community children and physically and mentally disabled children. They also cite the lack of/inadequate provision of basic facilities like water, fuel, health facilities, *anganwadis*, ration shops as being a big deterrent to their attending school. The children recommend – flexible timings, relevant job-centric curriculum, participation in planning school activities, schedule, curriculum and courseware, provision of basic services and provision of infrastructure like toilets and facilities like mid-day meals in schools.

*"Education is our right. It should be made available to us at the place of our convenience and at times which are convenient to us. All the childcare centres should work full day, so that our parents can go to work."*

**In the Community:** The children cite the lack of opportunities and avenues for participation in their communities as their primary concern. They also feel the need for a support system for their protection.

*"When decisions are made about matters that concern us, we children should be involved in that process. Wherever children's organisations exist, representatives of children's organisations should be involved in the process. Where children's organisations do not exist at present, the adults should facilitate children to choose their representatives – keeping in mind different age groups and different situations of children. Children's organisations, children's councils, ombudspersons and concerned adults, such as representatives of local governments and government departments should collectively develop these support structures. These structures should be a part of the National Commission for Children."*

**With the Police and the Juvenile Justice System:** The children observe that abuse and harassment of vulnerable children at the hands of the police and the juvenile justice system is very common and there is no system in place for the protection and proper rehabilitation of juveniles. They recommend that special training sessions be held with the police to apprise them of children's rights. They also recommend that juveniles receive legal aid, counselling and care and vocational training when they are in observation homes and remand homes.

*“When a child is taken into the State observation home, he/she should have an immediate access to legal assistance from a special panel of Lawyers. (Either volunteers or those appointed by the Judges or from the Legal Aid Cell). This will ensure that we are assured of legal and emotional support of a high quality. All police personnel must be trained in how best to deal with children and to assist them. They should be aware of children’s rights.”*

The report also details NMWC’s critique of the government periodic report – and gets straight to the heart of the matter: children themselves were absent in the preparation of that report. NMWC’s version, it turns out, is more than an alternate, It is also the real thing.

*–Author works with the Concerned for Working Children (CWC), in Bangalore, Karnataka. She wrote this paper in November 2003*



## CHILDREN'S RIGHTS IN SHINING INDIA

**Enakshi Ganguly Thukral**

Every time my 16-year old daughter gets on to stage to dance, she dusts some extremely fine shiny stuff on her face and it glitters and shines. By the time she is off the stage, most of the shiny glitter is gone, except for some bits of sparkle here and there... and by the next morning, there is no trace of it. India's shine is much like that – here today, gone tomorrow – effervescent and transient.

Every day we see articles focusing on the shining and the non-shining 'bits' of India. But if anything or anyone truly shines in India today, it is its children, comprising over one-fourth of our population. Resilient and lively, they continue to smile and give hope in the not-so-shining 'bits' of India that most of them inhabit. But then, they are not voters. What they think or feel does not count.

As Indians we constitute 16 percent of the world's population, occupying 2.42 percent of its land area. India has more working children than any other nation, as also the lowest female-male ratio. Despite constitutional guarantees of civil rights, children face discrimination on the basis of caste, ethnicity and religion. Even the basic need for birth registration that will assure them a nationality and identity, remains unaddressed, affecting children's right to basic services.

India is also home to one of the largest illiterate citizenries in the world. In the not-so-shining India that we see, hear and read, children are dying of starvation, while food in our granaries rots and feeds rats. We watch while female sex ratio dips. Little children, barely able to stand, are married off flouting all laws. Little ones are sacrificed, trafficked and sold. Others are locked, abused, sodomised – the list is endless. And there are all those realities that never make the news. We know this is only the tip of the iceberg, but we choose not to act. Our silence and tolerance not only condones such violation of rights, it also makes us guilty of complicity.

Therefore, any understanding of human rights of children cannot be confined to some children – 'poor children', 'working children' and 'marginalised children'. Such categories only help us to remove ourselves from the problem. Let us not delude ourselves. Violations of children's rights are not limited to the poor and downtrodden. They happen in middle class and elite homes too, albeit in different forms, and the silence around these is even deeper. Also, any analysis on the situation of children must be understood within the context of the economic and political changes in the country. Of particular importance are globalisation and liberalisation, and the gender, caste and religious attitudes that prevail today. All these add to children's vulnerability and affect any action that may be taken for them.

Children are not a homogeneous category. Like adults, they are divided into different categories based on social and economic status, physical and mental ability, geographical location etc. These differences determine the difference in the degree of their vulnerability. While gender discrimination exists almost all over the world, it is much greater in some countries – and India is definitely one of them. Girls in vulnerable situations such as poverty, disability, homelessness, etc. find themselves doubly disadvantaged by their gender and the physical, economic, political, social situation that they find themselves in. It is therefore imperative to take a gender perspective into account in examining the situation of children.

### **The rights vs welfarist approach**

The Constitution of India provides a comprehensive understanding of child rights. A fairly comprehensive legal regime exists for their implementation. India is also signatory to several international legal instruments including the Convention of the Rights of the Child (CRC). However, the govern-

ment seems to be more comfortable with the idea of well-being rather than rights (with its political overtones). Child rights activists are faced with challenges of promoting and protecting rights as a positive social value.

Needless to say, ours is not the only government to do so. Union government's ideology resonates with the watering down of the rights-based framework in the recent UN special session on children which failed to reaffirm international pledges made in 1990 to protect the rights of children.

Government's approach remains largely welfarist. India is yet to adopt a single comprehensive code that addresses the provisions of the CRC. Clearly the draft national policy (charter) for children which has been recently passed in Parliament, and is envisaged as being such a code, is inadequate as it does not address the full range of rights. It does not make any reference to the CRC. In the words of the Joint Secretary, Department of Women and Child, Gol, it captures the 'essence of the CRC' thereby does not need to refer to it.

### **Child rights: From an adult's perspective**

An examination of the laws shows that although they are meant to protect the interests of children, they have been formulated from the point of view of adults and not children. They are neither child-centred nor child friendly, nor do they always resonate with the CRC.

The problem begins with the very definition of 'child' within the Indian legal and policy framework. The CRC defines children as persons below the age of 18 years, however different laws stipulate different cut off ages to define the child. Only the Juvenile Justice (Care and Protection) Act 2000 is in consonance with the Convention. In the absence of a clear definition of a child, it is left to various laws and interpretations.

That our laws are not child friendly or child oriented is also evident in the distinction family laws make between legitimate and illegitimate children depending on the status of their parents' marriage or relationship. A child born out of wedlock or of a void or illegal marriage is considered 'illegitimate'. Children pay for the decisions taken by the parents and are denied inheritance rights. Even worse, a child born of rape is stigmatised and treated as 'illegitimate', both by society and law.

### **Access to health: A chimera**

The health of our children continues to be a matter of grave concern, especially in the wake of growing privatisation of health services, and their increasing inaccessibility for the poor. This is a particularly serious situation as environmental degradation and pollution lead to a further deterioration in children's health. The working conditions that many children are forced to suffer worsens matters.

In our shining India, children suffer from malnutrition or die of starvation and preventable diseases. According to UNAIDS there are 170,000 children infected by HIV/AIDS in India. Children affected by the virus—whether children of victims or those who are infected themselves—live on the fringes of society, ostracised by people they call their own, unloved and uncared for, even as our government continues to squabble over numbers of affected people. Even juvenile diabetes is reported to be taking on pandemic proportions.

While the Constitution lays down the duties of the State with respect to health care, there is no law addressing the issue of public health. Children's health care needs continue to be, in great part, dealt under the reproductive and child health programme of the ministry of health and family welfare, with a focus on reproductive health, safe motherhood and child survival. The other health needs of children are addressed by the country's primary health care system, with very little attempt to address these needs specifically or separately.

The population policy with its coercive manifestations in the states has of course proved most 'children unfriendly'. Parents aspiring to political positions are now forced to choose between children and politics. Law does not allow persons with more than two children to hold elected positions in

local self governments – and many choose politics as they disown their children or give them up for ‘adoption’ in an effort to keep to the ‘right’ family size.

The government has announced its national health policy 2000. One cannot but note that children do not find mention as a separate category- yet another example of the lack of child focus in our planning and implementation.

### **Education for all: A promise yet to translate**

Education for all is also a promise held out by the State. An examination of State policies and programmes shows that education is not going to open the promised gateway to equality. Indeed if anything, it is a promise of ‘differential education for all’ (read ‘some’ even here).

While some children continue to have access to mainstream schools or expensive private schools, the rest must contend with ‘non-formal’ second grade education provided by untrained and lowly paid ‘para- teachers’. As if that was not enough, the new curriculum framework has opened up a can of worms on the kind of biased syllabus, with incorrect or incomplete content, that our children will be subjected to.

The passing of the 93rd Amendment Bill (passed as the 86th Amendment to the Constitution) making education a fundamental right, should have been an occasion to rejoice. Instead it has become an issue for another long struggle because it only reinforces the lack of political will to make education universal and accessible for all. By leaving the critical 0-6 years age group, putting the onus of creating conditions on parents for sending children to school and making it their fundamental duty, by reinforcing parallel streams of education – it has once again sealed the fate of the poor and the marginalised children.

Although the rhetoric speaks of free and compulsory education for all, in practice, the education system seems to be designed to keep children out of it. To implement the 86th Amendment the government has drafted ‘The Free and Compulsory Education Bill, 2003. Concerns and criticisms on this bill are being expressed by educationists and activists.

### **Educationists and activists**

Beatings, abuse, physical and mental torture faced by the students in schools is one of the reasons for the high dropout rate. It is well established that corporal punishment is detrimental to children’s growth and development. It is in violation of their rights. But there is no comprehensive national law banning it, although several states have even enacted laws dealing with it. The national education policy, 1992 clearly states that corporal punishment should be firmly excluded from the education system. Despite that, there are several cases registered against teachers in schools for use of violence.

At a recent workshop attended by children from across the country was a young spastic child named Debu.

“I have a right to be called by my name. Why is it that all children are called by their names and I am called langda (lame) or even pagal (mad)?”

This made all the other children sit up and look at Debu in a new light. While they had been discussing their rights, it had not occurred to them that children with disabilities may be denied even this basic right.

Children with disability continue to suffer unequal opportunities for survival and development. They are denied personal or economic security, health care, education and all basic needs necessary for their growth. Certain disabilities, such as, mental disability carry even greater stigma. If the disabled child is a girl, then the discrimination is doubled. The rights of disabled persons have finally been recognised with the enactment of the Persons with Disabilities (Equal Protection of Rights and Full Participation) Act, 1995.

## **Children in situations of crime and exploitation**

Recognising the flaws of the 1986 Juvenile Justice Act, the government passed the Juvenile Justice (Care and Protection) Act, 2000. But the knee jerk reaction in amending the law without a wider discussion and consultation with child rights practitioners has left many, who are concerned with children and work with them, deeply distressed. In 2003 the government drafted amendments to the law. Because of criticisms and concerns raised by several organisations and groups, it has been placed before a parliamentary standing committee.

The Child Labour (Prohibition and Regulation Act) was enacted in 1986, to specifically address the situation of children in labour. However, this law distinguishes between hazardous and non-hazardous forms of labour, and identifies certain processes and occupations from which children are prohibited from working. It leaves out a large range of activities that children are engaged in and are exploited and abused. The large-scale exploitation and abuse of children employed in domestic work and hotels are cases in point.

Child trafficking is one of the most heinous manifestations of violence against children. This is taking on alarming proportions – nationally and internationally. Although, very little reliable data or documentation is available, meetings and consultations across the country have revealed the gravity and the extent of this crime. It is high time we understood and realised that children are trafficked for a number of reasons and this cannot be treated synonymously with prostitution. The absence of this understanding and of a comprehensive law that addresses all forms of trafficking to back it, makes this issue even more critical.

## **Adoption: The need for greater checks and balances**

Adoption is one of the best and appropriate forms of alternative family care. It is the only way to break the mindset of institutional care for children which has been posed as the only solution for many years.

However, adoption of children continues to be determined by religion of the adoptive parents or the child when religion is known. Only Hindus, Jains, Buddhists and Sikhs can adopt children. The personal laws of other religions – Muslims, Parsis, and Jews do not allow it. Even as it exists for Hindus, the law has serious flaws discriminating against married women. It allows only married men to adopt. Further, it only allows for adoption of children of opposite genders.

The Juvenile Justice (Care and Protection of Children) Act, 2000 also provides for adoption making no exception on the basis of religion. So more complications may arise. Large scale setting up of baby shops and the selling of babies from poor families has caused panic across the country. We need to be careful not to throw the baby out with the bath water. Greater checks and balances are required to ensure that adoption is legal and proper, and that it is not being used as a means of trafficking of children.

## **Protection from or by, instruments of violence?**

In January 2002, a school going girl in Jammu, while discussing the Right to Protection said that even in the current environment of unrest she felt protected because she had armed guards, who accompanied her to school! She was not alone. There were others too who felt protected because they had guards. Incidentally, one of them was from the Kaluchak Army School in an army base, which was attacked by terrorists a month later. We need to ask ourselves what environment we are providing to our children where they need instruments of violence to feel protected.

Armed conflicts across the country, based on religion, ethnicity, and caste have affected the lives of children everywhere. The recent violence in Gujarat is still fresh in all our minds. Children continue to suffer from the conflict that Punjab faced in the last decade. The ongoing situation in Kashmir and in many of the North-eastern states has led to many child casualties. Children are both victims and

perpetrators, brainwashed and incited into following adults in spreading violence. Even as they are seen as perpetrators of violence, they are victims of an adult worldview imposed on young minds.

### **Children and disaster mitigation**

Thousands of children are homeless or living in inadequate living conditions. Thousand others are displaced in the name of development and progress. Land is acquired for 'public purpose' while the benefits seldom include those who are evicted and displaced.

Others are de-housed as a result of natural calamities – the floods, cyclones, earthquakes that have come to become almost a regular feature in our country. In all of these, while whole communities are affected, children are affected even more.

An estimated 3.3 million children had been affected by the supercyclone that hit the coastal districts of Orissa on October 29, 1999. NGOs reported that for five days after the cyclone, no special attention was focussed on the needs of children. There was very little information on where the children were, where they were going or being taken.

How many children were actually displaced, how many died in the earthquake that hit Gujarat on 26 January, 2000? No one has exact numbers. This is true of all such situations of disaster or displacement. The need is to ensure that along with immediate relief measures, proper information is collected so that we can get a sense of the numbers affected, and ensure that children are helped to move back to a semblance of normalcy as soon as possible. This is to ensure that there are no long-term psychological implications. In the absence of a holistic disaster mitigation policy, which is also designed to be child friendly, this will not be possible. The same is true for rehabilitation policies for development-related displacement.

### **Child participation: Many miles to go**

It is only with the ratifying of the Child Rights Convention that children's rights to participation began gaining formal recognition, although several NGOs had initiated processes to enlist participation of children and young adults long before the CRC. There is, however, no universal or accepted definition of child participation. Various groups and individuals have defined it according to their own understanding. However, there is still a fairly long journey before this 'inclusion' of children's participation is internalised and accepted widely.

Is the situation confronting the lives of our children bleak or is there reason for hope? Can we promise them an India that truly shines? What will the forthcoming elections hold for these non-voters?

Lest we forget, they are the citizens of today and adults of tomorrow and they will hold the adults of today, accountable someday.

*—Author works with HAQ: Centre for Child Rights.  
HAQ in Urdu means rights. HAQ is dedicated to the recognition,  
promotion and protection of all children.  
Combat Law Vol. 3, Issue 1, April-May 2004*



## UNIT-6 SESSION-IV

### Indian Constitution & Supreme Court on children

#### Justice Hansaria MC Mehta vs State of Tamilnadu & Others- Judgement dated 10.12.1996

##### "I am the child

All the world waits for my coming. All the earth watches with interest to see what I shall become. Civilization hangs in the balance, for what I am, the world of tomorrow will be

##### I am the child

You hold in your hand my destiny. You determine, largely, whether I shall succeed or fail, Give me, I pray you, these things that make for happiness. Train me, I beg you, that I may be a blessing to the world"

–Manie Gene Cole

### Indian Constitution and children

#### Article 24: Prohibition of employment of children in factories, etc.

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. This provision is a fundamental right ever since 1950

### Indian Constitution and children

#### Article 39 (e) & (f): Certain principles of policy to be followed by the State

The State shall, in particular, direct its policy towards securing that the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

### Indian Constitution and children

#### Article 45: Provision for free and compulsory education for children

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. This provision acquired the status of fundamental right after Unni Krishan case in 1993

#### People's Union for Democratic Rights vs Union of India (1982) 3 SCC 235

The Asiad Worker's case. The Supreme Court held that though the Employment of Children Act, 1938 did not include construction work on projects because the construction industry was not a process specified in the Schedule to the Act, yet, such construction was a hazardous occupation and under Art.24 children under 14 could not be employed in a hazardous occupation. The right of a child against exploitation under Art.24 was enforceable even in the absence of implementing legislation, and in a public interest Proceeding



## UNIT-6 SESSION-IV

### **Lakshmi Kant Pandey vs Union of India(1984) 2 SCC 244**

Relating to the adoption of Indian children.

There was no law to regulate inter-country adoptions and considering the possibility of child trade for prostitution or slave labour, legal regulation of such adoptions was essential. Justice Bhagwati created a scheme for regulating both inter-country and intra-country adoptions. The Supreme Court held that any adoption in violation of or non-compliance with this may lead adoption to be declared invalid and expose person concerned to strict action including prosecution. Social activists have since used these directions to protect children and promote desirable adoptions. The Government of India has framed a national policy in this regard

### **Sheela Barse vs Union of India 1986 SCALE (2) 230**

- For a child-accused of an offence punishable with imprisonment of not more than 7 years, a period of 3 months from the date of filing of the complaint or lodging of the FIR, is the maximum time permissible for investigation and a period of 6 months from the filing of the charge sheet as a reasonable period within which the trial of the child must be completed. If that is not done, the prosecution against the child would be liable to be quashed. Every State Government shall give effect to this principle or norm in so far as any future cases are concerned

- The state governments must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail

- Instead of each state having its own Children's Act different in procedure and content from the Children's Act in other States, the central government should initiate parliamentary legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. The Children's Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost

### **Sheela Barse vs Union of India 1986 SCALE (2) 184**

- Even though the Children's Acts are on the statute book, in some states the Act has not been brought into force. This piece of legislation is for the fulfilment of a constitutional obligation and is a beneficial statute. There is hardly any justification for not enforcing the statute. Ordinarily it is a matter for the state government to decide as to when a particular statute should be brought into force but in the present setting, it is appropriate that without delay every State should ensure that the Act is brought into force and administered in accordance with the provisions contained therein.

- Every district and session judge should visit the district jail at least once in two months, and in the course of his visit, he should take particular care about child prisoners, both convicts and under trials and as and when he sees any infraction in regard to the children in the prison he should draw the attention of the administration as also of his High Court

## UNIT-6 SESSION-IV

### **Sheela Barse vs Secretary, Children Aid Society & Others 1987 AIR 656**

- The Child Welfare Officer (Probation) and the Superintendent of the observation home must be duly motivated. They must have the working knowledge in psychology and have a sense of keen observation

- The juvenile court has to be manned by a judicial officer with some special training. Creation of a court with usual judicial officer and labelling it as juvenile court does not serve the requirement of the statute. The statutory scheme contemplates a judicial officer of a different type with a more sensitive approach-oriented outlook
- Children in observation homes should not be made to stay long and as long as they are there, they should be kept occupied and the occupation should be congenial and intended to bring about adaptability in life aimed at bringing about a self-confidence and picking of humane virtues

### **MC Mehta vs State of TN (1991) 1 SCC 283**

The Supreme Court directed that children should not be employed in hazardous jobs in factories for manufacture of match boxes and fireworks, and positive steps should be taken for the welfare of such children as well as for improving the quality of their life

### **Unni Krishnan Case 1993 1 SCC 645**

After the judgement of constitution bench of Hon'ble Supreme Court in this case, Article 45 in Part V of Indian Constitution, which casts a duty on the state to endeavour to provide free and compulsory education to children, has acquired the status of a fundamental right

### **Sheela Barse vs Union of India 1995 SCC (5) 654**

- **Background:** A letter from Ms Sheela Barse with respect to the deplorable conditions in which mentally ill and insane women and children were locked up and kept in Presidency jail, Calcutta, was registered as a writ petition. Several orders were passed by Supreme Court in this regard time to time and commissioners were appointed to investigate and report on such conditions in various places

- **Judgement:** By way of this judgement, dated 05/09/1995, respective High Courts were directed to appoint a Judge to look into such matters in their jurisdiction areas and were directed to make all such necessary and appropriate orders as may be warranted, from time to time, for a proper implementation of the orders of Supreme Court. High Courts were also directed to pass such other and further orders as may be found necessary or appropriate to protect and improve the conditions in places where women and children - not accused or convicted of any crime - are detained

## UNIT-6 SESSION-IV

### **MC Mehta vs State of TN (1996) 6 SCC 756**

The Supreme Court directed that the employers of children below 14 years must comply with the provisions of the Child Labour (Prohibition and Regulation) Act providing for compensation, employment of their parents /guardians and their education

### **Gaurav Jain vs Union of India (1997) 8 SCC 114**

The Supreme Court held that the children of prostitutes have the right to equality of opportunity, dignity, care, protection and rehabilitation so as to be part of the mainstream of social life without any stigma attached on them. The Court directed for the constitution of a committee to formulate a scheme for the rehabilitation of such children and child prostitutes and for its implementation and submission of periodical report of its registry

### **Pratap Singh vs State of Jharkhand (2005) 3 SCC 551**

The relevant date for determining the age of the juvenile would be the one on which the offence has been committed and not when the juvenile is produced in court

### **Chief Justices' conference, 2006**

High Courts will impress upon the state governments to set up juvenile justice boards, wherever not set-up. The Chief Justices may nominate a High Court Judge to oversee the condition and functioning of the remand /observation homes established under the Juvenile Justice (Care and Protection of Children) Act, 2000"

### **Babloo Pasi vs State of Jharkhand 2008 (13) SCC 133**

Although the JJB is bound to obtain the opinion of the medical board but the opinion per se is not a conclusive proof of age of the person concerned, it is no more than a mere opinion, which can be considered whichever way the JJB wants to interpret

### **Hariram vs State of Rajasthan 2009 (6) SCALE 695 Judgement dated 05.5.09**

- The said law ( JJ Act) is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different therefrom

## UNIT-6 SESSION-IV

- The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000

### **Chief Justices' conference 14-15 August,2009**

The Chief Justices of the High Courts will expedite the matter with the respective State Governments for setting up of Juvenile Justice Boards, wherever they have not yet been set up

The Chief Justices of the High Courts will nominate a Judge to make periodical visits to juvenile homes, wherever set up, and the learned judge may suggest remedial measures for the betterment of the conditions of the juvenile homes and inmates

### **Bachpan Bachao Andolan vs Union of India Writ Petition (Civil) 51 of 2006**

- Order dated 22.01.10
- Weekly hearing
- Will look into every aspect of child rights
- Juvenile justice boards, child welfare committees and special juvenile police units to be established throughout India in six weeks positively

### **Suggested references**

- Supreme Court on Children, 2005, HRLN
- MC Mehta vs State of Tamilnadu and Others, 1997 AIR 699 / 1996 (6) SCC 756

## HUMAN RIGHTS DEFENDER

### **Iqbal Masih**

In 1995, a 13 year old Pakistani human rights activist, Iqbal Masih, was murdered. He was shot dead on his way to visit relatives. No one has ever been charged with the crime but it is widely believed that he was the victim of a carpet weaving mafia to stop him drawing attention to atrocities committed against children in the carpet weaving industry.

Iqbal became a debt slave at the age of five. His mother became ill and needed an operation. Too poor to pay, she took out a loan from a carpet factory owner. The loan was in Iqbal's name meaning that he became liable for the 5000 rupees that his mother's operation cost.

According to UNICEF, upto 90% of Pakistan's carpet weavers are children. There are estimated to be between 500,000 and 1,000,000 children, from four to fourteen years old working in the industry. Boys aged seven to ten are preferred for their dexterity and endurance. They earn only one-quarter to one-third the salary of adult weavers, and they are obedient, compliant workers. They are from Pakistan's poorest families, sold in by their parents as a means of survival. The work is tedious, hazardous and arduous and the hours are long. Children are denied education, family life, social life and any form of social interaction outside the factory. Many of them die before they reach adulthood.

Although Pakistan has continuously violated the United Nations Convention on Child Labour, in 1992, as a result of international pressure Pakistan passed the Bonded Labour Act, which abolished indentured servitude and the system of payment to parents to bond children in labour. However, the law is routinely violated by carpet manufacturers without interference by law enforcement agencies or the government.

As a result, the task of abolishing bonded labour in Pakistan has been left to the human rights community, the most well-known and effective organisation being the BLLF (Bonded Labour Liberation Front) BLLF workers visit factories, giving the child workers information concerning their rights under the Bonded Labour Act, telling them that bonded labour has been abolished, and letting them know that they are free to leave if they wish. In addition, the BLLF has established its own primary schools and has placed more than 11,000 children in them. Since 1988, the BLLF has liberated 30,000 adults and children from brick kilns, farms, tanneries, and carpet factories.

After five years as a factory worker Iqbal Masih was one of the children freed in this way by the BLLF. After his release Iqbal started to tell other children that they too could escape. He became a worker for the BLLF and visited factories with other workers to encourage children to leave. He gained a reputation and travelled to the US and Europe where he urged people to boycott carpets from Pakistan until child labour laws were properly enforced. As a direct result of increased awareness in the West in 1992, 1993, and 1994, Pakistani carpet sales fell for the first time in two decades.

Having confronted the Pakistan Carpet Manufacturers and Exporters Association, and having shamed the government, the consequences were dire for Iqbal. Pakistani government has done nothing to bring Iqbal's killers to justice. The FIA, Pakistan's secret police, raided BLLF headquarters in Lahore, harassed workers and the founder of the organisation was forced to flee the country.

## UNIT-6 ADDITIONAL MATERIAL

# CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

### UNOFFICIAL SUMMARY BY UNICEF

#### **Article 1**

##### **Definition of a child**

A child is recognised as a person under 18, unless national laws recognize the age of majority earlier.

#### **Article 2**

##### **Non-discrimination**

All rights apply to all children without exception. It is the State's obligation to protect children from any form of discrimination and to take positive action to promote their rights.

#### **Article 3**

##### **Best interests of the child**

All actions concerning the child shall take full account of his or her best interests. The State shall provide the child with adequate care when parents, or others charged with that responsibility, fail to do so.

#### **Article 4**

##### **Implementation of rights**

The State must do all it can to implement the rights contained in the Convention.

#### **Article 5**

##### **Parental guidance and the child's evolving capacities**

The State must respect the rights and responsibilities of parents and the extended family to provide guidance for the child which is appropriate to her or his evolving capacities.

#### **Article 6**

##### **Survival and development**

Every child has the inherent right to life, and the State has an obligation to ensure the child's survival and development.

#### **Article 7**

##### **Name and nationality**

The child has the right to a name at birth. The child also has the right to acquire a nationality and, as far as possible, to know his or her parents and be cared for by them.

### **Article 8**

#### **Preservation of identity**

The State has an obligation to protect, and if necessary, re establish basic aspects of the child's identity. This includes name, nationality and family ties.

### **Article 9**

#### **Separation from parents**

The child has a right to live with his or her parents unless this is deemed to be incompatible with the child's best interests. The child also has the right to maintain contact with both parents if separated from one or both.

### **Article 10**

#### **Family reunification**

Children and their parents have the right to leave any country and to enter their own for purposes of reunion or the maintenance of the child-parent relationship.

### **Article 11**

#### **Illicit transfer and non-return**

The State has an obligation to prevent and remedy the kidnapping or retention of children abroad by a parent or third party.

### **Article 12**

#### **The child's opinion**

The child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.

### **Article 13**

#### **Freedom of expression**

The child has the right to express his or her views, obtain information, make ideas or information known, regardless of frontiers.

### **Article 14**

#### **Freedom of thought, conscience and religion**

The State shall respect the child's right to freedom of thought, conscience and religion, subject to appropriate parental guidance.

### **Article 15**

#### **Freedom of association**

Children have a right to meet with others, and to join or form associations.

## **Article 16**

### **Protection of privacy**

Children have the right to protection from interference with privacy, family, home and correspondence, and from libel or slander.

## **Article 17**

### **Access to appropriate information**

The State shall ensure the accessibility to children of information and material from diverse sources, and it shall encourage the mass media to disseminate information which is of social and cultural benefit to the child, and take steps to protect him or her from harmful materials.

## **Article 18**

### **Parental responsibilities**

Parents have joint primary responsibility for raising the child, and the State shall support them in this. The State shall provide appropriate assistance to parents in child-raising.

## **Article 19**

### **Protection from abuse and neglect**

The State shall protect the child from all forms of maltreatment by parents or others responsible for the care of the child and establish appropriate social programmes for the prevention of abuse and the treatment of victims.

## **Article 20**

### **Protection of a child without family**

The State is obliged to provide special protection for a child deprived of the family environment and to ensure that appropriate alternative family care or institutional placement is available in such cases. Efforts to meet this obligation shall pay due regard to the child's cultural background.

## **Article 21**

### **Adoption**

In countries where adoption is recognised and/or allowed, it shall only be carried out in the best interests of the child, and then only with the authorization of competent authorities, and safeguards for the child.

## **Article 22**

### **Refugee children**

Special protection shall be granted to a refugee child or to a child seeking refugee status. It is the State's obligation to co-operate with competent organisations which provide such protection and assistance.



### **Article 23**

#### **Disabled children**

A disabled child has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible.

### **Article 24**

#### **Health and health services**

The child has a right to the highest standard of health and medical care attainable. States shall place special emphasis on the provision of primary and preventive health care, public health education and the reduction of infant mortality. They shall encourage international cooperation in this regard and strive to see that no child is deprived of access to effective health services.

### **Article 25**

#### **Periodic review of placement**

A child who is placed by the State for reasons of care, protection or treatment is entitled to have that placement evaluated regularly.

### **Article 26**

#### **Social security**

The child has the right to benefit from social security including social insurance.

### **Article 27**

#### **Standard of living**

Every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development. Parents have the primary responsibility to ensure that the child has an adequate standard of living. The State's duty is to ensure that this responsibility can be fulfilled, and is. State responsibility can include material assistance to parents and their children.

### **Article 28**

#### **Education**

The child has a right to education, and the State's duty is to ensure that primary education is free and compulsory, to encourage different forms of secondary education accessible to every child and to make higher education available to all on the basis of capacity. School discipline shall be consistent with the child's rights and dignity. The State shall engage in international co operation to implement this right.

### **Article 29**

#### **Aims of education**

Education shall aim at developing the child's personality, talents and mental and physical abilities to the fullest extent. Education shall prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and for the cultural background and values of others.

### **Article 30**

#### **Children of minorities or indigenous populations**

Children of minority communities and indigenous populations have the right to enjoy their own culture and to practice their own religion and language.

### **Article 31**

#### **Leisure, recreation and cultural activities**

The child has the right to leisure, play and participation in cultural and artistic activities.

### **Article 32**

#### **Child labour**

The child has the right to be protected from work that threatens his or her health, education or development. The State shall set minimum ages for employment and regulate working conditions.

### **Article 33**

#### **Drug abuse**

Children have the right to protection from the use of narcotic and psychotropic drugs, and from being involved in their production or distribution.

### **Article 34**

#### **Sexual exploitation**

The State shall protect children from sexual exploitation and abuse, including prostitution and involvement in pornography.

### **Article 35**

#### **Sale, trafficking and abduction**

It is the State's obligation to make every effort to prevent the sale, trafficking and abduction of children.

### **Article 36**

#### **Other forms of exploitation**

The child has the right to protection from all forms of exploitation prejudicial to any aspects of the child's welfare not covered in articles 32, 33, 34 and 35.

### **Article 37**

#### **Torture and deprivation of liberty**

No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. Both capital punishment and life imprisonment without the possibility of release are prohibited for offences committed by persons below 18 years. Any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. A child who is detained shall have legal and other assistance as well as contact with the family.

### **Article 38**

#### **Armed conflicts**

States Parties shall take all feasible measures to ensure that children under 15 years of age have no direct part in hostilities. No child below 15 shall be recruited into the armed forces. States shall also ensure the protection and care of children who are affected by armed conflict.

### **Article 39**

#### **Rehabilitative care**

The State has an obligation to ensure that child victims of armed conflicts, torture, neglect, maltreatment or exploitation receive appropriate treatment for their recovery and social reintegration.

### **Article 40**

#### **Administration of juvenile justice**

A child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. The child is entitled to basic guarantees as well as legal or other assistance for his or her defence.

Judicial proceedings and institutional placements shall be avoided wherever possible.

### **Article 41**

#### **Respect for higher standards**

Wherever standards set in applicable national and international law relevant to the rights of the child that are higher than those in this Convention, the higher standard shall always apply.

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For more information, please contact PDHRE:

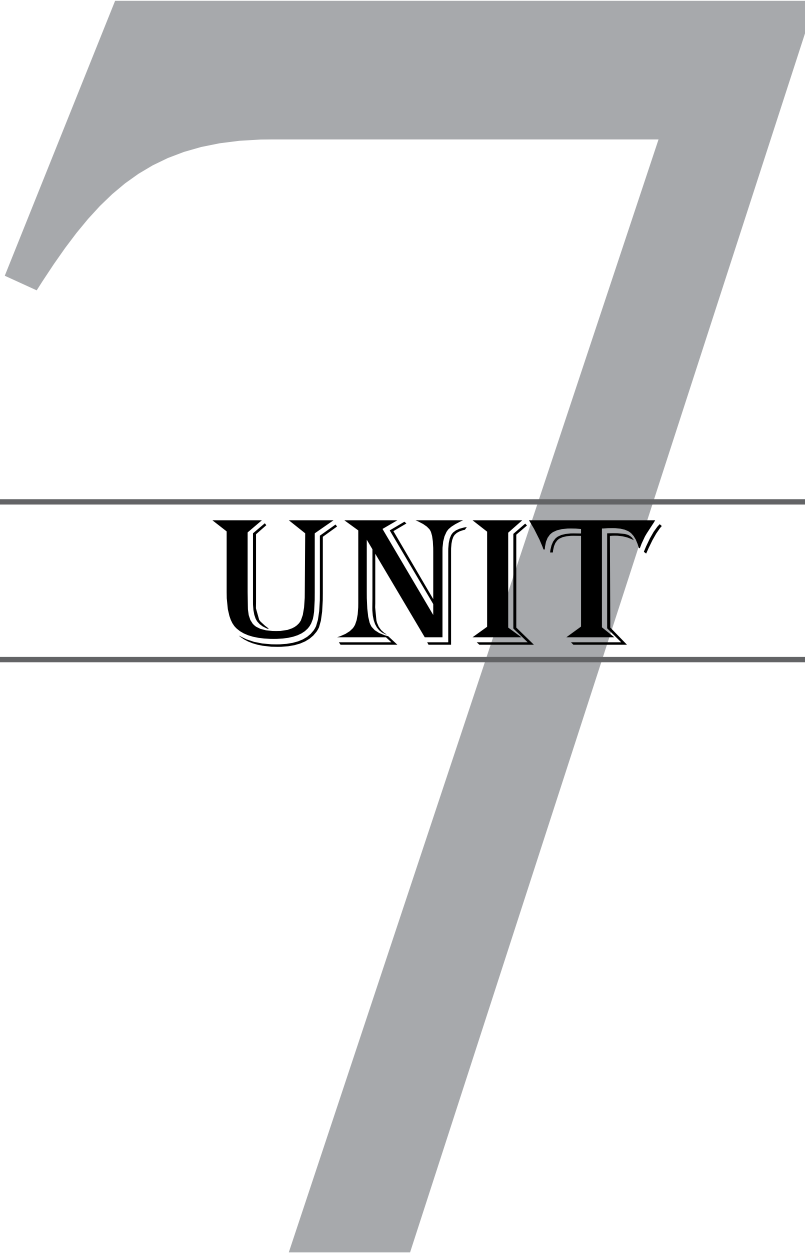
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**UNIT**

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## **Aung San Suu Kyi**

It is often in the name of cultural integrity as well as social stability and national security that democratic reforms based on human rights are resisted by authoritarian governments.

## MAINTAINING LAW AND ORDER

*“Justice is incidental to law and order.”*

–John Edgar Hoover

**O**n the subject of law and order, the first point to make is that maintaining law and maintaining order are not necessarily the same. In some situations it might be unlawful to stage a mass gathering for political protests even if it does not create disorder but lawful to hold a mass gatherings for religious festivals even though it does. Furthermore, methods used to maintain order might themselves be unlawful (for example, detention of political opponents) and enforcement of the law might bring about public disorder (for example, violent protests against tax rises).

In theory, governments create laws to maintain public order. Enforcement bodies are given the task of ensuring that laws are respected by investigating and apprehending those suspected of breaking the law. The judicial system reviews the evidence and determines whether or not a crime has been committed and how and how that should be redressed. The government, police and security forces, courts and prisons are all involved in the processes of maintaining law and order.

In a democracy such as India, the public has a role in determining the law via the electoral system. In reality the scale and complexity of legislation means that few people really know what laws exist and how they impact on their day to day lives. Several of India’s laws date back to pre independence and are no longer relevant but the process of repealing and amending laws or creating new laws is long winded and slow. Furthermore, as India is a federal republic different laws operate in different States. This complex situation can allow greater public involvement and make the law more responsive to local opinion but can also enable higher levels of corruption and vested interest.

One of the basic tenets of human rights is that the law should be impartial but political interference, religious pressure, media hype and public opinion all influence the development and implementation of legislation. There are numerous examples of governments and judiciary bowing to corporate, religious, or other vested interest and of police, security personnel and prison officers acting unlawfully. Corruption and abuse of power is the norm amongst law enforcement bodies in several parts of the world, including India, to the extent that civil society often has a more proactive role in protecting the public against human rights abuses, often by protesting against government and police action.

How a country responds to protest and dissent is a key indicator of its respect for human rights. It is in this matter that the role of police and other security personnel is most questionable. Although lawful assembly is enshrined in the Universal Declaration of Human Rights this allows that if a crowd refuses to disperse when ordered to do so ‘reasonable force’ may be used. The intention of this is to keep the peace and avoid disorder. Unfortunately, what is regarded as ‘disorder’ is open to interpretation and too often is interpreted as any protest or resistance against the government or other powerful bodies, including powerful businesses and families (for example police in the UK baton charged and arrested a gathering of peaceful protesters against a multinational supermarket chain). The term ‘reasonable force’ is also interpreted liberally by several governments around the world. Consequently using excessive force, false detention, harassment, torture and even killing ‘suspects’ have all been used in the name of maintaining public order.

In India torture in the forms of routine physical, psychological and sexual abuse of minorities and marginalised communities including Dalits, Adivasis and women, is commonplace at the hands of the police and security forces. Sexual violence against women and children is rampant in conflict zones, prisons and against lower casts all over India<sup>1</sup>. In 1996 the UN Special Rapporteur on Torture<sup>1</sup>

1. UN Special Rapporteur on Torture 1995

reported that the security forces systematically used torture to coerce confessions to militant activity, to reveal information about suspected militants, or to inflict punishment for suspected support or sympathy with militants.

‘India has the highest number of cases of police torture and custodial deaths among the world’s democracies and the weakest laws against torture’<sup>2</sup>.

The Indian government has recognised the need for police forces across the country to be modernised but has yet to implement reforms. Whilst countries like the UK have carried out considerable reforms and today have an Independent Police Complaints Commission, reforms in India are virtually at a stand still. Hence civil society complaints regarding corruption, violence and lack of professionalism in the investigation of crimes remain unresolved.

The National Human Rights Commissions and the state commissions have been established by statute to redress grievances in respect of violation of human rights. However, A Report<sup>3</sup> based on a study done of the complaints redress procedure followed by the NHRC found that about 80% of all complaints to the NHRC were dealt with by sending the complaints for verification to the very police station against whom the complaints were made. As a result a large number of genuine complaints were dismissed without ever being investigated.

#### **Points for discussion**

1. Can there be any justification for torture or detention without trial?
2. Can the police and armed forces be impartial when they have sworn allegiance to the State?
3. When human rights abuses are carried out by police or security officers who should be held accountable? The individuals, the police force/security force or the State?

### **The right to a fair trial**

The right to a fair trial includes the procedures of arrest, investigation and pre-trial detention as well as the trial itself. In accordance with international law a person is presumed innocent until proven guilty leaving the burden of proof with the prosecutor and giving the accused the benefit of the doubt. This must hold true throughout the process of prosecution. Equality and non-discrimination must be applied to both the accused and the person bringing the complaint. Gender, caste, class, age, race, religion or any other factor must not influence the conduct of police, prison officers, lawyers, judges or juries. A fair trial must mean that both the complainant and the accused are given a fair hearing and equal access to the justice system.

An independent and impartial judiciary is paramount. Judges must be able to respond to the evidence before them without being influenced by comments made by officials or the media, by political pressure, public outrage, or personal affiliations to social or religious communities.

The production of evidence must also be reliable and valid. Therefore investigations must be conducted and evidence obtained with the objective of enforcing the law rather than to achieve prosecutions. There are a number of international instruments and codes concerning the right to a fair trial but there remain some broad interpretations and outright contraventions practiced in many countries including India. In international law, evidence that has been obtained by unlawful means or methods is not admissible in court. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. India is not a signatory to CAT but is still bound by the Constitution, the UDHR and ICCPR

2. Directory of Detention Conditions’ (2005) released by the Immigration Advisory Service (IAS) UK

3. ‘Judgment Reserved: The Case of the National Human Rights Commission of India’, South Asian Human Rights Documentation Centre, ISBN 81-87379-06-5, 2001 <http://www.ohchr.org/en/publicationsresources/pages/trainingeducation.aspx>

all of which demand 'Due Process' meaning that no-one can be arbitrarily charged with an offence or punished.

## Punishment

All societies have laws defining crimes and penalties for committing crimes. What may and may not be categorised as criminal is a subject for human rights debate and alongside that is the question of what may be regarded as appropriate and reasonable punishment. In democratic countries governments must follow due process as approved by the electorate in determining crimes and punishments. Most forbid torture and many have outlawed the death penalty.

India and the USA defend their continued use of the death penalty for heinous crimes but it is not completely clear on what basis they justify this. In considering how to make the punishment fit the crime it is necessary to consider the purpose of punishment. Many arguments for and against certain kinds of punishment base their judgement on the effectiveness of different methods. However, a human rights-based approach must weigh up the balance of rights of the victim and perpetrator of a crime. It means that the severity of the punishment must take into account the violation committed and the impact of any sentence on the victim while at the same time protecting the perpetrator from unreasonable rights violations.

### The purpose of punishment

**Retribution** by paying a debt to society, "an eye for an eye"

**Restoration of law and order** by keeping criminals off the street

**Deterrence** to other potential lawbreakers

**Preventive** to stop re-offending by the same person

**Reform and rehabilitation** of the criminal by turning people from the path of criminality and enabling them to lead a different life

**Justice** includes each of the above but with the additional consideration of the human rights of the offender

It has often been reported that rape victims feel as much violated by the proceedings of a criminal prosecution as by the incident and then further so by lenient sentencing. Parents of child sexual abuse victims often call for merciless penalties for the perpetrator. Public opinion often supports harsh sentencing, including the death penalty for certain crimes including child abuse, drug trafficking and terrorism, all of which might represent gross human rights violations, but apart from the questionable effectiveness of such punishment there is the issue of justice that is most at stake.

According to Amnesty International, "The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the State. This cruel, inhuman and degrading punishment is done in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights. Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the State to kill the prisoner." (see Justice Suresh; Lecture 8)

- | The Universal Declaration of Human Rights, 1948
- | The International Covenant on Civil and Political Rights, 1966
- | The Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, 1984



## UNIT-7 SESSION-I

### **Criminal law basics**

#### **Arrest & rights of accused**

#### **Who is an accused**

- A person suspected, arrested or charged with the commission of a crime

#### **Kinds of offences**

- Cognizable/Non-cognizable
- Bailable/Non-Bailable
- Compoundable/Non-compoundable
- Summons Triable /Warrant triable
- Magistrate Triable/Sessions triable

#### **Conditions of arrest**

- A person arrested must submit to the police
- If not, the police may confine him
- If s/he forcibly resists, police may use all force necessary
- Police must not cause the death of an accused who did not commit an offence punishable with death / life imprisonment
- The person arrested cannot be subjected to more restraint than necessary

#### **How an arrest can be made**

- Handcuffs cannot be used without an order of the court
- Police have a right to enter any place to arrest the accused
- No woman accused can be arrested without a female police officer present
- The arrested person should be produced before the court within 24 hours

#### **DK Basu Guidelines on arrest**

- Police personnel must display visible identification
  - They must produce a memo of arrest
  - Friend or relative must be informed of the arrest
  - Time, place and location of arrest to be notified
- The person arrested has the right to:**
- Inform a third party
  - A medical examination every 48 hours
  - A lawyer

## UNIT-7 SESSION-I

### **Persons in custody have the right to:**

- write and receive letters
- write and publish books
- receive books and magazines
- be interviewed by journalists
- wages for labour
- meet their families, friends, their lawyer
- decent food, soap, clothing, bedding

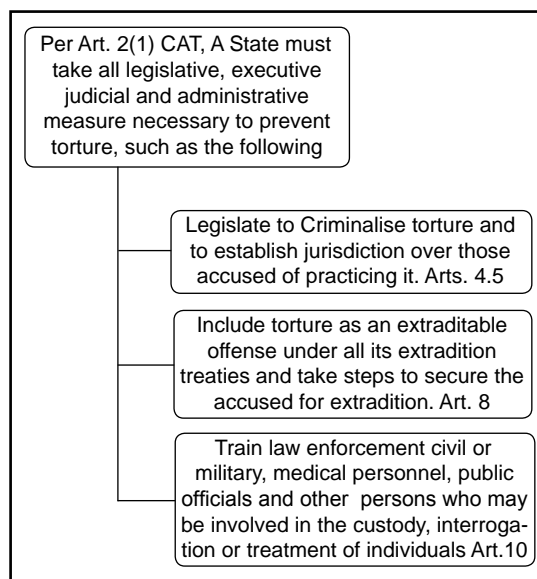
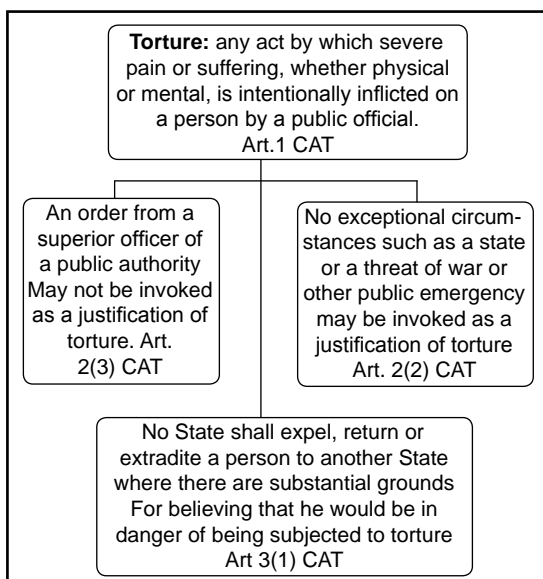
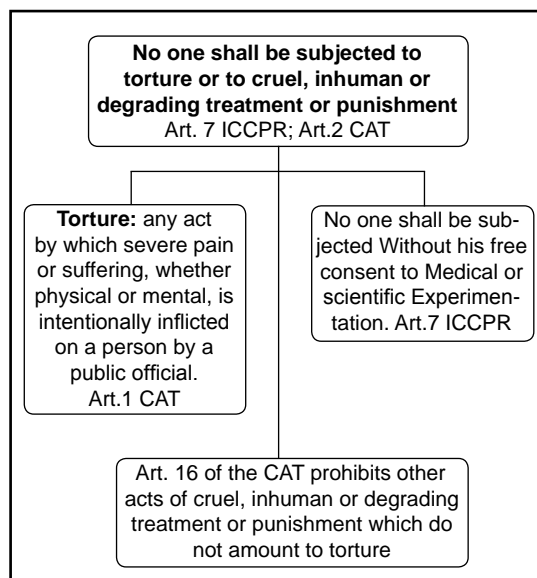
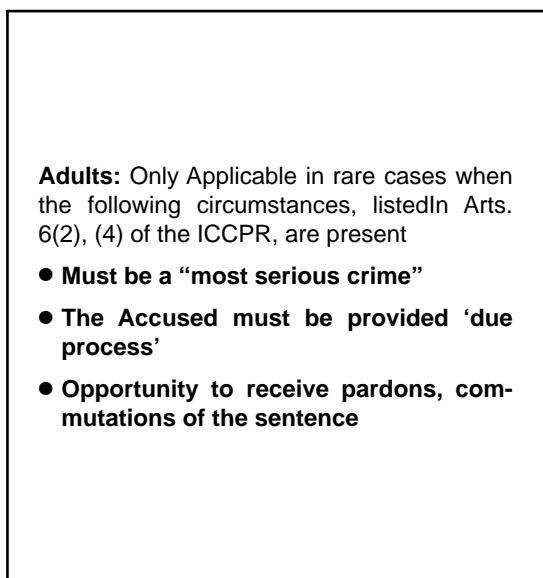
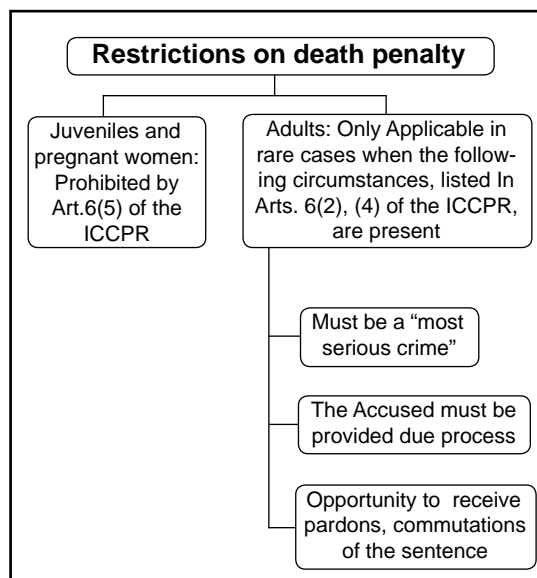
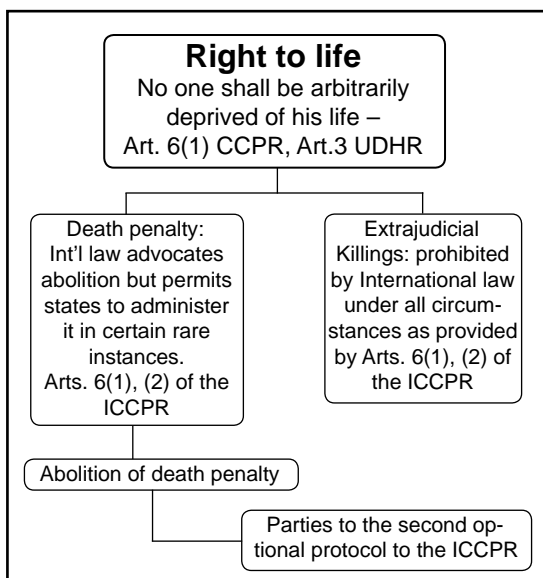
### **Person in custody cannot be**

- as under trials, forced to do labour
- transferred to a prison far from home and family
- subjected to solitary confinement of hard labour without the court's permission
- as women prisoners, separated from their children below four yrs against their will

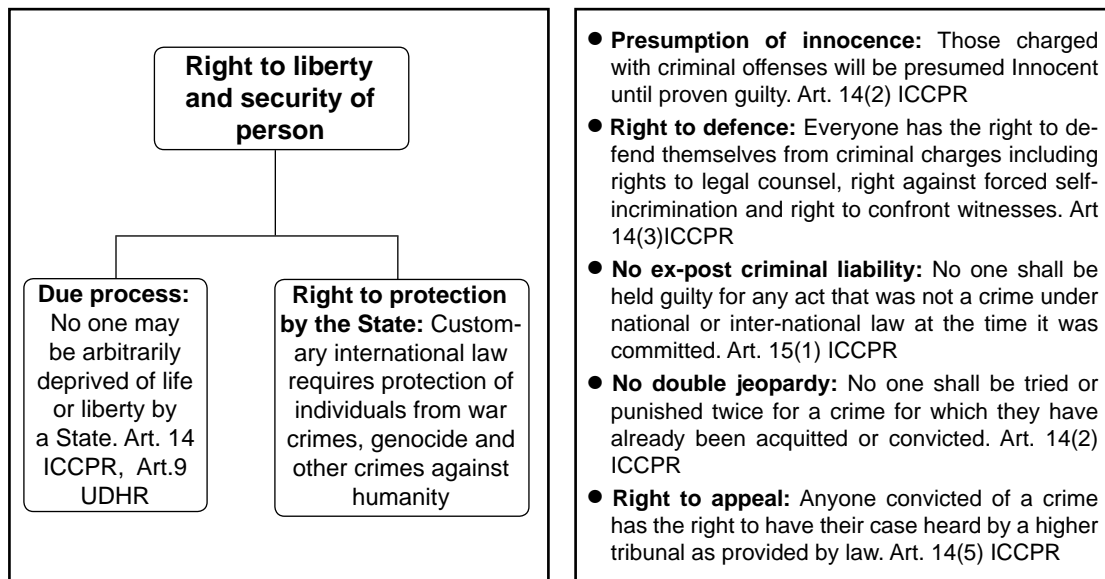
### **Groundless arrests**

- A person has a right to compensation for arrest made without adequate grounds
- Magistrates may provide compensation to a person acquitted or discharged
- A suit for defamation can be filed against the complainant
- A suit for damages can also be filed

## UNIT-7 SESSION-II



## UNIT-7 SESSION-II



## UNIT-7 SESSION-III

### Bails and bonds

#### What is bail

- it is a security
- sought by court
- from an accused
- at the time of his release
- to ensure his appearance in Court

#### Bailable/Non-bailable offences

##### ● Non-bailable offences

- Accused is not entitled to bail as a matter of right
- S/he can apply to the court immediately after arrest

##### ● Bailable offences

- Accused is entitled to bail as a matter of right
- Bail can be furnished in the Police Station
- Police themselves can release on bail
- Otherwise bail may be taken from court

#### Kinds of bail

##### ● Personal Recognizance (bond)

- Accused is released on his own undertaking to remain present in the Court on date fixed

##### ● Cash bail

- Accused is required to deposit cash to ensure his attendance

##### ● Surety bail

- Accused is required to produce a guarantor

#### Bail in non-bailable offences

##### ● Bail is not a matter of right

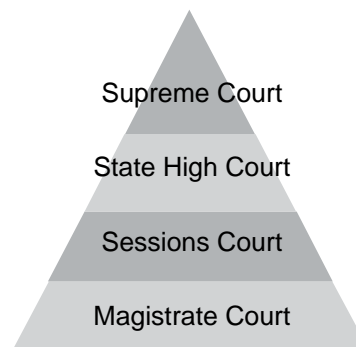
##### ● It requires consideration of the court on certain grounds like:

- Physical condition / age of accused
- Period in custody
- Likelihood of absconding
- Whether threat to society
- Having family, children or other dependants
- Evidence collected against

##### ● Interim bail

- Bail granted on a temporary basis with conditions

#### Progress of bail application



## UNIT-7 SESSION-III

### Bail application

- There is no restriction on the number of bail applications that can be made
- Each successive applications must show a change in circumstances
- An accused in custody is not required to pay court fees
- Statutory bail – due if a charge sheet is not filed within 90 days

### Anticipatory bail

- Application for bail in anticipation of arrest
- An application may be made before the Sessions Court or directly before the High Court
- The court may impose condition
- On the event of arrest the person will be released on bail



## UNIT-7 SESSION-IV

### Reporting a crime – Filing an FIR

#### Cognizable/Non-cognizable

- Cognizable offences; Police can arrest the offender without a warrant from the court
  - These are grievous and serious offences like murder / dacoity / rape / fraud
- Non cognizable offences; Police cannot arrest without a warrant from the court

#### First Information Report (FIR)

- Information about a cognizable crime
- Reported to a police officer
- Who puts the information into writing
- First step to initiate a criminal proceeding
- Is vitally important as evidence

#### Who can lodge an FIR?

- An aggrieved person
- Any other person on behalf of the aggrieved person
- Any person who is aware of an offence
- Officer-in-charge of police station
- Doctor attending an aggrieved person

#### When to lodge an FIR?

- Immediately after a crime is committed
- Delay in lodging FIR can lead to complications
- The following grounds can be cited for delay:
  - Physical/Psychological condition of the informer
  - Distance of place of occurrence
  - Threat / Promise/undue Influence
  - Economic / Social threat
  - Dispute over jurisdiction

#### What goes in to an FIR

- Information relating to the commission of a cognizable offence
- Given to an officer-in-charge of a police station
- It must be reproduced in writing, if given orally
- Signed by the informer (refusal to sign the report is punishable)
- Read back to the informer
- The gist of the information should be entered in the station general diary
- A copy of the FIR should be given straight-away, free of cost, to the informer
- Informer must be produced in the court to corroborate the report

## UNIT-7 SESSION-IV

### What is a general diary entry

- Day to day proceedings of a police station are recorded
- Information about any non-cognizable offence is entered as GDE
- Any other information – loss of documents

### Expected outcomes of FIR

- Criminal proceedings to be initiated
- Accused person to be arrested and produced before the court
- Police to collect evidences to prove the charge
- Statements of the informer and witnesses to be recorded

### What to include

- It should be recorded in first person
- Technical words should be avoided and as far as possible
- Written statement should be duly signed or thumb impressed
- Only a report of cognizable offence should be lodged in FIR
- Only authentic information (known fact or reliable information)
- Place, date and time of occurrence
- Reason for delay, if any, in registering the case
- Description and role of every accused involved in the commission of offence
- Any physical attack on persons or property
- Any weapons carried
- Observations of the scene of the crime
- A copy of FIR should be provided to the complainant free of cost

### How to complain

- Be calm and clear about what happened
- Don't use harsh or rude language
- Even if you are angry don't be aggressive
- Avoid unnecessary details
- Over-writing/scoring out should be avoided
- Don't down play the offence

### Penalty for giving false information

- You will be liable to criminal prosecution
- If convicted you can be imprisoned or fined

### What if the police refuse to lodge FIR

- Write the report yourself including all the information you would have told the police officer
- Sign it and send it to the Officer-in-Charge by Registered Post
- Lodge the complaint to the Superintendent of Police / Commissioner of Police
- Lodge the complaint before the Magistrate
- File a writ against the Police in the High Court



## UNIT-7 SESSION-V

# EXERCISE: HOW CAN YOU DEFEND THOSE PEOPLE?

### SOURCE

Adapted from: Correspondence Bias in Everyday Life, Minnesota: Carleton College.

Available online at: [www.acad.carleton.edu/curricular/PSYC/classes](http://www.acad.carleton.edu/curricular/PSYC/classes) and 'Understanding Human Rights a Manual for Human Rights Education' [www.etc-graz.at](http://www.etc-graz.at)

The case of Kasab, the only person prosecuted for a series of shooting attacks that took place in Mumbai in November 2008, had much of India baying for blood. Several advocates refused to defend Kasab on grounds of patriotism. When the time came for Kasab to be sentenced there was little doubt that a death penalty would be handed down.

1. Let participants read the handout on the Kasab case. Ask them to imagine that they are advocates who have been asked to defend him.

2. Read out the statement of the defence attorney Gerry Spence, who described his response to the question frequently put to him, "How can you defend those people?"

3. Gerry Spence, defense attorney USA:

"Well, do you think the defendant should have a trial before we hang him? If so, should it be a fair trial? If it is to be a fair trial, should the accused be provided with an attorney? If he is to be provided with an attorney, should the attorney be competent? Well, then, if the defence attorney knows that the defendant is guilty, should he try to lose the case? If not, should he do his best to make the prosecution prove its case beyond a reasonable doubt? And if he does his best, and the prosecution fails to prove the case beyond a reasonable doubt, and the jury acquits the guilty accused, who[m] do you blame? Do you blame the defense attorney who has done his job, or the prosecutor who has not?"

(Source: Adapted from: Harper's Magazine. July 1997.)

4. Start a discussion on the rights of perpetrators on the basis of this statement.

- n Should everybody be considered innocent until proven guilty?
- n If you are accused of a crime, should you always have the right to defend yourself?
- n Should everybody be allowed to ask for legal help and get it free of charge if s/he cannot afford it?
- n Should everybody be equal before the law?
- n Why do you think advocates defend criminals?

### FOLLOW UP

Read out the Articles 6 and 8 of the UDHR.

## **Background to the case**

At the age of twenty two, Ajmal Amir Kasab was convicted for his role in killing 166 people, including 23 foreigners, and injuring 304 on 26 November 2008. A sentence of capital punishment was passed.

Most of the fatalities were commuters at the CST railway station. Eighteen security personnel, including then anti-terrorist squad chief Hemant Karkare and other top police officers were killed.

The court heard that Kasab and nine others arrived at Mumbai by boat from Pakistan in November 200 on a suicide mission to attack the city. Only Kasab was captured alive, the others were all killed in counter-attacks.

The 26/11 trial the fastest in a terror case conducted in India. It commenced on May 8, 2009, in a special court set up at Arthur Road Jail. During the trial, 3,192 pages of evidence were recorded. There were 658 witnesses and 296 of them were examined in court on 271 working days. Another 357 witnesses were examined via affidavit. There were five court's witnesses. The trial lasted 369 days.

Thirty witnesses in the court of judge ML Tahaliyani identified Kasab as the man who had opened fire at them. The prosecution, led by Ujjwal Nikam, submitted 1,015 articles seized during investigations and filed 1,691 documents to support its case. The prosecution had also argued that Pakistan's security apparatus was used by LeT in the attacks.

For the first time in Indian legal history, FBI officials deposed to give technical evidence that the killers came from Pakistan using a global positioning system (GPS) and that they made calls from their mobile phones through voice-over-internet protocol (VOIP) to stay in touch with their handlers across the border.

The Prosecution also tabled CCTV footage from cameras fitted at CST railway station, the Times of India building, and the Taj Mahal and Oberoi hotels. The images showed the terrorists moving about with guns and firing at people.

Photographs of Kasab shot by photojournalists Sebastian D'Souza and Sriram Vernekar were also placed before the court. However, Kasab took the plea that these were morphed and that he was not the man shown in the stills.

Kasab was captured alive on the first day of the attacks, and he confessed to his part in the crime before a Magistrate in February 2009.

During the trial, Kasab revoked part of his earlier confession, diluting his role in the attacks and passing the blame onto his accomplice Abu Ismael. At the end of the trial, he disowned all earlier versions and claimed innocence.

In the initial stages, Kasab claimed he was juvenile but the court rejected his plea after scientific evidence proved otherwise. The charge sheet filed on February 25, 2008 put his age at 21.

K P Pawar, who defended Kasab, pleaded that his client was innocent and was picked up by the police from Chowpatty a few days before the 26/11 attacks.

## **LANDMARK ORDERS ON PRISONERS' PLEA**

### **Madhukar Bhagwan Jambhale vs State of Maharashtra and others (Bombay High Court) 1987 Mah. LJ 68**

The Petitioner complained of torture and ill treatment in prison and challenged a number of various rules and practices of the prison as violative of Articles 14, 19(1)(a) and 21 of the Constitution.

The petitioner challenged rules 20, 17(ix) and 23 of the Maharashtra Prisons (Facilities to Prisoners) Rules, 1962, which put restrictions on the rights of the prisoners to correspond with people outside the prison and to censor their letters on the ground that they violate their rights guaranteed under Articles 14, 19(1)(a) and 21 of the Constitution.

The court held that rule 17(ix) which permitted a prisoner to send welfare letters to his near relatives in other prisons, but not permitted to send welfare letters to prisoners in other prisons who, are not related to him was discriminatory and violative of Article 14 of the Constitution. The court stated that a prisoner is entitled to send welfare letters to prisoners in the other prisons whether such prisoners are his relatives or not.

Rule 20 prohibited prisoners from writing letters which may contain subjects of political propaganda, strictures on the administration of prisons and any reference to other prisoners confined in the prison. Rule 23 gave wide powers to the prison authorities to withhold the letters containing objectionable matter and are entitled to erase such passages in the letter. The court found that the blanket restrictions contained in rule 20 were contrary to Articles 14 and 19(1)(a) of the Constitution but that rule 23 was not unconstitutional.

In the case of punishment, the petitioner submitted, some appeal for challenging the order of punishment must be provided for. The court, however, accepted the respondent's case that an order issued by the inspector general of prisons, allowed for the inspector of prisons, or the state government, to vary or reduce a punishment imposed on a prisoner.

The petitioner also contended that the grievance procedure prescribed under the various rules is grossly inadequate and does not conform to the guidelines in the matter of grievance procedure laid down by the Supreme Court in Sunil Batra vs Delhi Administration, AIR 1980 SC 1579. The court ordered the state government to take steps to implement the guidelines. These included: the installation of a grievance deposit box under the control of a Sessions judge who is responsible for recording and investigation the complaints, a complaint register in the prison office, maintained by a judge, visits to prisons by judges and lawyers to enable inmates to voice their grievances and the right of petition to judicial and governmental departments.

### **Ranchod vs State of Madhya Pradesh and others (Madhya Pradesh High Court)**

The petitioners in this case were the father and brother of a prison inmate (Vengariya) who was given a lethal injection by the prison doctor, allegedly as punishment for refusing to wash the clothes of the doctor, nurse and compounder in the prison. A magisterial enquiry had been ordered but there was no evidence of any progress having being made. The court got despaired at the way in which the prisoner had been treated by the prison staff, the lengths they had gone to cover up his death and the lack of any meaningful recourse open to the petitioners.

The court held that the suspicious circumstances in which Vengariya died necessitated a thorough probe into the whole episode and criminal prosecutions of those found to be responsible. The court ordered the probe to be completed within 45 days from the date of this order and those found guilty must be criminally charged.

## **Inacio Manuel Miranda vs The State (Bombay High Court)**

This case deals with complaints made by prisoners about the conditions in their prison.

The court noted the Supreme Court's view, expressed in the case of Sheela Barse vs State of Maharashtra, 1988 that citizens who are detained in prisons either as undertrials or as convicts are also entitled to the benefits guaranteed by the Constitution, subject to reasonable restrictions.

The prisoners complained that one single shaving blade was used to shave several prisoners. This was defended on account of security reasons. The court held that the prison should use some sort of disinfectant to avoid any infection and also to prevent transmission of disease from one prisoner to another. The court further stated that this direction should apply equally to another grievance made about the use of a common needle for extraction of blood.

Another complaint related to the practice of the jail authorities to supply paper to the prisoners free of cost from the office of the prison for the purpose of preferring appeals, applications, etc., but where they require paper for private use, it is sold at 0.08 paise a sheet. Rule 19 of the Prison Rules stated that writing material should be supplied by the government without any cost. However, Rule 17 contemplates that Class I prisoners can write four letters, two at the government cost and two at the prisoner's cost and Class II prisoners can write two letters per calendar month. The court held that the classification in the present Rules was discriminatory and therefore, unreasonable. All convicts should be treated equally in the matter of writing letters and should be allowed to write at least four letters per month, two with the paper supplied by the government, at government cost and two, at the cost of the prisoner, on the paper supplied by the government at 0.08 paise per sheet which is stated to be the cost price.

A further grievance by the prison inmates was regarding the non-availability of the Jail Rules. Rule 28 of the Facilities Rule provides that there should be a library in the prison. The court noted that the government appeared to have directed the jailer that the Rules should not be made available to the prisoners. The court found this direction to be wholly arbitrary and unreasonable. "It would be against the principles of natural justice to permit the prisoners to be punished or penalised by laws of which they had no knowledge and of which they could not even with exercise of due and reasonable diligence, acquire any knowledge". The court directed the state government to prepare copies of the Rules and make them available in the libraries of the jail and sub-jails.

Prisoners also complained about the ventilation conditions in the police lock-up. The court directed the government to improve the ventilation in the lock-up and to make arrangements to provide a lavatory.

A grievance was made about the composition of the Board of Visitors which should consist of cross-sections of society and the visits should not be routine ones. The court ordered the state government to reconstitute the Visitor's Board and to implement an effective procedure for redressing grievances of the prisoners in accordance with the directions given by the Supreme Court in Sunil Batra vs Delhi Administration.

The court ordered the Inspector General of Prisons to report compliance on these matters within six months.

## **In the matter of Prison Reform, Enhancement of Wages of Prisoners etc., Kerala High Court**

The two petitioners in this case sought an order that the wages of the prisoners be enhanced. The court noted that although the matter had been brought to the notice of the government three years ago and a specific recommendation on the matter by the High Court was sent two years ago no decision was attempted. The court stated that "We are not going to decide this case on the basis of ethics of giving more humane treatment to a prisoner in jail. That is for the executive and Legislature to concern themselves with on the basis of a policy approach they may choose to adopt. We confine our attention in these cases to the question of the legality and constitutionality of denying reasonable

wages to a prisoner when, against his will, he has been compelled to work". Finding that the prisoners undergoing sentence of imprisonment in the jails of the state are entitled to the enjoyment of their fundamental rights except insofar as they may be curtailed due to the fact of imprisonment, the court examined Article 23(1) of the Constitution which prohibits forced labour and Article 39(a) which refers to the principle that citizens should have the right to an adequate means of livelihood as well as Articles 41 and 43.

Relying on Article 23(1) and on *People's Union for Democratic Rights vs Union of India* (AIR 1982 SC 1947) the court took the view that prisoners are entitled to payment of a fair or living wage which would be 'reasonable'. The court noted that minimum wages are at a much lower level than living wages and that reasonable wages would therefore always exceed minimum wages. The court ordered the government to pay its working prisoners a sum of Rs 8/- per day as being a reasonable wage.

### **Gurdev Singh and others vs State of Himachal Pradesh and Others**

Both petitioners were prisoners in jails in Himachal Pradesh. They were both employed for work but were being paid Rs 1.5 per day for their labour. They also complained that no wages were paid for the first three months of their work. Furthermore, they stated that they are forced to work with contractors either at a lesser wage or for no wages at all. The court examined the details of the cases and the relevant constitutional and international standards on the subject. The court concluded that, in its view, subjecting prisoners, sentenced to rigorous imprisonment, to hard work and providing work to others is not at all bad. However, this must be done keeping in view their will, physical strength and the uppermost obligation to make payment for the work done by them. There must be no distinction between work carried out inside the prison and outside it. On the question of pay, the court was of the opinion that all the prisoners of various categories in all the jails in the state are entitled to be paid reasonable wages for the work they are called upon to do in the jails and outside the jails. The wages were left to be decided by the state government within one year of the date of decision of these cases. Until then the court ordered that the prisoners be paid the minimum wages as notified by the state government from time to time under the Minimum Wages Act, 1948, from the date of filing of the petitions in the court.

The court also requested the state government to undertake comprehensive jail reforms within a year by appointing a high power committee to advise the state government. In addition to various other important aspects, the Committee would also look into matters like:

- (i) opening of more open air institutions with sufficient agricultural land attached to it so that prisoners hailing from rural areas with agricultural background may continue to work in the same atmosphere and rehabilitate suitably in their villages
- (ii) provision for adequate work inside and outside jails
- (iii) provision for different jails/correctional institutes for young prisoners, juvenile offenders, hardened criminals and other prisoners who suffer from mental aberrations
- (iv) opening of more open air jails in the state and one exclusively for women
- (v) provisions for education and vocational training
- (vi) liberal remissions and regular paroles
- (vii) greater opportunities to meet friends and near relatives and facilities to allow them to discuss their problems away from the policemen's gaze
- (viii) proper attention for health and entertainment facilities for prisoners
- (ix) comprehensive scheme for procurement of work for them and payment of reasonable/living wages
- (x) provision for better dieting facilities
- (xi) comprehensive management of their wage funds, and
- (xii) provision for after-release for guidance and help

### **The State of Maharashtra vs Prabhakar Pandurang Sanzgiri and another (Supreme Court)**

Prabhakar Pandurang Sanzgiri was detained by the Government of Maharashtra under Rule 30(1) (b) of the Defence of India Rules, 1962, in the Bombay District Prison in order to prevent him from acting in manner prejudicial to the defence of India, public safety and maintenance of public order. He had written a book on quantum theory with the permission of the state government. He twice applied to the Government of Maharashtra seeking permission to send the manuscript out of the jail for publication. His request was refused on both occasions. He then filed a petition under Article 226 of the Constitution in the High Court directing the state to permit him to send out the manuscript of the book written by him for its eventual publication.

The court held that since there was no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenu from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of the first respondent and acted contrary to law in refusing to send the manuscript book of the detenu out of the jail.

### **Kunnikkal Narayanan vs The State of Kerala and Another (Kerala High Court)**

The petitioner had been detained under the Maintenance of Internal Security Act, 1971. He requested a direction that three books: Four Essays on Philosophy by Mao Tse-Tung, Mao Papers by Jerome Ch'en and Mao-Tse-Tung by Stuart Sefram, be delivered to the petitioners. The three books were sent to the petitioner but he was not permitted to receive them on the ground that the books fell within the term 'Mao literature' under Clause 19 (1) (b) of the Kerala Security Prisoners' Order, 1971 which stated that it will not be permissible for Security Prisoners to receive or purchase Mao literature.

The petitioner sought an order that this provision was illegal. He also argued that that Clause 19(1) infringed the fundamental rights guaranteed to the petitioner under Article 19(1) (a) includes the freedom to acquire knowledge, to peruse books and periodicals and read any type of literature and restrictions relating to such a right which can be said to be reasonable restriction. It was urged that the refusal of permission to receive the three books mentioned above is an unreasonable restriction.

The court noted that the words 'Mao literature' covered both inflammatory and non-inflammatory materials. The court stated that wide and ambiguous words 'Mao literature' did not achieve the desired result and so the order should be set aside.

### **M A Khan vs State and Another (Bombay High Court)**

The petitioner was detained in prison. He had been trying to get hold of certain journals and periodical at his own cost but he was denied permission to receive them. The jail authorities did not allow him to purchase or receive the journals and periodicals on the ground that they were not included in the official list of newspapers allowable to security prisoners of Class 1. The petitioner applied to the court for an order or direction stating that he was entitled to the literature he had chosen.

The court took the view that the liberties of a detainee cannot be curtailed by imposing such stringent conditions on which publications he can and cannot read. The court noted that the state government may prevent a detainee from receiving periodicals and books which cannot be lawfully obtained by people, who are not under detention. Books and periodicals which are proscribed, or which are obscene, may be disallowed on those grounds, but not books and periodicals which can be freely had by the general public.

The State of Maharashtra and the superintendent of the Bombay district prison were not entitled to disallow the petitioner from receiving the newspapers and periodicals he had requested and were directed to remove the said restriction and allow the petitioner to receive the newspapers and periodicals, at his cost.

### **George Fernandes vs State (Bombay High Court)**

The petitioners were both prisoners. He challenged the practice of the prison superintendents to restrict the number of books to be made available to each petitioner. In one prison the number was restricted to 12, 10 non-religious books and two religious books. The petitioners' contention is that there is no justification for so restricting the number of the books to be made available to either of them and that the Conditions of Detention Order 1951 does not contain restrictions on the number of books available to detainees.

The first petitioner was a prominent trade union worker and member of the Socialist Party of India and a member of its national committee. As a full time social, political and trade union worker he required a number of books on a wide range of subjects. For this purpose he has received from his personal source number of books on these topics some of which had been confiscated being deemed 'unsuitable'. The second petitioner was an active trade unionist and a member of the state secretariat of the Maharashtra committee of the Communist Party. He complained that the prison superintendent has refused to hand over all books required by him on the ground that he could have only six books at a time and no more.

The court stated that the superintendent did not have an unrestricted power to curtail any of the privileges set out in the Conditions of detention order 1951 but that he did have discretion to decide whether a book was suitable or not. The court stated that this discretion must be exercised within "a well-defined field". The court stated that a book may be considered unsuitable because it preaches violence, it may be vulgar or obscene, it may be pornographic, or it may have been proscribed. Beyond this, the court did not find any power in the superintendent to withhold a book from a detainee on any other ground. The court also stated that it failed to see any rational justification for restricting the number of books that a prisoner could have at any one time.

The court directed the prison superintendent not to put any restriction on the number of books that were supplied to each of the petitioners unless a particular book is determined to be unsuitable by the authority for reasons set out above.

### **Frances Mullin vs Union Territory of Delhi and Others (Supreme Court)**

The petitioner, a British national, was arrested and detained under the Conversation of Foreign and Prevention of Smuggling Activities Act (COFEPOSA Act). Under the provisions of this Act the petitioner was permitted to have an interview with her five-year-old daughter no more than once a month. The petitioner's lawyer also experienced significant difficulties in arranging meetings with her. The restrictions on her meeting were imposed by powers conferred under Section 5 of the COFEPOSA.

The petitioner therefore challenged the constitutional validity of the restrictions under Article 32. The principal ground on which the constitutional validity of the provisions was challenged was that they were violative of Article 14 and 21 of the Constitution inasmuch as they were arbitrary and unreasonable. It was contended on behalf of petitioner that allowing interview with the members of the family only once in a month was discriminatory and unreasonable, particularly when undertrial prisoners were granted the facility of interview with relatives and friends twice in a week under Rule 559A and convicted prisoners were permitted to have interviews with their relatives and friends once in a week.

The petitioner also argued that a detainee was entitled under Article 22 of the Constitution to consult and be defended by a legal practitioner of her choice and she was, therefore entitled to the facility of interview with a lawyer whom she wanted to consult or appear for her in a legal proceeding. She argued that the requirement of prior appointment for interview and of the presence of customs or excise officer at the interview was arbitrary and unreasonable and therefore violative of Articles 14 and 21.

The court found that as part of the right to live with human dignity and therefore as a necessary component of the right to life, the petitioner should be entitled to have interviews with the members of her family and friends and no prison regulation or procedure laid down by prison regulation regulating the



right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Article 14 and 21, unless it is reasonable, fair and just. The court found the restrictions on visiting to be unreasonable and arbitrary and violative of Articles 14 and 21.

The court also found that the rule restricting the right of detainees to have interviews with a legal adviser of his choice was violative of Article 14 and 21 and must be held to be unconstitutional and void.

### **Danial H Walcott vs Superintendent, Nagpur Central Prison (Bombay High Court)**

The petitioner challenged the legality of the punishment of 30 days separate confinement awarded to him by the superintendent of Nagpur Central Jail under the Prison Act. He had found with a fellow prisoner, the superintendent of the prison had demanded an explanation and the incident was over. Three weeks later the superintendent informed him that he was being punished for the incident through separate confinement.

Section 46 of the Prisons provides that the superintendent may examine any person touching any such offence and determine thereupon and punish such offence by awarding the punishments which are specified in that Section. The question for the court was whether the petitioner's contention that he has been found guilty of a prison offence without complying with the provisions of Section 46 of the Prisons Act, and therefore, the punishment awarded to him is justified or not. The inquiry was made without questioning the petitioner. The court held that the process of determination under Section 46 implies the application of mind by the superintendent to the material before him and he has to determine objectively whether the person charged with a prison offence has been proved to have committed that offence. The court found the enquiry claimed to have been made by the superintendent to be in clear violation of the provisions of Section 46 of the Prisons Act because being of quasi-judicial nature the decision must be made according to the principle of natural justice of which the right to be heard is an essential characteristic.

*–Compiled by the Combat Law team  
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## DEATH TO THE DEATH PENALTY

**Colin Gonsalves**

**F**our recent Capital cases and the public debate over the views of the President and the Chief Justice, brings to the fore the need for India to urgently reconsider its position on the death sentence and to abolish it once and for all. The Parliament attack case saw one of the accused unable to pay for a lawyer and seeking legal aid. He was given a legal-aid lawyer with whom he publicly disagreed and he asked the court to discontinue with that person. The court declined. He went unrepresented. The amicus attempted some sort of a defence but he was contradicted by the accused at critical moments. The accused, a surrendered militant, set out in his defence, that he had been tortured by the army and forced to do certain things that brought him onto the fringe of the conspiracy to attack parliament. This defence was not properly brought on record. This is how he was convicted and sentenced to death.

This was a classic case of trial by media. The accused was chained to a chair in the police station and was asked to confess before the national press. His confession, entirely illegal and inadmissible, was broadcast on prime time television. From that moment onwards he was guilty as far as the people of India were concerned.

Virappan's case saw poor tribals sentenced to death for the killing of policemen. When he was ultimately killed, huge crowds of the poor gathered to pay their last respects to a man who had fought the police successfully for decades. A perusal of the defence evidence showed that the police routinely terrorised the villagers, robbed their chickens and molested their women. True, Virappan cut trees and killed elephants, but he paid labour double the minimum wage and treated them with dignity. He was their hero and they protected him by providing him safe haven, food and intelligence. It was these villagers who were ultimately sentenced to death.

The high profile Dhananjay Chatterjee case, where the accused was sentenced to death for raping and killing an 18-year-old girl, galvanized public opinion in favour of the death penalty. The date of his execution was announced ignoring the pendency of his mercy petition before the President. It was only the last minute intervention of the Supreme Court that brought him temporary respite. When the President rejected his plea for commutation he was gleefully hanged by the Government of West Bengal on his birthday.

A five-judge constitutional bench of the Supreme Court rejected his plea that having been in jail for 14 years, it was cruel, inhuman and degrading to now execute him and that, in any case it amounted to double punishment.

The innovation of the American courts introducing DNA testing as admissible in a criminal trial was not followed. The man is now beyond the reach of any human tribunal.

It was said by the sentencing court, that the fact that he was a watchmen duty-bound to protect people, was an aggravating factor calling for the death sentence. In cases where the security forces have been found guilty of raping and executing citizens, the Apex Court has held that such crimes do not fall into the category of 'rarest of the rare'. Perhaps it was the fact that he was a poor security guard that had something to do with the sentence. Much like the Naxalites from Bihar who engage in violence on behalf of the poorest of the poor and who get the death sentence, while the Ranvir Sena, the army of landlords, get away with no punishment at all.

Then came Om Prakash's case. He was sentenced to death in a multiple murder case. He claimed to be a juvenile. Once again the legal aid provided to him was much below par. Although he submitted

his school certificate confirming his minority, it was not looked at. His plea was rejected on the specious ground that he had a bank account and that this implied that he was a major. His mercy petition is pending and he has sought review as well.

Leadership by the apex court on such a vital, moral and legal issue was sorely lacking. The majority, in the constitutional bench decision in Bachan Singh's case, reduced the arguments to a triviality. Their views were that if in the civilised world people are divided as to whether there ought to be capital punishment, then it is not the business of the Supreme Court to so decide, and the legislature must take on that task. The Constitutional Court of South Africa did not take such a limp and easy way out. In a stunning unanimous decision, the court held the death sentence to be unconstitutional. Justice Bhagwati's courageous and erudite defence will remain in our jurisprudence as one of the finest judgments ever rendered. I have no doubt that, sometime in the future, it will be the law of this land. But till then it will stand out as a decision to trouble the conscience of those who advocate the death penalty and of judges who impose it.

In the meanwhile, judges have lost the ideological battle waged by the police against them on television and in the print media. In a short sighted attempt to appear more strict, they have begun to dilute the safeguards of criminal law and the standards for executions in an attempt to push up the conviction rate and appear tough. In doing so a great disservice to the system of constitutional and criminal law is being done. Ad-hocism, naive pragmatism, silly common sense and guesswork, replaced the sound tenets of criminal jurisprudence: and the victims are always the poor, Dalits, Adivasis, unorganised workers and Muslims. As K.G.Kannabiran said 'its only those without capital who get the punishment'.

And in the midst of all this, when a principle stand was required to be taken, the Law Commission came out with a report asking for hanging to be replaced by the lethal injection!

No society burns women for dowry, humiliates Dalits, batters women at home, forces women to commit suicide in sati, bulldozes the houses of the poor, starves half the population and tortures people incarcerated at police stations- as we do in India. What is now this acceptable level of violence has permeated into the psyche of even ordinary people. We are at the threshold of developing a society so disfigured by violence that the very foundations of democracy are threatened. On the horizon is the police State.

## UNTRUTH SERUM

P Chandra Sekharan

Interrogation is an important aspect of criminal investigation. It is an art to be mastered through study and experience. It plays major role in investigation whenever there is little or no physical evidence. Police and other investigators depend on interrogation as a principal means of determining facts and resolving issues. It is a well-accepted norm in civilized nations that for both ethical and pragmatic reasons no interrogator may take upon himself or herself the unilateral responsibility for using coercive methods. Concealing from the interrogator's superiors intent to resort to coercion, or its unapproved employment, does not protect them. It places them, in unconsidered jeopardy.

Reliance on interrogation, however, involves certain problems: ascertaining when a suspect or witness is telling the truth, evaluating memory, allowing for the physical and mental condition of a witness or suspect, and understanding the problems created by an individual's perspective. Interrogation methods and equipment have evolved in response to these problem areas. It is true that the psychological, psychophysical, and physical sciences have played vital roles in police interrogation techniques. But unfortunately this eventually led to many pseudoscientific truth-detecting techniques as well.

### Coercive techniques

But we should know basic information about coercive techniques available for use in the interrogation situation. Coercive procedures are designed not only to exploit the resistant source's internal conflicts and induce him to wrestle with himself but also to bring a superior outside force to bear upon the subject's resistance. The following are the principal coercive techniques of interrogation: Arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression.

If we look at the history of police investigation, physical coercion (third degree practice) has been preferred to painstaking and time-consuming inquiry in the belief that direct methods produce quick results. Sir James Stephens, writing in 1883, rationalises a grisly example of "third degree" practices by the police of India: "It is far pleasanter to sit comfortably in the shade rubbing red pepper, in a poor devil's eyes than to go about in the sun hunting up evidence."

### Narcoanalysis

More recently, police officials in our country are lured by one or two pseudoscientists to the practice of narcoanalysis to extract confessions from accused persons. The police are misguided to think that narcoanalysis is a boon to the police to make breakthroughs. This technique, as claimed by the police, is neither modern nor an internationally accepted one having its origin in the early 1920s. Drugs are supposed to relax the individual's defenses to the extent that he unknowingly reveals truths he has been trying to conceal. This investigative technique cannot be considered as humanitarian and as an alternative to physical torture, but could be dubbed as "psychological third degree", raising serious questions of individual rights and liberties. The civilised nations abhor the use of chemical agents in the guise of truth serum "to make people do things against their will".

### Truth serum

What is truth serum? "In vino veritas" ("in wine there is truth") observed Gaius Plinius Secundus, (better known as Pliny the Elder), the Roman nobleman, scientist, natural philosopher and historian

during the first century. In fact, alcohol given as intravenous ethanol, was an early form of truth serum. But the fascination for truth-eliciting drugs began in 1916 when an obstetrician named Robert Ernest House, practicing in a town outside Dallas named Ferris, saw a strange event during a home delivery.

The woman in labour was in a state of “twilight sleep” induced by scopolamine, a compound derived from the henbane plant that blocks the action of the neurotransmitter acetylcholine. House had asked her husband for a scale to weigh the newborn. The man looked for it and returned to the bedroom saying he could not find it — whereupon his wife, still under the anesthetic, told him exactly where it was. House became convinced that scopolamine could make anyone answer a question truthfully, and he went on to promote its forensic use.

The phrase “truth serum” appeared first in a news report of the experiments conducted on prisoners by Robert House, in the Los Angeles Record, sometime in 1922. Robert House himself resisted the usage of the term for a while but eventually came to employ it regularly himself. Since then police departments used it — and in a few cases judges permitted it — through the 1920s and 1930s. Other drugs were also tried, most famously the barbiturates and Pentothal Sodium had become the drug of choice in interrogations. But by the 1950s, most scientists had declared the very notion of truth serums invalid, and most courts had ruled testimony gained through their use inadmissible.

The terminology “truth serum” is itself a twofold misnomer. Neither the drugs used in this technique are sera nor do they necessarily bring forth the probative truth. It is the media which continues to exploit the appeal of the term as it provides an exceedingly durable theme for the press and popular literature.

### **Practice of narcoanalysis**

The use of so-called “truth” drugs in interrogation is similar to the accepted psychiatric practice of narcoanalysis, which is nothing but psychotherapy conducted while the patient is in a ‘sleep-like state’ induced by barbiturates or other drugs, especially as a means of releasing repressed feelings, thoughts, or memories. Its use in psychiatric practice is restricted to circumstances when there is a compelling, immediate need for a patient’s responses. But the difference in the procedures adopted by the investigator lies in a totally different objective. The police investigator is concerned with empirical truth that may be used against the suspect, and therefore almost solely with probative truth: The usefulness of the suspect’s revelations depends ultimately on their acceptance in evidence by a court of law.

The psychiatrist, on the other hand, using the same ‘truth-drugs’ in diagnosis and treatment of the mentally ill, is primarily concerned with psychological truth or psychological reality rather than empirical fact. A patient’s aberrations are reality for him at the time they occur, and an accurate account of these fantasies and delusions, can be the key to recovery. According to psychiatrists ‘they cannot be considered as reliable recollection of past events.

### **Experimental studies**

The clinical and experimental studies conducted by many researchers have concluded that there is no such magic brew as the popular notion of truth serum. The barbiturates, by disrupting defensive patterns, may sometimes be helpful in interrogation, but even under the best conditions they will elicit an output contaminated by deception, fantasy, garbled speech, etc. A major vulnerability they produce in the subject is a tendency to believe he has revealed more than he has. Studies and reports dealing with the validity of material extracted from reluctant informants indicate that there is no drug which can force every informant to report all the information he has. Not only may the inveterate criminal psychopath lie under the influence of drugs which have been tested, but the relatively normal and well-adjusted individual may also successfully disguise factual data.

Several patients revealed fantasies, fears, and delusions approaching delirium, much of which could

readily be distinguished from reality. But sometimes there was no way for the examiner to distinguish truth from fantasy except by reference to other sources. One subject claimed to have a child that did not exist, another threatened to kill on sight a stepfather who had been dead a year, and yet another confessed to participating in a robbery when in fact he had only purchased goods from the participants. Recently a Bangalore journalist, who was voluntarily undergoing a narco test, revealed that he loved Shah Rukh Khan's mum the most while his recorded answer before he took the test was he loved his mother.

Testimony concerning dates and specific places was untrustworthy and often contradictory because of the patient's loss of time-sense. His veracity in citing names and events proved questionable. Because of his confusion about actual events and what he thought or feared had happened, the patient at times managed to conceal the truth unintentionally. As the subject revived, he would become aware that he was being questioned about his secrets and, depending upon his personality, his fear of discovery, or the degree of his disillusionment with the doctor, grow negativistic, hostile, or physically aggressive. Drugs disrupt established thought patterns, including the will to resist, but they do so indiscriminately and thus also interfere with the patterns of substantive information the interrogator seeks. Even under the conditions most favourable for the interrogator, output will be contaminated by fantasy, distortion, and untruth. Because of these world-wide opinions, narcoanalysis for interrogation has been dispensed with long back.

As cited by Anirudh K Kala, Inbau, the then professor of law at Northwestern University, who had had considerable experience in observing or participating in 'truth serum' tests, is of the opinion that such tests are occasionally effective on persons who, if they had been properly interrogated, would have disclosed the truth anyway. The person who is determined to lie will usually be able to continue the deception even under the effects of the drug. On the other hand, the person who is likely to confess will probably do so as a result of skillful police interrogation and it will not be necessary to use drugs.

### **Side effects of pentothal**

The life-threatening adverse side effects of pentothal are circulatory depression, respiratory depression with apnoea and anaphylaxis. Its effects on CNS may produce head ache, retrograde amnesia, emergence delirium, prolonged somnolence and recovery, besides several other side effects.

Sodium thiopental is a depressant and is sometimes used during interrogations not to cause pain (in fact, it may have just the opposite effect) but to get the person being interrogated to talk. It is not true that sodium pentothal does not cause pain. It can be irritating and painful if accidentally injected into tissues. Extravascular or intra-arterial injection would indeed cause pain<sup>4</sup>. (Please refer Stephen Raftery, Bristol Royal Infirmary, UK., Pharmacology Issue 2 (1992) Article 8: Page 1 of 1 ).

### **The Indian scenario**

It was sometime during the year 2000, narcoanalysis was given a rebirth in India when the Bangalore Forensic Science Laboratory announced the availability of a four-in-one package tests for the investigating police officers. From then on the Indian police were lured to these tests and they began considering 'pentothal sodium' as the cornucopia for all their unsolved crimes. They believe in the fits and starts of the drug rather than their wits to intelligently interrogate. The Indian judiciary, barring the Supreme Court, appears to have given its tacit approval to adopt pseudoscientific techniques in crime investigation. The Fourth Estate looks at the truth drug with the same excitement it created in 1922 when the Texas obstetrician, Robert House first termed the drug as 'truth serum'. The Indian psychiatry is watching the fun with caution. The Indian Neuroscientists (medicos) are amused to see the misuse of brain sciences by the non-medicos.

### **The four-in-one package**

The package includes the following four tests in that order a) psychological profile b) polygraph test

c) brain fingerprinting test and d) narcoanalysis. All the four tests are conducted by the same expert (social psychologist) one after the other on the pretext that the earlier test suggests confirmation by the next. The tragedy is that the final confirmation is made by narcoanalysis, the earliest to be thrown out. The intention is clear. The report on narcoanalysis will only be in the form of verbal statements by the accused while the reports on the other tests are simply based on electrical responses. The architect of these tests is also not bothered about the possibility of the result of one test prejudicing the findings in the next which is again against principles of scientific investigation and ethics.

### The other tests

**A. Polygraph Test:** The most dramatic gains in interrogation technology, when once narco test was discarded, have come through the polygraph, or so-called lie detector. The polygraph monitors and records selected body changes that are affected by a person's emotional condition. The recorded changes are then studied, analysed, and correlated in respect to specific questions or other stimuli.

Again, the name "polygraph test" is itself misleading. The word "test" indicates an 'objective process of evaluation' based on facts, similar to a DNA or a blood test. Results obtained from a polygraph test are much less credible, since the device measures the body's reaction to two different types of questions. The two different types of questions are known as relevant and control questions. The examiner must compare responses from relevant questions to those of control questions in order to form an opinion. The dirty little secret behind the polygraph is that the "test" depends on trickery, not science. Perversely, the "test" is inherently biased against the truthful

'Absolutely there is no difference between a polygraphist who manipulates examinations, and a law enforcement officer who plants contraband on a suspect. In both cases, evidence is being manufactured. The only difference is the law enforcement officer has committed a crime, and the polygraphist just made money'.

**B. Brain Fingerprinting:** The technique developed in the early nineteen nineties by Lawrence A. Farwell, a former research associate in psychology in the department of psychiatry of Harvard Medical School, is claimed to be an alternative to polygraph test. In using the technology, a suspect is shown carefully selected words, phrases or images on a computer screen. They are things like a photo of a murder weapon or the model of car used in a crime. It is claimed that these things would only be recognised by the person who committed the crime.

Sensors on a headband register the subject's EEG, or brain wave responses to the computer images. The EEG is fed through an amplifier and into a computer that uses proprietary software to display and interpret the brain waves. Unlike polygraph testing, it does not attempt to determine whether or not a subject is telling the truth. Rather, it attempts to determine whether the subject's brain has a record of relevant words, phrases, or pictures.

### Farwell's visit to India

I had an opportunity to expose the fallacy behind Farwell's brain fingerprinting technique when Lawrence Farwell visited Hyderabad on March 27, 2004 whence the Andhra Pradesh Forensic Science Laboratory had organised a symposium on 'Truth detecting techniques'. After Farwell made his presentation I confronted him with the comment that his technique would not differentiate the brain wave response exhibited by the perpetrator of a crime from that exhibited by the others who have knowledge about the crime. Farwell concurred with my observation. Farwell's team brought with them more than a dozen equipment to be marketed in India. The director general of police, Andhra Pradesh, Mr Sukumaran had on the spot cancelled the orders earlier placed for the purchase of a unit for Andhra Pradesh Forensic Science Laboratory from Farwell and Farwell has to go back to America taking back all the units he brought to India for sale.

**Farwell's Brain Fingerprinting:** The Des Moines Register, a newspaper dated September 06, 2004 has published a very interesting story about Farwell's company having swindled the taxpayers of

Iowa out of over \$100,000 on the pretext of Brain Fingerprinting research. On the outskirts of Fairfield, alongside a gravel- driveway marked with a sign that reads “Hermit Haven,” sits the National Data Center and Regional Operations Center for Brain Fingerprinting Laboratories Inc. The centers consist of a small, rented office and an empty laboratory. A few computers with archived experiment data are stashed in the basement behind steel doors, but no workers are there to use them. “They moved to Seattle,” explains a businessman in a neighboring office.

In the months before that move, Brain Fingerprinting Laboratories collected \$125,000 in grants and loans from the Iowa department of economic development. However, a lawyer in the Iowa attorney general’s office has said Farwell’s so-called brain fingerprinter is no more effective than “a pasta strainer with a chin strap.” Another lawyer in the attorney general’s office called the state’s investment a waste of taxpayer money. A third has said the company’s claims are “nonsense.” There are no takers for brain fingerprinting in America itself.

### **Brain fingerprinting in India**

When such is the real position of brain fingerprinting, two forensic science laboratories in India (The Gujarat lab also joined the bandwagon now) moved fast to apply this technique in actual cases. (Bangalore Lab claims that they have already completed 700 cases of brain mapping and 300 cases of narcoanalysis.) Our psychologists claim that they have brought out the hidden secrets of the brain of the accused.

The P300 brain wave response is just a waveform with a single spike which is very similar in the suspect as well as the other witnesses. Unless our experts find out a distinct characteristic in the brain-wave response of the perpetrator which is totally different from the responses of other witnesses, the information derived from brainwave response of an accused will have no meaning. I am yet to find any publication about original research, if any carried out in this direction by our brain wave specialists in peer-reviewed scientific journals. There is a wild rumour that these people are simply copying Farwell’s patented technique without paying royalty to him and they will certainly get into problems. First they must come out with their own findings, if any, which are different from that of Farwell, and satisfy the ‘falsifiability criterion’, before applying the technique in actual cases. ‘Brain fingerprinting’ as it is today, is little supported by forensic evidence or experience and it is no better than its cousin ‘lie-detector’. If narcoanalysis is a primitive technique, brain wave test is a premature one.

### **Strong support from DFS, MHA**

Meanwhile, the directorate of forensic sciences functioning under the ministry of home affairs (DFS, MHA) had officially released a manual, prescribing the procedure for the conduct of narcoanalysis. Yes! A manual was released in 2005 by the DFS, which proclaims “Promoting good practices and standards” for a technique not practiced until this day in any of the three central forensic science Laboratories directly under its own control; a technique considered to be a barbaric practice and abandoned by all civilised countries; a technique not practiced by any forensic science laboratory anywhere in the world; a technique, since its inception in 1922 was practiced only in hospitals with the help of medical men, psychiatrist and anesthetist until it was abandoned a few decades ago.

It is only the State Forensic Science Laboratory Bangalore that had suddenly found a fancy for this test during the past few years. But the “laboratory procedure manual-forensic narcoanalysis issued under the banner of ministry of home affairs, Government of India, carries disinformation as if many laboratories in India are doing this test. It is said in the preface of the manual that “Forensic Science Laboratories now have started playing active role in providing scientific aids to investigators by examining suspects under the “state of trance” achieved by employing Narcoanalysis technique.” The fact is that no laboratory other than the Bangalore one in India conducts this test. No big procedure or technology is involved in this test. The write-up, resembling the advocacy of a private company to promote its product, makes tall claims ignoring all negative aspects and risk factors involved in the



test. The manual also advises that the revelations during narcoanalysis can be verified by polygraphy and brain fingerprinting, the two pseudoscientific techniques. Incidentally, the DFS has also released a manual for brain fingerprinting.

### **Plea before Indian government**

It is in such a scenario, calling narcoanalysis a “psychological third degree” method of investigation, I had written to the prime minister in July 2006, asking the government to make a policy decision on whether the police may use narcoanalysis, and to clarify what role, if any, forensic scientists should have in such tests. I had also suggested to form a committee of experts to tackle the issue and to refer the matter to the Supreme Court. My letter was subsequently forwarded to the home ministry. The ministry is responsible for the directorate of forensic sciences, the Centre’s forensic sciences department.

I had again addressed the MHA in August 2006 criticizing the Ministry for trying to mainstream a technique that has been discredited in most “civilised” countries and not practiced by any forensic science lab anywhere in the world. I have also called for the withdrawal of the manual on narcoanalysis. I am yet to get a response.

### **Ethical considerations**

For ethical reasons the psychiatrist is advised against performing narcoanalysis when the examination is requested as an aid to criminal investigation. World Medical Association recently revised its Tokyo Declaration on this subject and now states inter-alia:

1. The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty and whatever the victim’s beliefs or motives and in all situations including armed conflict and civil strife.
2. The physician shall not provide any premises, instruments, substance or knowledge to facilitate the practice of torture or other forms or cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.

Medical Council of India has recently amended its official code of medical ethics by adding, “The physician shall not aid or abet torture nor shall he be a party to either infliction of mental or physical trauma or concealment of torture inflicted by some other person or agency in clear violation of human rights.”

Anirudh Kala says, “It is shocking that such a gigantic fraud with so many important ramifications is being perpetrated on the nation. I suggest that a group of scientists and intelligentsia be formed so that a concerted effort can be made to expose the absurdity going on.”

### **Conclusion**

The police are a disciplined force trained to uphold the law and to enable democratic institutions to function lawfully. Police powers are confined by the provisions of the Constitution, the Police Act, the Criminal Procedure Code the Evidence Act and many other local and special laws which impose restrictions on the scope and method of exercise of that power. Forensic scientists should inspire the police with their scientific methods not to violate the norms. They will be accused of conspiring with them if they are a party in using the above psychological coercive methods.

Courts have powers to extract accountability from the police in case of violations of human rights in exercising their functions. Courts should therefore be posted with a detailed knowledge about these techniques. The recent decision of the Bombay High Court in a case that employing certain physical tests involving minimum bodily harm such as narcoanalysis, lie detector tests and brain fingerprinting did not violate the rights of the accused persons guaranteed by Article 20(3) of the Constitu-



tion has come probably due to the fact that they have not been posted with full information about these techniques. Certainly, this will lead to a systematic violation of human rights through the use of coercive pseudo scientific practices under the label of proven and recognized forensic scientific techniques.

All the more it is necessary that the media, the Lok Ayuktas, the human rights commissions, the superiors within the police organisations should take a serious view about the use of these techniques in the guise of interrogation and guide the home ministries to evolve a common code in this regard.

In the case of *Daubert vs Merrell-Dow Pharmaceutical*, the Supreme Court of America unanimously decided on June 28, 1993, that 'falsifiability criterion' should be the arbiter of what kind of scientific evidence will be admissible. According to this criterion Freudian psychoanalyst concept is clearly unscientific. Many psychologists themselves have little or no understanding of 'falsifiability criterion' and this may be even truer of psychiatrist and social workers.

The expert witness of psychologists using hypnosis, narcoanalysis, theories of repression, recovered memories, deviant behaviour, dissociation and multiple personality disorder, as well as others is no longer acceptable. And such expert witness can be questioned on the grounds of lack of reliability and testability. In my opinion, narcoanalysis is yesteryear's barbarism and today's truth detecting terrorism marketed by some self-centered pseudoscientists.

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*—The author is President, Forensics International (Consultancy, Education, Research and Training) and President of Forensic Science Society of India & Editor-in-Chief of the Indian Journal of Forensic Sciences. Combat Law, May-August, 2010*

## INSIDE GHAZIABAD JAIL

Kumar Baadal

**T**he Indian criminal justice system from the days of the British Raj is based on one premise innocent till proved guilty! Yet the reality is exactly the opposite. It is simply, punishment and more punishment for the undertrials till they can prove themselves innocent!

I am not talking of habitual and serious criminals, who are influential and resourceful enough to make jails their second home. I am concerned about the majority of undertrials who are either merely suspects, caught simply to fill up the monthly quota of the policemen in their area, or those arrested on false and malicious complaint filed by an enemy through bribing authorities, or even for some petty crime like squatting and playing cards on the pavements. In thousands of district jails across India, millions of undertrials go through hellish lives for months and years together – only to be acquitted by the lower courts after a prolonged trial, for lack of ‘proper’ evidence!

Picture this – Zahoor was caught on charges of gambling and sent to judicial custody in Ghaziabad district jail. He was a migrant labourer from Bihar and no one in his family came to know of his incarceration. Being poor and uneducated he could not keep in touch with them and hence no one came to see him for the five months that he spent in that jail. In jail, as Zahoor did not have the Rs 1,100 to pay for the illegal custom known as *Ginti Katai* or exclusion from doing menial jobs (many such illegal customs in jails fill the pockets of the junior to senior jail officials as well as their bosses in the bureaucracy and the ministry). These menial jobs include sweeping the vast compounds facing the barracks inside the jail, cleaning the filthy toilets, working at the furnace called jail-kitchen, washing clothes and massaging the jail officials, besides other degrading activities. Zahoor was put on the job from the moment he entered the jail barrack.

On his first night, Zahoor was shooed away like a dog by the ‘established’ prisoners from whichever spot he went inside the closed barrack, thinking it to be his abode for the night. The entire railway platform-like structure had at least 250 profusely sweating inmates, much beyond its capacity of accommodating 60 persons. The air was too heavy to breathe and still worse was the fact that Zahoor got some space to sit only beside the toilet, from which a foul stench emanated. At five in the morning he stood along with another prisoner for counting and then got some watery porridge in a plastic teacup for breakfast. Then the menial jobs, intermittent volley of expletives, massaging the feet of jail staff followed until lunch, which consisted of a few cardboard like roties and yellow watery dal or lentil.

Very soon Zahoor forgot the outside world and resigned himself to life in this hell. He even felt happy that after a couple of months he was not so frequently beaten up with lathies by the lower officials of the jail who established their fear, awe and authority among the inmates by beating poor prisoners like Zahoor mercilessly. He forgot the taste and the desire for normal roties and never complained about jail food.

I was incarcerated in the same jail during the time when we tehelka.com journalists were slapped with false charges by the hostile government of the day for doing a sting operation called ‘Operation Westend’ exposing corruption in high places responsible for defence procurement. I found Zahoor to be always behaving like a threatened puppy, but he was also always smiling. I felt sympathetic towards him as I always found him doing menial jobs. When I was shifted to the hospital cell inside the jail for safety reasons, Zahoor used to wipe the floor in front of it. Gradually, we started talking and he became so familiar with me that he would sometimes ask for Rs 5 or 10 to buy vegetable curry

from an illegal canteen run by a deputy jailor (which clearly gives away the reason for the inedible food served officially to inmates). Taking advantage of the friendship that developed between us I asked him his story. I wrote an application on behalf of Zahoor, stating that he was a very poor person and has already spent so much time in jail for a crime that did not deserve so much punishment and that he should be let off with a fine. It took Zahoor at least three appearances in the court before the policemen escorting him allowed him to go near the magistrate to handover the application.

Zahoor is just one face among the millions who are down on their luck. My own experience and investigation tells me that this is typically true for jails anywhere in the country. The people change but the conditions remain the same. And remember this is a jail for the undertrials who are supposed to be 'innocent till proven guilty'!

According to the last survey on prisons in India done in the year 2005, nearly 70 percent of prisoners are under-trials! The all India conviction rate for IPC crimes like murder, attempt to murder, culpable homicide not amounting to murder, robbery, burglary, theft, counterfeiting, dowry, molestation, rape, kidnapping and dacoity is around 30 percent whereas for crimes coming under special and local laws (SLL) like Arms Act, NDPS Act and Gambling Act is 60.6, 60.9 and 85 percent respectively. This on its own proves bungling at the level of filing the FIR and making arrests. Since the laws for arrest in the SLL crimes are stricter and follow some checks and balances, only actual offenders are in the net and hence evidence precedes conviction. But there is a lot of bungling and false arrests in the case of IPC crimes that result in a low rate of conviction.

The sad part is that the lower courts, despite the knowledge of over-crowding in jails and police excesses and inhuman conditions in the jails, often deny bail, as if denying bail is a career building exercise. Bail is the discretionary power of the judicial officer or the magistrate. Sometimes a murder accused will get bail within two days while another charged with robbery, will be denied bail for months on end on account of the 'charges being serious in nature'! This begs the obvious question – what charges are more serious than others? Finding answers for inadequacies like this is at times more difficult than counting the stars. Another dictum of the Indian criminal justice system, that 'bail is the rule and jail is the exception' is conveniently forgotten.

While there are discussions on disposing off pending criminal cases by fast track courts, one hardly gets to hear about improving jail conditions and tackling corruption that is leading the prison system from bad to worse.

Can anybody take responsibility for the plight of the millions of prisoners who are punished first and who later turn out to be innocents by pronouncing -Ba-izzat bari kiya jata hai (You are honourably set free).

*—The writer is a journalist*  
Combat Law Vol. 7, Issue 2, March-April 2008

## UNIT-7 READER-VI

# CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

### UNOFFICIAL SUMMARY

#### **Article 1**

**Definition of torture:** Any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person for purposes such as obtaining information or a confession from him or another person, punishing, intimidating or coercing him or another person, or for any reason based on discrimination of any kind. For the purposes of this Convention, such pain and suffering must be inflicted by or at the instigation of or with the acquiescence of a public official or someone acting in an official capacity. It does not include pain and suffering arising from lawful sanctions.

#### **Article 2**

Each State Party shall take effective legislative and other measures to prevent acts of torture. No circumstances of any kind, including war, may be invoked to justify torture. An order from a superior officer may not be invoked to justify torture.

#### **Article 3**

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds to believe he would be subjected to torture.

#### **Article 4**

Each State Party shall ensure that all acts of torture, attempts to commit torture, and complicity or participation in torture are offences punishable by law.

#### **Article 5**

Each State Party shall establish its jurisdiction over offenses relating to torture when they are committed in any territory under its jurisdiction, or on board a ship or aircraft registered in that State; when the alleged offender is a national of that State; and when the victim is a national of that State, if appropriate. Each State Party shall also establish its jurisdiction in cases where the alleged offender is in territory under its jurisdiction and it does not extradite him.

#### **Article 6**

Any State Party in whose territory a person alleged to have committed, attempted or participated in torture is present, shall take him into custody.

#### **Article 7**

The State Party, if it does not extradite the alleged offender, will submit the case to competent authori-

ties for prosecution. The person shall be guaranteed fair treatment at all stages of the proceedings.

#### **Article 8**

Torture, attempted torture, or participation in torture shall be deemed extraditable offences in any extradition treaty existing between States Parties. This Convention may be considered a legal basis for extradition if no extradition treaty exists.

#### **Article 9**

States Parties shall provide each other with the greatest degree of judicial assistance possible in connection with cases of alleged torture and supply all of the evidence at their disposal.

#### **Article 10**

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of civil and military law enforcement personnel, medical personnel, public officials, and others involved in custody, interrogation, or treatment of any individual subjected to arrest, detention, or imprisonment.

#### **Article 11**

Each State Party shall review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, with a view to preventing any cases of torture.

#### **Article 12**

Each State Party shall ensure that its authorities proceed with a prompt and impartial investigation wherever there is ground to believe that an act of torture has been committed in territory under its jurisdiction.

#### **Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly examined by, competent authorities.

#### **Article 14**

Each State Party shall ensure in its legal system that the victim of torture obtains redress and has an enforceable right to fair and adequate compensation. In the event of the death of the victim as a result of torture, his dependents shall be entitled to compensation.

#### **Article 15**

Each State Party shall ensure that any statement made as a result of torture shall not be used as evidence in any proceedings.

#### **Article 16**

Each State Party shall undertake to prevent other acts of cruel, inhuman or degrading treatment or

punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity.

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## HUMAN RIGHTS DEFENDER

### **Binayak Sen**

**B**inayak Sen, a human rights activist, a paediatrician and a public health doctor, was arrested on May 14, 2007 in Bilaspur, Chhattisgarh. His crime: He and his organisation (People's Union for Civil Liberties - PUCL) had helped draw public attention to the unlawful killings on March 31, 2007, of several adivasis in Santoshpur, Chhattisgarh.

Sen was detained under provisions of the Chhattisgarh Special Public Security Act, 2006 (CSPSA), and the Unlawful Activities (Prevention) Act, 1967), which was amended in 2004 to include key aspects of the Prevention of Terrorist Activities Act (POTA), 2002.

A number of organisations and individuals across the world protested against the arbitrary arrest of Dr Sen following which a police probe into the incident was ordered on May 5. As is the pattern, the evidence was destroyed promptly. Bodies of the victims were exhumed in the week immediately preceding Sen's arrest. Autopsy report has confirmed that three of the victims were hit on the head and waist by bullets at close range. Others had been brutally axed to death. Police have been quoted as admitting that it was "certain that some police personnel crossed the limits and killed innocent villagers branding them as Maoist militants... Now the government has to decide whether the cops involved in killings should be arrested or not." However, a minister from Chattisgarh has ruled out any arrest of any police personnel involved in the killings.

Binayak Sen's raised disturbing questions regarding threats, harassment and intimidation by the State against those who defend and protect human rights. The rights to freedom of expression, association and assembly are fundamental human rights. Activists continue to be targeted for harassment and intimidation by state officials. Their activities, their rights to freedom of expression, association and assembly are being restricted.

In his capacity as an active member of the PUCL, Sen has helped organise numerous fact finding missions into human rights violations that included extra-judicial killings, tortures, rapes and unlawful detentions. Sen was actively pursuing these investigations and high-handedness of the State, including cold-blooded murders of unarmed civilians by police and government-backed 'Salwa Judoom'. Sen and his organisation has been on the forefront of chronicling fake encounters, rapes, burning of villages, displacement of Adivasis and loss of their livelihoods. He has always stood against senseless killings and advocated for peaceful methods

Dr Sen has been involved in many other activities. He is renowned for extending health care to the poorest of the poor, a dwindling tradition among health professionals in India. For the past 30 years, he has been promoting community rural health care centres in the country. He helped to set up the Chhattisgarh Mukti Morcha's Shaheed Hospital, a pioneering health programme for the region. The hospital is owned and operated by a workers' organisation for the benefit of all, regardless of caste or other distinctions.

Dr Sen is an advisor to Jan Swasthya Sahyog, a health care organisation committed to developing a low-cost, effective, community health programme in the tribal and rural areas of Bilaspur district of Chhattisgarh. He was also a member of the state advisory committee set up to pilot the community-based health worker programme across Chhattisgarh, later well-known as the Mitandin programme. He also gives his services to a weekly clinic in a tribal community.

His arrest was a grave assault on the democratic rights movement in India. Democratic voices across the globe have stood up in defence of Dr Sen and other human rights activists. Noam Chomsky headed a list of prominent persons issuing a press statement on June 16, 2007. "Dr Sen has been



detained under the Chhattisgarh Special Public Security Act, 2006 and the Unlawful Activities (Prevention) Act, 2004 on charges that are completely baseless. Both these extraordinary laws have been criticised by numerous civil rights groups for being extremely vague and subjective in what is deemed unlawful, and for giving arbitrary powers to the State to silence all manners of dissent.”

Binayak Sen was granted bail on May 25, 2009 by the Supreme Court after being held for more than two years under unproven charges of links with Maoists in Chhattisgarh. A Supreme Court vacation bench of Justice Markandey Katju and Justice Deepak Verma granted him bail even as voices for his release grew louder.

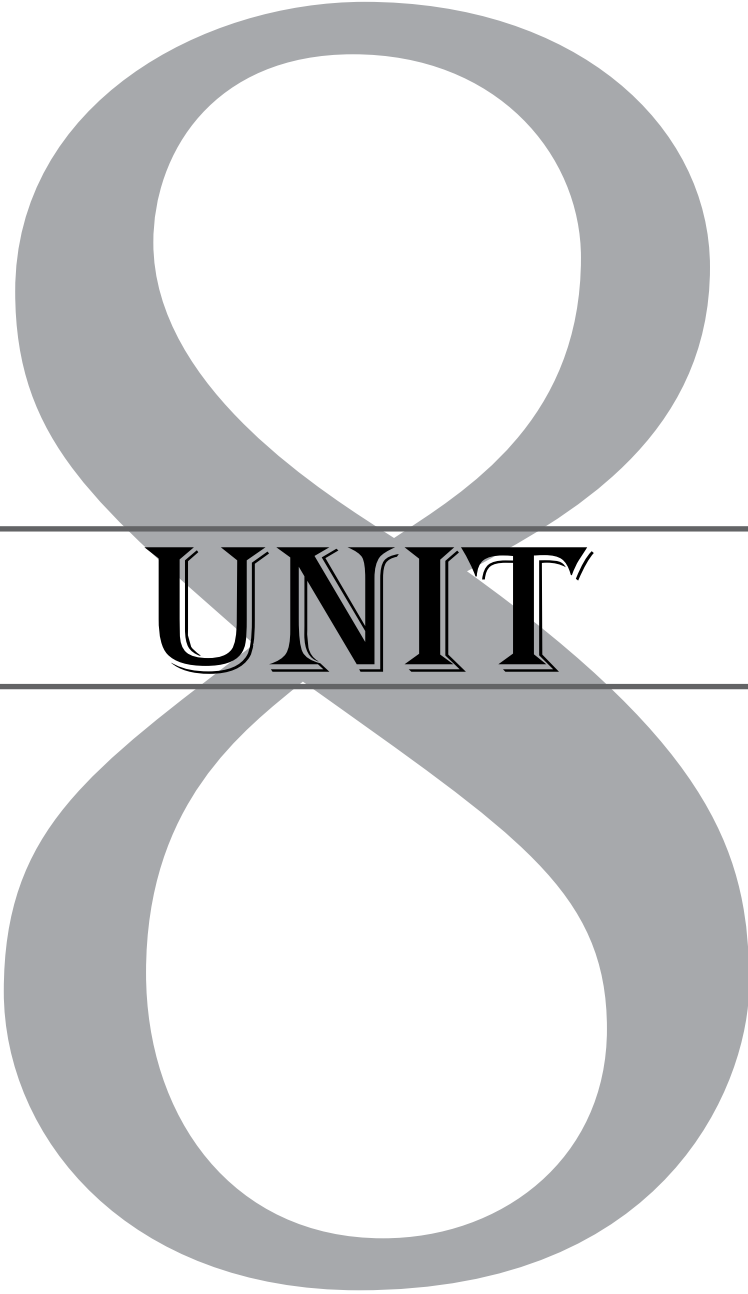
Human rights activist like Mr Sen form the backbone of a vibrant democratic struggle but the State does not look upon such activists as partners in the democratic process. They are periodically targeted, subjected to suspicion, hostility and vendetta. More often, they are also perceived as threats to the “national interest.”

Consequently, individuals, organisations, lawyers, journalists, and physicians, among other freedom and justice loving persons find themselves at considerable risk when they take on issues.

*—Adapted from an article by Harsh Dobhal published in Combat Law, July-August 2007*







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**UNIT**

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## **MK Gandhi**

A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history.

## UNIT-8 READER-I

# RIGHTS AND DUTIES

Just as every person has inalienable rights so they also have responsibilities towards the rights of others. Article 29 of UDHR specifies both that everyone has a duty towards their community and that individual rights and freedoms are necessarily limited by recognition and respect for the rights of others. The freedom to live life as you choose can only be guaranteed if you allow other people the same freedom. Keeping in mind that many members of society are unable to defend their own rights due to their social status or vulnerability it is necessary for others to defend and promote rights on their behalf. To a great extent democratic society has passed this responsibility on to governments but if governments fail to protect the vulnerable the responsibility still rests with the individual. There have been many human rights defenders who have put their own freedom and even their lives on the line to defend the rights and freedoms of others. However, being a human rights defender can be as simple as challenging the casual racist remark made by a colleague to taking part in direct action to protest against oppression. In either context, being a human rights defender is not an act of charity but the duty of every rights holder.

### **The Role of civil society**

There is no fixed definition for the term civil society but it is generally used for organisations that undertake social actions. This might involve providing services such as care for disabled or elderly people, legal advice, support for victims of crime and other roles which either fall outside the role of the government. They also step in where the state provision is inadequate, inappropriate or unsatisfactory by providing healthcare and education and welfare. An additional and vital role of civil society is in monitoring, regulating and reforming government bodies.

Non-government organisations (NGOs), community based volunteers, loosely organised pressure groups, individual activists and writers and to some extent the media are all components of civil society. The media as a civil society organisation is questionable as it often operates as a business and therefore is not primarily interested in reform. In some countries it is dominated by the State and cannot be said to be truly independent. However, the media, in its various forms, has an essential role to play in challenging government excesses and influencing social change. For this reason protection of the freedom of the press is pivotal to protecting human rights.

A vibrant civil society culture is a sign of a healthy democracy and is usually better placed to bring about social reform than elected governments specifically because it doesn't rely on votes. The concerns of minorities are not readily addressed by an electoral system that relies on majority support. Governments are often reluctant to risk votes to support a cause that might prove to be unpopular. Movements for women's suffrage, gay rights, anti-apartheid have all been led by often loosely organised groups that call on wider public support to make a statement. Each of these causes involved civil disobedience in one form or another, some involved armed struggle but all have resulted in fundamental changes in democratic and legal systems.

### **Article 29 UDHR**

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

## **Civil disobedience, freedom fighting and terrorism**

Whereas civil disobedience is usually characterised by open and public, non-violent action, revolutionary activities might involve more violent or destructive measures. Extremists, insurgents, terrorists are terms used by opponents to describe groups that rebel against prevailing governments. History is full of examples of persons regarded at one time by the State as public enemies but who were later recognised as national heroes.

Bhagat Singh, Emily Pankhurst, Nelson Mandela and Che Guevara all engaged in direct action, sometimes violence, to achieve their goals. Pamphlet writing, petitioning and slogan painting all have their place in protesting against injustice but freedom from repressive governments, repeal of draconian laws or equality for oppressed minorities is rarely won by peaceful demonstrations.

The extent to which such activities are distinguished from common crimes depends to a large extent on the political climate but also on the motivation, consequences and proportionality of the action. Due to a range of factors including media reporting, public sympathy and suppression by the authorities, the eventual justification or condemnation of civil disobedience can only be made through the lens of history.

Today's terrorists might be viewed as tomorrow's freedom fighter but there remains a question about how violating the human rights of one group can be justified in order to secure the rights of another. This question becomes more pressing when innocent people are harmed. In any conflict whether carried out by governments or by resistance movements members of the public, who take no part in fighting, are likely at very least to have their movements restricted by curfew or their belongings searched and at worst killed by explosions in public places or caught in the crossfire of clashes between security forces and insurgents. Some people believe that police and security forces are fair targets as they have put themselves in the front line of national defence but they are still human and they have human rights. Even those that have committed atrocities themselves have human rights, just as any other person who has committed an offence.

### **Points for discussion**

Can attacks on innocent civilians ever be justified in order to achieve independence or political reform?

## **Civil society and human rights**

The human rights lobby has been very dependent on civil society to bring about reforms. However, it would be a mistake to assume that all civil society organisations are human rights supporters. There are many examples of campaigns against minorities, the use of intimidation and terror to restrict the freedom and rights of women, and targeted violence in opposition to abortion and homosexuality. In each of these cases pressure groups have been formed, civil disobedience has taken place and violence has been used by groups seeking to impose their particular ideology.

The Indian Penal Code (IPC) 1860 penalises several acts and speech which have the potential to promote disharmony, public mischief and religious discord or is prejudicial to national integration. Acts penalised include damaging or defiling a place of worship or sacred objects, disturbing a lawful assembly engaged in religious worship, trespassing onto burial places with malicious intent, any act which is prejudicial to harmony between groups. Organising drills and exercises for the purpose of training participants to be deployed for committing violence against another group is prohibited under the IPC. Speech against another group (on grounds of their race, religion, language, caste, place of birth, residence, community or any other ground) that seeks to promote enmity is an offence. Speech that challenges the faith and allegiance to the Constitution of India or India's sovereignty and integrity, of any group on ground of their race, religion, language and caste is also an offence. Sections

295-A and 298 penalise speech that is intended to wound or outrage religious feelings. None of these provisions have succeeded in suppressing the activities of the Sangh Parivar and their agenda to achieve Hindutva in India.

### **Communalism**

Anti-Christian violence erupted in Kandhamal (Orissa) between December 2007 and November 2008 displaced up to fifty thousand people. Ninety people were murdered, hundreds were brutally beaten and several women and girls were raped.

Rightwing Hindutva groups have persistently targeted Christians in Orissa with the stated aim of eliminating them from the area. The most high profile of these attacks was on Australian missionary Graham Staines and his ten and six year old sons who, in 1999, were burnt alive while sleeping in their car. This incident attracted worldwide news coverage but it was neither the first nor the worst of attacks on Christians. with the exception of the Stains family all of the victims were Indians from the locality.

The catalogue of incidents that took place in December 2007 followed by the attacks in August 2008, indicate that these were not isolated or sporadic but were well planned and orchestrated. The perpetrators of these attacks were members of the Hindutva movement, the Sangh Parivar. Hindutva literally means 'Hinduness' but in the context of the Hindutva movement it is an ideology of Hindu nationalism. The Sangh Parivar is the umbrella for a number of rightwing nationalist groups. The BJP is the constitutional party of the movement, at the time of the attacks the Government of Orissa was a coalition of The BJP with the BJD. The VHP (Hindu World Council) is the activist front with a stated aim of re-converting or eradicating non-Hindus from India, while The RSS (National Volunteers Association) and their youth wing, the Bajrang Dal are the foot soldiers. Hindutva has a record of inciting violence by using hate speech and calling bandhs (strikes or shut downs), rallies and riots against minority cultures including Muslims, Christians and secularists.

However, just as a civil society movement was responsible for inciting violence in this case, equally it was the intervention by activists and NGOs that brought it to international attention and helped to bring relief to the victims. The police and government were virtually inactive in protecting the innocent people targeted in the attacks. They were forced to respond by a Supreme Court order following a Public Interest Litigation.

#### **Points for discussion**

- n How can democracies protect minorities from being marginalised?
- n To what extent do separatist and independence movements resolve the problems faced by minorities?
- n Should international law apply differently to politically motivated crimes?

## UNIT-8 SESSION-I

### EXERCISE

#### **Facilitating an action plan**

The purpose of this exercise is to:

- n Practice the skills for facilitating and developing action plans
- n Consider the human rights of people who misuse drugs and other substances
- n Identify ways to get involved in activities for promoting human rights

#### **Case study**

'Change' is a (fictional) harm reduction project that works with street-based injecting drug users in the city. Change reaches out to this community, providing a needle/syringe exchange, distributing condoms providing HIV/AIDS information, counselling and testing, a harm reduction and drug rehabilitation programme and support for rehabilitated clients to stay healthy and off drugs.

Change has secured funding to establish a hostel to provide transition accommodation for recovering drug users. It is essential that the identity and privacy of the service users is maintained but some local people have found out about the proposed site and have protested against the hostel being opened. Change will now have to find another site and a landlord willing for the premises to be used as a rehabilitation hostel. Change realise that in order for the project to get off the ground they will also have to do some work to address public perceptions about drug users and at the same time challenge the city authorities to take responsibility for their welfare. This must be done while maintaining strict confidentiality for their service users.

#### **Activity**

In groups read the case study and develop an action plan for change to implement over the next 12 months based on the aims and objectives below.

The aim of the action is to establish within the next year a rehabilitation hostel where around twenty (in number) former street based drug users can stay for up to six months while they prepare to manage their lives without drugs.

The objectives (to achieve this aim) are to:

- n Allay misconceptions and fears in the local community about drug users, change and the purpose of the hostel
- n Campaign for local authorities to meet their responsibilities for providing appropriate services for recovering drug users
- n Identify alternative accommodation for the hostel

Each group must record all suggested actions on a flip chart, discuss them, select and prioritise them and organise into achievable actions.

There are no wrong answers or bad ideas in this exercise.

## UNIT-8 READER-II

### REJECT THIS BILL



*There are many flaws and uncalled provisions in the proposed Biotechnology Regulatory Authority of India Bill. Dubbing it as “the wrong Bill, by the wrong people for the wrong reasons” **activists of Kheti Virasat Mission and Youth for Safe Food** wrote to the Members of Parliament to reject the legislation to be tabled in Parliament and instead demand for a national biosafety protection authority. Excerpts from the letter:*

**T**here are many scientific and other concerns with regard to genetically modified organisms in our food and farming systems. The nationwide debate on Bt brinjal has brought to the fore the fact that even the scientific world is quite divided on the GM technology issue and there are quite a few socio-political, ethical, cultural and economic concerns centring around this technology. We have for a long time now been asking for a statute which will have its mandate as protecting Indians’ health and environment from the risks of such technologies as genetic engineering. Rather than set up a National Biosafety Protection Authority with such a mandate, the department of biotechnology, which seeks to promote GM crops, is proposing to set up a Biotechnology Regulatory Authority of India through a bill to be introduced in Parliament in the current session. In any possibility this Bill should not get the nod of Parliament. The following are the important and serious objections around the Bill:

**Wrong bill for wrong reasons:** The Bill wants to set up a single-window clearance for GM commercial applications and makes the processing of such applications as the main purpose of the regulatory authority. However, this very mandate is wrong and assumes that an inherently unsafe technology can be made safe by making the regulation effective and efficient! The main purpose of biotechnology regulation should be “to protect the health (human and animal) and environment of India from the risks posed by modern biotechnology and its applications”. Therefore, we need a national biosafety protection authority.

**Objectionable conflicting interest:** This so-called autonomous regulatory authority should not be housed under the ministry of science and technology or more specifically within the department of biotechnology (the Draft Bill emerged from the DBT). This will be a major conflict of interest and if it is housed under this ministry, the mandate itself becomes questionable. Housing the authority under MoST is objectionable and does not fulfill the mandate of protecting the health and environment of Indians. This body should be under the ministry of environment & forests or under the ministry of health & family welfare.

**Objectionable over-riding power:** This statute proposes to take away the constitutional authority that state governments have over their agriculture and health in the Indian democratic system. The



proposed bill envisages only an advisory role for the state governments in the form of “state biotechnology regulatory advisory committees” with no decision-making powers. This is simply not acceptable on at least two counts: this ignores the constitutional powers that state governments have over their agriculture and health sectors; and it ignores and can impinge on or override the progressive legislations like the Biological Diversity Act, with a mandate also to conserve and sustainable use biological diversity with some decentralised authority.

**Commerce-friendly functioning:** The legislation, instead of having expressive clauses on information disclosure, that too before decision-making for independent or public scrutiny, has brought in clauses on retaining confidential commercial information. This is only to protect business interests at the expense of the best interests of common citizens.

**Decision-making with few experts:** Final decision-making, especially in the case of environmental release, cannot be left to technical experts alone. The current bill proposes a three-member decision-making body of technical experts. It is proposed that decision-making on a subject like this should be vested in the hands of a broad-based inter-ministerial body which also has representatives of consumers’ and farmers’ organisations.

**No independent testing in the Bill:** Risk assessment in the proposed Bill has been left narrowly to “science based evaluation” of the applicant’s data. This is completely inadequate and risk assessment should consist of independent testing too for cross-verification of biosafety data. Therefore, having independent testing and analysis capabilities in the form of required laboratories etc., need to be set up and decision-making cannot be based on crop developer’s data alone.

**No risk management plans:** Risk management aspects like reviewing approvals and permissions, time-bound permissions, clauses for revoking and cancellations of approvals etc., do not figure in the current proposals, unfortunately and this makes the bill inadequate. No environmental releases should be allowed before biosafety is conclusively proven. The Bill remains silent on a crucial aspect like this incorporated in legislations elsewhere.

**Regulation a technical issue:** The proposed legislation also makes modern biotechnology regulation into only a technical risk assessment and risk management. It ignores the bottomline set out in the task force report on agri-biotechnology and operationalising the same. That is the reason why a broad-based decision-making body is essential.

**No space for public participation:** The proposed legislation has no clauses on public participation. The Cartagena Protocol on Biosafety’s (under the Convention on Biological Diversity) Article 23.2 says that “Parties... shall consult the public in decision-making process regarding living modified organisms...” and India is a signatory to this.

**Clauses aim to harass civil society:** Section (63) is completely objectionable and is meant to harass civil society groups concerned about the application of this hazardous technology. This clause says: “Whoever, without any evidence or scientific record misleads the public about safety of GMOs and products thereof shall be punished with imprisonment and fine!”

**Lack of proper liability regime:** The liability clauses in this proposed legislation are very weak. To begin with, there need not be any distinction made between companies, universities, society, trust, government departments, etc. The penal clauses should apply uniformly. Two, the legislation should have express clauses on redressal or compensation and remediation or cleaning up. The legislation should also have a clause that makes the crop developer solely liable for any leakage, contamination and so on throughout every stage of the product development cycle. Further, the penalty of one-year imprisonment and two lakh rupees fine is no deterrent and this should be made more rigorous.

**Shortcomings in appellate tribunal:** The tribunal should be constituted in a more broad-based fashion. Further, no time bar for appeals should be imposed. There should also be no bar on who can appeal and it need not be just applicants.

**What we demand** instead is a national Biosafety Protection Authority. Any regulatory regime around

GMOs should have the primary mandate of protecting health of people and the environment from the risks of modern biotechnology. It should have the following components as cornerstones of the legislation:

- (a) Precautionary principle as the central guiding principle
- (b) Going in for the GM option only in case other alternatives are missing
- (c) Separating out very clearly the phases of contained research and deliberate release and distinct regulatory mechanisms for both, in a sequential fashion
- (d) No conflicting interests to be allowed anywhere in the regulation and decision-making
- (e) Transparent functioning: information disclosure and public/independent scrutiny
- (f) Democratic functioning including public participation – even here, data to be put out in the public domain and public participation included before the decision-making process and not just informing after a decision is made
- (g) Risk assessment – (i) prescribing rigorous, scientific protocols and asking the crop developer to take up studies and then do independent analysis of the dossier supplied by the crop developer and evaluate/review of the same; (ii) to also take up independent testing by having all facilities and institutional structures in place for the same and evaluating the results
- (h) Risk management – including monitoring, reviewing, revoking of approvals
- (i) Liability – including penal clauses, redressal and remediation
- (j) Labelling regime for informed choices – this covers traceability and identity preservation requirements
- (k) Oversight and appellate mechanisms
- (l) In the case of India, given that it is a federal structure and given that agriculture is a State subject, special clauses which allow the state governments to form their own regulatory systems and mechanisms
- (m) Ongoing post market monitoring of every GM crop

Further, the law should be governed by principles like polluter pays, inter-generational equity (a key principle in environmental jurisprudence now which covers conservation of options, conservation of quality and conservation of access, for present and future generations) etc.

In countries like Norway, the law also has provisions to answer questions like “is this ethically and socially justifiable?” before a GMO is cleared. That would automatically include socio-economic and ethical concerns within the regulatory regime.

It is worthwhile to remember here that the need for an independent and credible regulatory regime was articulated by the 2004 task force report on agricultural biotechnology and this report clearly pointed out that the following should be the bottom line for any biotechnology regulatory policy: The safety of the environment, the well being of farming families, the ecological and economic sustainability of farming systems, the health and nutrition security of consumers, safeguarding of home and external trade and the biosecurity of the nation.” These important aspects or cornerstones do not find any place in the proposed bill sought to be introduced in Parliament.

We therefore urge you to reject the Biotechnology Regulatory Authority of India Bill being proposed by the department of biotechnology/ministry of science & technology. It is a wrong bill drafted by the wrong people for the wrong reasons. Instead, we urge you to collectively enact a National Biosafety Protection Authority Act in India, under the ministry of environment & forests or ministry of health & family welfare, keeping in mind the sustainable development interests of all Indians.

–Combat Law, March-April 2010

## UNIT-8 SESSION-II

### Right to Information Act

**“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties”**

–John Milton  
(*Areopagitica*)

### Introduction

“Right to Know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution”

Supreme Court of India in  
R P Limited versus Indian Express Newspapers  
(1989 AIR SC 190 @ p202)

“The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries”

–Justice Mathew in  
State of UP vs Raj Narain  
(AIR 1975 SC 865)

### Right to information as fundamental right

*“Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age of our land under Article 21 of our constitution”*

R P Limited versus Indian Express Newspapers  
(AIR 1989 SC 190: 1988 SCC (4) 592)

### Supreme Court on right to Information

*“In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare”*

Dinesh Trivedi vs Union of India  
[(1997) 4 SCC 306 at p 314]

### Universal Declaration of Human Rights

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

(Article 19)

## UNIT-8 SESSION-II

### Right to information movement in India

- Mazdoor Kisaan Shakti Sangathan, Devdun-gri, Rajasthan (1987)
  - Movement for proper wages, fight for workers
  - Obtained copies of muster rolls
  - Conducted Jan Sunwai (Public Hearing)
- Parivartan, Delhi (2000)
  - First urban based right to information movement
  - Movement started to combat corruption in public offices
- Movement spread over other parts of the country

### What is right to information?

- Right to Information
  - “right to information” means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—
    - i. inspection of work, documents, records;
    - ii. taking notes, extracts or certified copies of documents or records
    - iii. taking certified samples of material
    - iv. obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device

[Section 2 (j)]

### Right to information

- Policy formulation
- Policy implementation
- Accountability and transparency in functioning of public authority
- Availability of the services
- Confidentiality of the patient

### Proactive disclosure

- Obligations of public authorities
  - Cataloguing and indexing of records
  - Publication of certain basic details related to their functioning
  - Publication of relevant facts while formulating important policies/ decisions that affect general public
  - Providing reasons for its administrative and quasi judicial decisions
  - Updating these information periodically
  - Dissemination of proactive disclosure using different modes

[Section 4]

### Functionaries under Right to Information Act 2005

- Public information officer
- Assistant public information officer
- Appellate authority
- Central/state information commissioner

### Application procedure

- Making application [Section 6]
  - Applicant has to make request in writing or through electronic means
  - If the applicant is not able to write, public information officer (PIO) has a duty to assist the applicant in filing the application
  - Applicant is not required to give any reason for obtaining information or any personal detail except those that may be necessary to contact him
  - Payment of fee
  - No fee for the persons below poverty line

## UNIT-8 SESSION-II

### Disposal of information request

- Information is to be provide within 30 days of making request.
- In case, application is made to assistant public information officer, five additional days are given for transfer of application
- In case, application relates to third party information, 15 additional days are given
- But, in cases of life and liberty of any person, information is to be given in 48 hours

[Section 7]

### Appeal procedure

- The PIO gives the reply in stipulated time
  - If applicant is satisfied, process ends
  - If applicant is not satisfied with the reply, he can file the first appeal before Appellate Authority within 30 days from the reply of PIO
  - If applicant is not satisfied with the decision of Appellate Authority, Second Appeal is filed before Central/ State Information Commission within 90 days of the decision of Appellate Authority

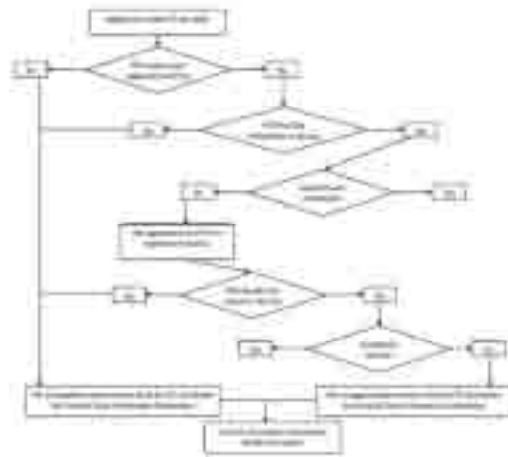
[Section 19]

### Complaint procedure

- If PIO does not give reply within stipulated period, or applicant has been denied access to information for various reasons
  - Complaints can be filed directly to the central/state information commission

[Section 18]

### Obtaining information



### Exemptions

- PIO can deny access to information if
  - its disclosure affects the sovereignty of the country
  - its disclosure has been forbidden to be published by a court/ tribunal
  - its disclosure would breach the privilege of Parliament or state legislature
  - its disclosure would harm the competitive position of third party on account of the nature of information being commercial confidence/ trade secret/ intellectual property of the third party

### ...Exemptions

- its disclosure breaches the fiduciary relationship
- it has been received in confidence from foreign government
- its disclosure would endanger the life and personal safety of a person
- its disclosure would impede the process of investigation
- decision has not been taken by cabinet, then cabinet papers can not be disclosed
- it is personal information, disclosure of which has no public interest

[Section 8(1)]

## UNIT-8 SESSION-II

### Exemptions

- Exceptions to exemptions
  - Information that can not be denied to Parliament/state legislature can not be denied to applicant
  - If public interest outweighs the harm to protected interest, access to information can be allowed
  - Information older than 20 years can only be denied on grounds of national security, breach of parliament, cabinet papers related to undecided matters
- Severability
  - Part information can also be allowed

### Third party information

- Two instances
  - Commercial confidence/trade secret/intellectual property [Section 8(1)(d)]
  - Personal Information [Section 8(1)(j)]
- Third Party information [Section 11]
  - Notice to third party is required to be given
  - PIO after hearing the third party will decide on merit/ public interest on disclosure
  - Third party can also prefer an appeal under section 19

### Fiduciary relationship

- Section 8(1)(e) reads:  
8 (1)Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen—  
.....  
(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information

### Powers of information commissions

- Penalties [Section 20]
  - Monetary penalty
    - Rs. 250/- per day of default in providing information till the day the information is provided. Maximum penalty Rs. 25,000/-
    - Penalty amount comes from the salary of the PIO
    - Reasonable opportunity is to be given to PIO before imposing penalty.
  - Recommendation for disciplinary proceedings

### Impact of right to information Act

- Sundar Nagri construction of lanes and other public works
- Ration and PDS
  - Sundar Nagri experiment
  - Supreme Court PIL on PDS- Effort of Parivartan
  - Appointment of Justice Wadhwa Commission
- Delhi Jal Board privatisation issue
- Hospital Inspections
- Drive Against Bribes Campaign (1st to 15th July 2006)

### What you can do?

- Create awareness about the Act
- Help people use the Act
- Make the Right more effective by contributing to the existing body of knowledge on it
- Provide a network in the courts to fight for the cause to protect RTI Act
- File as many RTI applications as possible
- Feel empowered

## WHY IS CIVIL SOCIETY MUTE TO THREAT OF COMMUNALISM IN INDIA?

Vidya Bhushan Rawat

Steve Bucknor is out. The umpire with impeccable credentials became victim of a slander, which the exploiters often use for their own purposes. All of a sudden, we found the upper caste Indians crying about racism and discrimination. That Harbhajan Singh is no saint has been well elaborated by former legend Bishan Singh Bedi. It is a well-known fact that he abused Andrew Symonds. But what was the abuse is not verified. The Australians, who are known for their own brand of racism and who sucked the blood of the indigenous population, are clamoring for it. Paradoxically, fight is between the two exploiters of colours and the umpire was the one who played cricket during the heydays of racial discrimination in Africa.

This event highlighted one fact that we are afraid of admitting our own disabilities and feel that offense is the best defence. Mr Sharad Pawar, the BCCI head, hails from Maharashtra, a land of great social rebels like Jyoti Ba Phule, Baba Saheb Ambedkar, Chhatrapati Shahuji Maharaj and others and how they waged war against caste system and untouchability. Perhaps, Sharad Pawar knows it well how the caste discrimination is still part and parcel of our life. Defending Harbhajan's innocence was Navjot Singh Sidhu, who is famous for his loud mouth on television channels. We laugh at his quotes and jokes but that reflect our mental make up as most of the jokes, wits and humours that we have in our country is based on somebody's physical appearance, colour, castes and disability. Mr. Sidhu often uses such terminology to emphasise his viewpoint. It is not long back that we had famous song from a Bollywood which suggests " *Mochi bhee khud ko sunar samjhe*", that the cobbler thinks himself of a goldsmith. This is nothing short of racial abuse that certain people deserve success and others do not have right to compare themselves with the 'big' people.

The socio-cultural conditions in South Asia are alarming. They are reflecting of our tainted cultural practices. It is important that before we come to any conclusion, we must introspect what is happening around us.

The events towards the end of 2007 do not reflect the entire subcontinent in good light. First, the election results from Gujarat gave a chance to the saffron brigade to feel happy about their presence, a victory, which was followed by them in Himachal Pradesh. Modi's victory became a toast for all those rightwing nationalists who enjoy this cocktail of capital and Hindutva in India. When Modi was celebrating in Gujarat, the Hindutva foot soldiers were busy in experimenting the same things in another state, which is one of India's poorest states yet very rich in natural resources. Here this richness of nature does not help the protector of nature, the Adivasis, but the exploiters of nature, the big corporate houses, who are on a purchasing spree. Yes, I talk of Orissa, a state which has a government whose chief minister did not know how to speak Oriya in the beginning. Yes, the legacy of the family made this corporatised man, chief minister. The Sangh Parivar worked without any administrative control and is now the horrific tales of violence against Christian community in Kandhamal district of Orissa are out. A white paper issued by some of the civil society activists led by Dr John Dayal reveals the hidden danger of communalisation process in Orissa and how the state administration became a silent spectator allowing the houses of the people be torched. While the white paper does speak about violence against non-Christians or Hindus but the fact is that communalisation process in Orissa has hit below the belt. Why is the Hindutva so eager to make Orissa its Gujarat replica? One needs not to be an ideologue to understand the philosophy of Hindutva or religious rights in general. They work closely with the business houses. While in the west the capitalist might have social concern



and secular ideals, in India Hindutva enamours them. Not a single industrialist could stand up and be counted to condemn the isolation and exclusion of Muslims in Gujarat. Each time the demand for their safety and natural justice was raised, Modi and his gangs made them an issue of MUSLIMS. And the resounding victory that Gujarat gave to Modi is a reflection of how the community has grown. It is a victory not of diversity but homogenisation of thought and deeds. Yes, Gujarat became a perfect Hindu Rastra and Gujaratis world over, unfortunately, have remained an isolated community, rarely meeting and mixing with the locals. Yes, they remain caged in their temples and money.

A few days later after Modi's victory, we found Gujaratis being amidst a storm in Kenya. Reports appeared in newspapers here that they were targeted but independent sources said that the violence was general and not particular against Gujarati community but Narendra Modi was ready to give them shelter in Gujarat, bypassing the foreign ministry's domain. He wanted government to act immediately. Of late, the Indians are becoming target of attacks but not due to any racial prejudices but because of their own isolation in those societies. I was alarmed to hear from my African friends as why the Indian community was unable to mix up with the local communities even when the Europeans came and married there, mixed up with the local populace and share their feelings, the Indians have a deep sense of colour prejudice and a superiority complex. While some of the Indians wrote me back from Uganda that they have contributed a lot but the fact is that the Gujarat's exclusivism will ultimately hurt their own communities. Today, Modi want Gujarat exclusively for the upper castes and there is no voice of the tribals who have faced the brunt of the industrial Gujarat as their voice is not heard, the Dalits are also not heard. Such things do not make stronger India. Gujaratis enjoyed fruits of diversity world over and they do not want the same thing in their own state. In Uganda, Kenya and elsewhere they are using Gandhi but in Gujarat, they have thrown away the old man.

Spending the last 10 days of the year 2007 in a remote town of Andhra Pradesh, I got an opportunity to understand and meet with many people from different parts of the country. A humanist friends from Gujarat made his presentation on the issue of communalisation in Gujarat for which he openly blamed the killings and ostracisation of the Kashmiri Pandits. How can the Gujaratis keep quiet if the Hindus are being killed and ethnic cleansing happening in Kashmir on largescale, he retorted. Then he went on to explain, how the Gujarati people got annoyed after the Muslims had burnt the train in Godhara. When I asked him why he felt that the Muslims burnt the train at Godhara and Hindus retaliated elsewhere? That is where we make mistake, I told him. How can you say that the Muslims burnt the train? They were criminals who might or might not be Muslims as their identities have not been established, I said. It is the duty of the State to nab the culprits and get them punished. Who are you to punish the people of Gujarat, I questioned. 'Oh, but tell me why are the terrorists only from the Muslim community', he responded to my observations. My answer is simple. 'Not a single Hindu has been implicated in the communal riots in India. Not a single one has been punished. You can catch a Dawood Ibrahim or Chhota Shakil but the culprits of the Mumbai riots, Gujarat violence, Delhi's anti-Sikh violence are roaming. They got rewarded by getting elected to Parliament and became ministers', I said. In a diverse society, the communalism of the majority is soon turned into a 'national' ethos while the demand of the minorities becomes communal, hence the votaries of the Ram Mandir have become 'national' while those who demand justice for Babari Masjid become anti-national. I am shocked not because people say such things. I have no doubt about death of civil society in India but it pains when those proclaiming humanists and human rights defenders behave in such a way to justify one brand of communalism. One has to understand the dilemma of the Muslim community in India to understand the ground reality. The more the community is marginalised the better the space for the fundamentalists to take over. That political leadership failed Muslim community in India, which depended on the Hindu leaders to prove their secularism, is another tragedy of the post independence India. A Dalit can shout on the rooftop saying Bahujan Samaj Party is my part but for a Muslim to say Muslim League is my party would mean a tag of communal mindset.

It is easier to blame the Muslims for everything. Often such questions greet us. Why are they terrorists? Why no Muslim country is secular? Why Muslim breeds so many children? Why do they have so



many wives? These things are true about every one. These things depend on your socio-economic status. One can also say that the population growth in the North India is tremendous comparatively to South. Secondly, the North Indian population is not just confined to Muslims; the increase in the population of Dalits and OBCs is enormous. The fact is that the population grows because of poverty and has nothing to do with religion.

Now, the important aspect is the falsehood of the Hindutva campaign. If they are against the Muslims for all those reasons, I mentioned above, then the important question, I am asking is, why are they hitting the Christian community? Are they terrorists? Do they have more children? Do they have more wives? The Hindutva does not want to understand that despite 9/11 incidents how Europe and USA showed exemplary resilience. There were violence but those incidents were stray and isolated. Even when technically many of the European countries are still Christian, the individual freedom and human rights are highly respected and are well in place and the society by and large is secular. If the Hindutva wants to compare India's own record of discrimination, it must come out of a better alternative rather than blaming the Christians and Muslims for its own problem.

The problem is clear. The issues of Dalits and tribals are getting not only politicised but also internationalised. The great tolerant society now is exposed to the world. And we feel that this expose of our society can be countered by a false aggression that we have shown in Australia. In the age of information technology, we still want to hide our evils and not fight against them. Conversion was a potential tool once upon a time, a sense of revolt against the unequal system. One can differ with its perceptions and outcomes but definitely for the Hindutva propagandists, they were the first one to hit upon the rights of the Dalits and marginalised in India. Arun Shourie, the former editor of Indian Express, is today the propagandist of the Hindutva in India. Shourie who once upon a time epitomised the probity in public life, fought for the victims of the 1984 riots in Delhi when every newspaper forgot about them. Ironically, today he speaks against not only human rights but want to speak in terms of an eye for an eye. His writings against Dalits, Muslims, Christians are well known to be documented here. The only thing he changed in these years was that his love for Ambanis has increased. A company against whom he wrote passionately. These are the people who came out from some of the best-known Christian Institutions and later grew up in the shadow of the veterans of the human rights movement in India.

The justification of happenings in Gujarat and now in Orissa underlines two things, that the Sangh Parivar has Hinduised the entire political system. Second, despite a secular constitution, we still have not won battle against fundamentalism and religious intolerance. It is a challenge for all of us. The gain comes from the political Islam in our surroundings but comparisons are rarely made with the Europeans where a large number of those who supply hate to India, live. Now, whether it is civil society or the political parties, the basic framework is the ideas. I mentioned earlier justification to violence under the garb of something else. You kill Hindus in Pakistan hence we have a right to retaliate in Gujarat. The Pakistani fundamentalists will do the same thing. You kill Muslims in Gujarat and we will avenge it in Pakistan, Bangladesh and elsewhere? When will this politics of prejudice end?

One needs to understand the threat perception in Orissa. The violence that killed Graham Stains and his two children was preceded with violence against the church and Christians in Gujarat. Prior to killings of Muslims in Gujarat, we had seen attacks on the churches and Christian Institutions in Gujarat and other parts of India, predominantly the tribal areas. So while Muslims are 'terrorists', produce more 'children', keep more 'wives', the Christians convert our children. Why are Mr Advani and his team leaving the prestigious Christian Institutions in the cities? Why they target in the villages? Is it because these Christian educational institutions have more RSS people than the Christians themselves? Is it because the Adivasis might also learn English language and understand their rights. Another question that comes in my mind is regarding the Christian contribution in India to civil society, health sector and education system. Can the Sangh Parivar and their different offshoots give us some counter argument on these issues?

Hatred in Orissa is long-term idea. The National Commission for Minorities has already said it in its note. The submissiveness of the civil society is a matter of grave concern. The fact of the matter is that barring a few exceptions, it has remained so always. It is systematic intrusion in our civil society through the right wing forces, like media where even the most secular character has saffron rob underneath. The face of civil society is more tainted. It compromised on these issues because of various reasons. India's health will only be good if it has a pluralistic heritage and a will to live together. Any imposition of ideas, identities, cultural and society on any other non-willing partner will make it a nation more dangerous than any of our neighbours. If lessons could be drawn from our immediate neighbours like Pakistan, Bangladesh, Nepal and Sri Lanka then, diversity, human rights, new ideas should be hallmark of a democratic system. Any deviation from these will turn India into an Afghanistan, which is still battling for unification and where different tribes are up in arms against each other. An India, where the women are not safe and where the discrimination on the basis of your caste, identity, colours and physical appearance are still rampant. The Sangh and its different Avatars should focus more on these issues so that life of the common person is changed. At least, this is what they can learn from the Christians.

At the end, we all pay our taxes. A government is there to protect the people and not become mute witness to violence against one community. If we do not find answers to our inherent discrimination as well as false nationalism, which is disturbingly turning into an upper caste cricket match that we witnessed in Sydney, then, I am afraid, the situation would go out of hand. This is the biggest hour of crisis in our social life and we have to respond it with responsibility and courage and not to let down the founding fathers of our nation, who gave us a secular and liberal Constitution which is still our proud possession and a guarantee for social justice and equality for all.

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countercurrents.org*

## LOCATING CIVIL SOCIETY ORGANISATIONS

**John Samuel**

**T**he term 'Civil Society' is contested terrain. It is one of the most commonly used and misused terms in the social and international aid sectors today. Over the last ten years it has been used to denote everything from citizens' groups and activist formations to highly institutionalised non-governmental organisations and foundations.

It may be time now to arrive at an operational definition of the term 'civil society organisation' or CSO. Definitions have so far been based on either the typology or location of such formations outside the conventional arenas of the State and market. I propose a definition based on ethical and political positioning and perspective.

Civil society organisations (CSOs) are those informal, semiformal or formal organisational formations that protect, promote and facilitate the principles and practice of democracy, participation, pluralism, rights, equity, justice and peace among people locally, nationally or internationally. Such civil society organisations play an ethical and political role within society, trying constantly to humanise an increasingly dehumanised world. They function outside the conventional spaces of State power and market forces, though they constantly negotiate, pressurise and persuade institutions of the State as well as market to be more responsible and responsive to the needs and rights of the people in general and the poor and marginalised in particular.

CSOs have gradually acquired a significant role in influencing the development agenda, public policies and international discourse on rights, justice, gender, ecology and peace. In the international and national political process, CSOs have a legitimate and crucial role to play.

What has led to this increasingly important role? The changing contours of the State, processes of governance and market forces, definitely. On the one hand, CSOs have become a legitimising mechanism for powerful global institutions and actors. On the other, CSOs are fast emerging as the rallying point for resisting and challenging unequal and unjust power relations in the private, public and political spheres. Such a paradoxical positioning of CSOs often creates a sense of ambivalence about their real politics and purpose. This ambivalence becomes particularly problematic when different sets of actors and institutions use the same set of words and phrases with entirely different meanings. For instance, words like 'empowerment', 'participation', 'freedom' and 'justice' are used by multinational corporations, BrettonWoods institutions, and of course powerful countries. Thus George Bush never was tired of reminding us that the war on Iraq was to 'free' the Iraqi people and that the continued occupation is to establish democracy, people's participation, etc.

When Satan begins to quote the scriptures and preach salvation, salvation itself becomes questionable and often demonic. Therefore, one needs to constantly validate the role and relevance of CSOs on the basis of what they do on the ground, rather than what they say. The disjuncture between words and their meaning, rhetoric and reality, and talking and doing is one of the key predicaments of the post-modern condition. Hence the role and relevance of CSOs needs to be seen in relation to their functions, affiliations, actions and context in which they operate. As the world and the international political order are constantly in a state of flux, we are living within more and more grey zones and less and less clearly demarcated black and white spaces. This makes the task of locating the political and social affiliations of CSOs problematic, as they seem to be partly responsible for and partly a response to and product of the greying of politics (eg the new labour of Tony Blair) and economy (MNCs are big on corporate social responsibility and ecology these days) worldwide.

## **The changing context**

The role of CSOs needs to be seen in the light of changing discourse on politics, development and governance. The emerging political arenas and development discourse are marked by the following trends:

1. Deficit of democracy and erosion of rights
2. Saturation of the State and crisis of governance
3. Marketisation of politics and development
4. Competing fundamentalisms and identity politics
5. Conflicts over resources and market

The role of civil society can be understood within the context of these emerging trends. We will discuss each of these trends briefly and then try to identify the role of CSOs in relation to them.

### **1. Deficit of democracy and erosion of rights**

Democracy is facing a crisis. The core of democracy and human rights is the notion of Freedom: Freedom from fear, freedom from want, freedom of association and freedom of belief. In a liberal democratic polity, freedom is the defining sign of citizenship. Citizens are supposed to define the boundaries of the State, and the State is expected to define the boundaries of the market. Now these roles seem to have been reversed. Markets increasingly determine the boundaries of the State (the WTO-led trade regime) and the State is increasingly defining the boundaries of citizens by undermining their freedom and eroding their rights. Citizens are increasingly forced to become consumers of public service and governance. A deficit of democracy results from the increasing trend of illiberal democracies which use the rhetoric of democracy, nationalism and security to take away the rights and freedom of citizens.

Political parties have become less and less legitimising agents of democracy and the State. They have become more and more the organisational apparatus to contest elections and capture State power. Most political parties have become closed spaces controlled by vested interest pressure groups and career politicians in search of power.

In this situation, a key role of CSOs is the amplification of the voice of the voiceless and the protection and promotion of the rights of citizens and the marginalised. This is a non-partisan political role to assert freedom and articulate rights so as to ensure that the core principles and values of democracy are sustained. This role requires CSOs to promote and adopt a rights-based approach to democracy and politics -- primarily asserting the dignity and freedom of people and resisting all kinds of discrimination based on gender, race, religion, caste, creed and ethnicity. The advocacy role of CSOs becomes crucial in promoting and protecting democracy and rights.

### **2. Saturation of State and crisis of governance**

The notion of the welfare state is withering away. Almost all the countries that became independent of colonial rule after the Second World War adopted the welfare State approach. However, over a period of time, the State apparatus began to be saturated by an indifferent, inefficient and growing bureaucracy and controlled by vested interest groups and career politicians. The apparatus of the State had become too fat to be functional. The dysfunctional State sought control and legitimacy through coercive power and militarisation. Increasing militarisation and conflict to sustain State power by vested interest groups resulted in economic resources being increasingly diverted from social and economic development to the purchase of more and more arms from industrialised countries.

The powerful OECD countries not only sold arms but also provided loans to the developing world to sustain their markets. As a result, most of the countries in the developing world got into the debt trap.

The debt trap, aid dependency and increasing corruption, coupled with an entrenched bureaucracy, led to the saturation of the State and a resulting crisis of governance.

The role of CSOs in the area of social development and governance needs to be seen in this context. CSOs must fill the gap and directly intervene in development and delivery of services where the State either lacks the capacity or the political will to deliver public services. CSOs must put the issue of poverty eradication on the global development and political agenda. CSOs must play a collaborative, cooperative, complementary, competing and confrontationalist role in relation to the government and processes of governance.

### **3) Marketisation of politics and development**

The State is increasingly controlled by market forces and multinational corporations. Most political parties and politicians around the world are dependent on corporate funds (either as donations or bribes) for electoral funding and sustenance of their power apparatus. This leads to a situation where political priorities and agendas are controlled by powerful corporations. In many countries, corporate leaders have captured State power through the electoral process and run the government like corporate CEOs (eg Taksin in Thailand, Berlusconi in Italy, George Bush, ex-CEO of an oil company in the USA), without any respect for the rights and voice of citizens.

The neoliberal policy regime and Washington Consensus promoted by the BrettonWoods institutions (World Bank-International Monetary Fund) and WTO actively seek to privatise public services and decrease public spending on key areas such as health and education. This makes the poor poorer and excludes them from the ambit of development.

Thus development is market-driven and citizens are merely consumers.

In order to be self-reliant, CSOs need to raise independent sources of income and not be dependent on official funds and corporate donations. Otherwise, there is a real danger that CSOs will be used as delivery boys for Development Cola, served up to the poor and marginalised for a price. If this is not to happen, CSOs must develop new fundraising strategies based on principles of solidarity, ethical philanthropy and community mobilisation. They must not run like 'service-delivery machines' that can be hired by anyone including the MNCs and World Bank.

The role of CSOs is thus crucial in humanising development and politics by building alliances of peoples and communities, facilitating people's participation, listening to and learning from the poor and marginalised and acting in solidarity with the marginalised.

*—This article is based on John Samuel's  
keynote address at the meeting of African Civil Society  
Organisations in Addis Ababa, Ethiopia  
(InfoChange News & Features, June 2004)*

## HUMAN RIGHTS DEFENDER

### Ten Years of Satyagarh Fast by Irom Sharmila Chanu

# HOW MANY DAYS MUST A WOMAN FAST BEFORE SHE'S FREE...?

**W**inter 2006: All India Institute of Medical Sciences (AIIMS), New Delhi. As you enter the building, about a dozen policemen and intelligence personnel stop you. Despite the permission obtained from a reluctant inspector, about five suspicious and armed policemen stationed at the door of room number 57 begin a sustained interrogation.

Inside the room, a frail young woman is lying on her back on the hospital bed in a rather awkward position. She is practising halasana, the 'plough' position in yoga. Her body is carefully covered with a blue blanket. She has a clean complexion, sharp eyes, unkempt hair and a white strip of medical tape around her nose. Che Guevara's *The Motorcycle Diaries* lies next to her on the bed; she has just finished reading the celebrated book in which the legendary young revolutionary details his journeys. "This is a very good exercise for kidneys and to cure diabetes. I do it every day for a few hours." She speaks softly, while the yoga goes on. "You can talk; it doesn't matter if I am doing yoga."

Irom Sharmila Chanu, poet, painter and a Gandhian activist from Manipur, has been on a fast-unto-death since November 2000, being force-fed through a pipe in her nose. She ducked the media and security personnel with the help of her brother and a friend to get out of Manipur and reach Delhi in order to bring national attention to the organised and institutionalised atrocities committed under the auspices of the Armed Forces Special Powers Act - 1958 (AFSPA).

At an Independent People's Tribunal (IPT) held by Human Rights Law Network (HRLN) in Manipur in the second week of December, 2009 – where the tales of 42 victims of atrocities by the paramilitary forces, CRPF, the Army and local police were presented by the victims or their family members before an eminent jury – Sharmila's path seemed the only 'peaceful' alternative for a bitter, grieving, helpless population, holding infinite years of relentless tragedy and injustice in their hearts.

In this relentless realm of injustice, most mothers in Manipur today hide the fear that their children might take the insurgents' path to seek justice, as the Centre continues not only to willfully, systematically neglect, but also to explicitly promote the creation of a fear psychosis amongst the people of a state that has been used as a "buffer-zone" to protect "mainland India". The Justice Jeevan Reddy report, which had raised much hope, is yet another clear signal from the Indian State that 'law and order' is one-dimensional, unconstitutional, inhuman, and that it will continue to aid and protect the powerful and alienated government and paramilitary machinery. Just as the government continues to ignore the violence and its multiple and deeply embedded root-causes in Manipur, similarly, it prefers to stonewall the tragic narratives of Manipur's vulnerable, helpless, and yet stoically adamant women or the peaceful, protracted resistance.

The decision to go on the long fast, though well thought-out, was not an action planned well in advance. In fact, Sharmila had joined the anti-AFSPA movement just two weeks before she began fasting. A three-member Indian People's Inquiry Commission (IPIC) headed by Justice H Suresh (formerly of the Bombay High Court) had visited Manipur in the second week of October in 2000. The Commission had travelled to various areas in the interiors of inaccessible Manipur, under army siege, and met a number of victims, their relatives and friends, to hear their tales of injustice – cases of rape, violence, killings and disappearances. It had also held workshops and extensive discussions with human rights lawyers, journalists, academics and others. Sharmila was a part of this process as a volunteer and that was her first 'training' in political participation. During the IPIC investigations,

she was particularly shaken by the testimony of a young girl who was raped by the security forces at Lamden village. Sharmila and two other women volunteers had privately spoken to the girl.

As the IPIC completed its investigations by the third week of October, something had already sparked inside Sharmila's restless soul. For the next few days, she met several human rights activists, lawyers and journalists to learn more about repressive laws, army atrocities and AFSPA in particular.

On November 2, 2000, security forces fired indiscriminately and killed 10 innocent people waiting at a bus stop at Malom, about 15 km from Imphal. That was a Thursday when Sharmila would observe the weekly fast she had been undertaking since her childhood. "The same fast continues till date," her brother Singhajit said as he narrated his sister's tale, his frame on the pavement at Jantar Mantar under Delhi's winter sky in 2006.

Though the Malom massacre was nothing new for the people in Manipur, as they had witnessed similar cold-blooded killings before, when the security forces would go berserk and kill ordinary people, Sharmila could not bear the sight of the blood spilled on the street. That single event changed her life. By now she had already taken a decision. She went to her mother on the evening of November 4 and took her blessings "to do something better for the people". That was the last time the mother and daughter saw each other.

Ever since, Sharmila has not combed her hair, not looked into the mirror and not a single drop of water has crossed her mouth. She cleans her teeth with dry cotton.

On November 21, she was arrested on charges of 'attempt to suicide'. The administration began force-feeding her nasally, and forcibly confining her to the Jawaharlal Nehru Hospital in Imphal. Under judicial custody, she has refused to break her fast or seek bail. As is the pattern, on the completion of one year, she is released by the court, as the maximum sentence given to her for 'attempting suicide' can't exceed one year. She is then inevitably rearrested within 2-3 days as she continues her fast without water. And this yearly cycle continues, till date.

"I was shocked to see the dead bodies. There was no means to stop further violations by the armed forces... It (fast) is the most effective way because it is based on a spiritual fight... My fast is on behalf of the people of Manipur. This is not a personal battle, it is symbolic. It is a symbol of truth, love and peace," she said.

On October 3, 2006, as she was once again released by the court in its annual ritual, her brother and a friend kept her away from the media limelight for the night. The next day, dodging media and security personnel, they literally smuggled her out of Manipur. She landed in Delhi the same day, in an attempt to highlight the issue nationally. From the airport, she headed straight to Rajghat to pay homage at Mahatma Gandhi's samadhi. "If Gandhiji were alive today, he would have launched a movement against the AFSPA. My appeal to the citizens of the country is to join the struggle against AFSPA," Sharmila told journalists. Later that day, Sharmila went to Jantar Mantar and continued her fast with a stream of people coming to express support. Three days later, in a midnight swoop, the police picked her up and admitted her in AIIMS.

Completing ten years of this 'satyagraha fast' on November 2, 2010 a slight Sharmila has come to symbolise the steadfast scaffolding of the movement against the injustices committed under AFSPA and in support of the protracted struggle for justice, human rights and peace in Manipur and the Northeast. An iconic legend in Manipur's politics, her fast is perhaps the longest political protest of its kind in history and in any part of the world.

As expected, the hard years of continuous fasting have taken their toll on her health and have had a serious, life-threatening impact on her body's normal functioning. Apart from the other medical problems that she has developed, her bones have reportedly become brittle.

Sharmila is not alone in her struggle. Women in the Northeast have a history of concerted peaceful political action, intense resistance and sacrifice, especially the great mothers of Manipur. Sharmila is continuing that legacy, taking it to new heights and thresholds of resilience and resistance. The state



erupted in flames in 2004, after the brutal rape and murder of a young woman activist, Thangjam Manorama Devi, by the Assam Rifles personnel. The incident triggered an unprecedented form of protest by Manipuri women that shook the nation's conscience. In an attempt to draw the attention of a cold-blooded political establishment in Imphal and Delhi, otherwise obsessed with giving its army and police unrestricted powers in the name of national security, Manipuri mothers, for the first time, protested nude in stark daylight. They bared themselves in front of the Assam Rifles headquarters in Kangla Fort, Imphal and challenged the army to rape them. "Come Indian Army, Rape Us," said their banner, as they protested, fully naked.

Meanwhile, Sharmila continues her fast, in custody, confined to a room in Imphal's Jawaharlal Nehru Institute of Medical Sciences as she did in AIIMS – writing poetry, reading books, practising yoga. The struggle against AFSPA continues in Manipur. In Imphal civil society groups celebrate her unwavering fight for justice and deep yearning for peace. A decade of unflinching courage to hope against all odds.

While Delhi briefly remembers and then quickly forgets this quiet, intriguing and unique visitor it received in 2006, the collective consciousness of Manipur can never ignore her. Indomitable, firm and resolute, Sharmila's clarity is as lucid as it was in 2006; she is in no mood to turn back. "Unless and until they remove the AFSPA, I shall never stop fasting," she says, and she means it.

**Harsh Dobhal**

*—Abridged from "Manipur in the Shadow of AFSPA:  
IPT Report on Human Rights Violation in Manipur"*



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# SHR human rights training module

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**S**tudents for Human Rights (SHR) is a movement of concerned students and young activists who are determined to bring about a situation in India in which the artificial barriers that divide people are eliminated and an equal, just and open society can flourish.

While India opens its economic borders to multinational companies, controls on the freedoms of its own people have become more rigid than ever. India is the largest democracy in the world but in several parts of the country the actions of police and security forces bear all the hallmarks of a militant dictatorship. To those in the cities it can seem that communal conflict, guerrilla movements and violent repression are distant problems only affecting the rural margins but in reality every state in India is affected with some kind of internal conflict. The government spends millions on restraining opposition, and all the while the rights and freedoms of every citizen are surreptitiously eroded. Human rights abuses abound.

Members of SHR recognise that the future of India's secular democracy is seriously under threat. We realise that the next generation of leaders and voters are those who are now studying at universities and in the first stages of their professional careers. It is here that change can take place. Students for Human Rights is determined to bring these issues to light, ready to defend the concept of a free and equal India as enshrined in our great Constitution. We invite students and young people everywhere to join us.